

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2004 and 2006 Biennial Regulatory)	WT Docket No. 10-88
Reviews – Streamlining and Other)	
Revisions of Parts 1 and 17 of the)	
Commission’s Rules Governing)	
Construction, Marking and Lighting of)	
Antenna Structures)	
)	
Amendments to Modernize and Clarify Part)	RM 11349
17 of the Commission’s Rules Concerning)	
Construction, Marking and Lighting of)	FCC 10-53
Antenna Structures)	



INITIAL COMMENTS

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INITIAL COMMENTS

The National Telecommunications Cooperative Association (NTCA)¹ responds to the April 20, 2010 Notice of Proposed Rulemaking (NPRM)² released by the Federal Communications Commission (Commission or FCC) seeking comment on proposed changes to the Commission’s Part 1 and Part 17 rules which govern the construction, marking and lighting

¹ NTCA is a premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 585 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service rural local exchange carriers (LECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended (Act). NTCA’s members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *In the Matter of 2004 and 2006 Biennial Regulatory Reviews – Streamlining and Other Revisions of Parts 1 and 17 of the Commission’s Rules Governing Construction, Marking and Lighting of Antenna Structures, Amendments to Modernize and Clarify Part 17 of the Commission’s Rules Concerning Construction, Marking and Lighting of Antenna Structures*, WT Docket No. 10-88, RM 11349, FCC 10-53, Notice of Proposed Rulemaking (rel. Apr. 20, 2010) (NPRM).

of antenna structures, which includes cell towers.³ The Commission's NPRM includes changes to the registration, marking, lighting, location accuracy, Federal Aviation Administration (FAA) notification, maintenance, record retention, definition of antenna structures, and antenna structure registration (ASR) notice regulations.

The Commission should, in general, adopt tower lighting and marking regulations that are consistent with the FAA regulations. This will minimize FCC and tower owner confusion in compliance and enforcement of FCC and FAA regulations of antenna structures. Any new regulation adopted, though, should reflect the Commission's careful analysis of impacts on small rural telco providers, such as NTCA members, who are also antenna structure owners to reduce the regulatory burden on these small carriers.

I. FCC ANTENNA STRUCTURE RULE CHANGES SHOULD BETTER REFLECT THE FEDERAL AVIATION ADMINISTRATION APPROACH TO TOWER LIGHTING AND MARKING.

The FCC released its NPRM on April 20, 2010, seeking comment on proposed revisions of its Part 1 and 17 rules that govern the registration, construction, marking, and lighting of tower antenna structures. Currently, any construction or modification of an existing antenna structure that requires Federal Aviation Administration (FAA) notification also triggers FCC notification.⁴ Notice is required for construction or alteration of any antenna structure greater than 200 feet in height above ground level, or as otherwise required by the FCC.⁵

The FCC has adopted procedures for registration of antenna structures that are generally consistent with the FAA procedures (14 C.F.R. §§ 77.13-17). In 2006, PCIA filed a petition for rulemaking that sought changes to Part 17 rules requiring antenna inspections, documentation,

³ The Commission's Part 17 rules are contained in 47 C.F.R. § 17.1 et seq.

⁴ NPRM, ¶ 3.

⁵ *Ibid.*

posting, marking, and lighting, and notification.⁶ This NPRM seeks comment on some of PCIA's recommendations, as well as other FCC recommended changes to the antenna structure rules.

NTCA conducts an annual survey of its membership's wireless service offerings.⁷ As NTCA's 2009 Wireless Survey Report shows, over three-fourths of the survey respondents provide wireless services to their customers.⁸ Many of NTCA's wireless service providers own the cell towers and other antenna structures they use in their service territories. Any new changes to the FCC's antenna structure rules will directly affect NTCA members as antenna structure owners. The Commission should consider, therefore, the impacts of proposed ASR rules on small rural telcos such as NTCA members.

A. Antenna Structure Registration, Marking and Lighting Requirements Should Be Revised.

Currently, antenna structures must be painted and lit if the structure exceeds 200 feet in height or requires aeronautical study, unless the tower does not impact air safety.⁹ The Commission seeks comment on rule changes regarding antenna structure marking and lighting, location and height data, exempt structures, and the impact of a pending FAA proceeding.¹⁰

1. Marking and Lighting.

The FCC wants to revise Sections 17.21-23 by removing all references to specific FAA

⁶ *Id.* ¶ 7; PCIA Petition for Rulemaking, RM 11349 (filed Sep. 12, 2006).

⁷ National Telecommunications Cooperative Association 2009 Wireless Survey Report (released April 2010) (NTCA 2009 Wireless Survey Report). This report is available on NTCA's website at: <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2009ntcawirelessurveyreport.pdf>.

⁸ NTCA 2009 Wireless Survey Report, p. 8.

⁹ NPRM ¶ 14.

¹⁰ *Id.* ¶¶ 9-20.

Advisory Circulars.¹¹ Instead, the Commission would require that marking and lighting requirements be tied to the FAA registration process, unless the FAA recommends new specifications to particular towers, which the FCC would consider as mandatory regulations.¹² The FCC also wants all changes to lights and markings to receive prior FAA and FCC approval.¹³ The proposed deletions of references in Section 17.23 to the FAA Advisory Circular are appropriate because some of the listed FAA Advisory Circulars can and have become obsolete. Retroactive application of any new marking and lighting standards would be unfair and thus inappropriate. Clarifying that FAA recommendations become FCC regulations, at least regarding Section 17.4 lighting and marking rules, is reasonable. This change appears to reflect a moderate approach that will reduce confusion for rural antenna structure owners between the FAA and FCC registration rules.

2. Accuracy of Location and Height Data.

“Alteration” of an existing antenna structure, such as would trigger a new registration, aeronautical study and FAA determination, is not currently defined under Section 17.4 of the Commission’s rules.¹⁴ The FCC proposes to define “alteration” as a change of at least one second in longitude or latitude or at least one foot in height.¹⁵ The FCC also proposes to require antenna structure owners who file FCC Form 854 to reflect antenna structure height and location within these accuracy limits and to use most accurate data available and to specify a particular survey method (*e.g.*, maps, or GPS).¹⁶

¹¹ *Id.* ¶ 11.

¹² *Ibid.*

¹³ *Id.* ¶ 13.

¹⁴ *Id.* ¶ 16.

¹⁵ *Id.* ¶ 16.

¹⁶ *Ibid.*

The proposal to require a one foot/one second change notice requirement reflects the industry's current practice, so formalizing the practice as regulation is appropriate. The Commission, however, should not require antenna structure owners to use a specific survey method to determine the structure height or location accuracy. Such a requirement would impose an unreasonable regulatory burden for small rural antenna structure owners, who need flexibility in selecting their accuracy determination method.

3. Structures Requiring FAA Notification.

Section 17.7 and Section 17.14 of the Commission's rules currently describe which antenna structures require FAA notification and which are exempt from the FAA notice requirements.¹⁷ The FCC proposes to delete Sections 17.7 and 17.14 and, instead, rely on and cross-reference the corresponding FAA exemption rules, FAA rules Sections 77.13 and 77.15.¹⁸ This moves classification of exemption from the FCC squarely to the FAA. Given the overall tone of this NPRM and the Commission's efforts to coordinate FCC tower lighting and marking rules with FAA registration rules, it would be consistent for the Commission to cross-reference FAA rules on structures requiring notification. Rural antenna structure owners would look only to the FAA for FAA notice exemption requirements, and this is reasonable.

4. Pending FAA Rulemaking Proceeding.

In June 2006, the FAA began a rulemaking proceeding of its Part 77 rules to change the notice requirements regarding changes in frequency bands, radiated power or antenna height or

¹⁷ *Id.* ¶¶ 18, 20.

¹⁸ 14 C.F.R. §§ 77.13, 77.15.

configuration.¹⁹ The FCC seeks input on whether the Commission should modify its rules in light of any rules the FAA may release.²⁰ It is too soon to determine the impact of FAA proposed rules on FCC procedures. Consequently, the FCC should re-examine this question and seek additional comment after the FAA completes its Part 77 rulemaking proceeding.

B. The Commission Seeks Changes To Inspection and Maintenance of Lighting Rules.

The Commission seeks input on proposed changes to the inspection interval, record retention rules, and paint maintenance standards.²¹

1. Inspection Frequency and Repair Time Limits.

The Commission asks whether it should delete Section 17.47, which requires quarterly inspections of all antenna structures, or whether the FCC should retain at least an annual inspection requirement.²² Alternatively, the FCC asks if it should exempt from quarterly or annual inspections certain NOC (network operations center) center-based monitoring systems that provide real-time notice of light extinguishments.²³ The FCC also wants input on whether to require notice (via a toll-free number) of light extinguishment (which prompts the FAA to issue a Notice to Airman or NOTAM) to be continuously active until the light is relit.²⁴ The Commission also asks if the FCC should impose a time limit to replace or repair the unlit light and if antenna structure owners be liable if lights are out due to loss of power and the owner does

¹⁹ NPRM, ¶¶ 19, 20.

²⁰ *Id.* ¶ 20.

²¹ *Id.* ¶¶ 22-35.

²² *Id.* ¶ 24.

²³ *Id.* ¶ 25.

²⁴ *Id.* ¶ 26.

not follow the FAA outage notification rules.²⁵ These are proposed changes to Sections 17.47, 17.48, and 17.56. Removing the inspection requirement, according to the Commission, would not prevent the FCC from punishing antenna structure owners for non-compliance with lighting and extinguishment notice requirements.

Best among the alternatives offered, the FCC should move to an annual inspection if the antenna structure owner has installed one of the new technologies for real-time notification of light extinguishment or improper function. Otherwise, the Commission should retain existing quarterly inspection requirement. Inspection compliance should remain a factor in any enforcement proceeding, as this will give rural antenna structure owners some reassurance that their efforts to comply will have meaning. Finally, the FCC should not impose a time limit for replacement or repair since some rural terrain is more difficult to reach than other types of terrain. The Commission should retain its current rules of replacing or repairing lights as soon as practicable, as stated in Section 17.48.

2. Record Retention on Improper Functioning of Structure Lights.

The Commission proposes to require antenna structure owners, per Section 17.49, to keep light extinguishment or improper functioning records for 2 years.²⁶ Currently the record retention period is unspecified. The Commission asks how burdensome is this proposed rule.²⁷ Setting a record retention period of two years is a sound business practice which will provide rural antenna structure owners additional predictability regarding their recordkeeping duties. Furthermore, the burden to small rural telco providers who must keep records of tower lighting

²⁵ *Id.* ¶¶ 27, 31.

²⁶ *Id.* ¶ 32.

²⁷ *Ibid.*

will be minimal. The Commission should adopt this proposed rule change.

3. Paint Maintenance Standards.

The FCC is considering amending Section 17.50 to incorporate the FAA's In Service Aviation Orange Tolerance Chart as a method to determine if the antenna structure is properly painted.²⁸ The Commission seeks comment on the merits of this proposal and asks whether evaluation of the paint maintenance under Section 17.50 should be made at the base of the structure or by observing the structure from ¼ mile away, or both.²⁹ The Commission should incorporate the Aviation Orange Tolerance Chart in Section 17.50 because it is an objective measurement of appropriate painting for antenna structures. Furthermore, evaluation for compliance with this paint standard should be viewed from the base of structure, not from ¼ mile away, because observation at the base is more objective than from ¼ mile away. The view from that distance may be blocked by seasonal leaf growth or other visual barriers, making compliance subjective and enforcement unpredictable.

C. Definitions, Voluntary Registrations, and ASR Notifications Should Be Clarified, Allowed and Amended.

The Commission also seeks comment on how to define "antenna structure owner," whether to allow voluntary ASR registrations, and how to provide ASR notices to antenna structure tenants.³⁰

1. Definition of "antenna structure owner."

The FCC proposes to clarify that "antenna structure owner" does not include the

²⁸ *Id.* ¶ 34.

²⁹ *Ibid.*

³⁰ *Id.* ¶¶ 36-45.

licensees, permittees, or service providers who own the antennas but not the tower or building to which the antennas attach.³¹ An antenna structure owner, under the proposed regulation, will be defined as “the owner of the underlying structure that supports or is intended to support antennas and other appurtenances.”³² These proposed revisions to Section 17.2 are good clarifications on ownership of antenna structures. The Commission should adopt these clarifications.

2. Voluntary antenna structure registration (ASR).

Some antenna structure owners choose to register their structures even though they are not required to register, according to the FCC.³³ Owners who voluntarily register their antenna structures with the FCC may be able to file an environmental assessment and obtain a finding of no significant impact under FCC’s environmental rules.³⁴ The FCC asks whether it should stop accepting voluntary registrations.³⁵ The Commission should not prevent voluntary ASR registrations and should continue to accept voluntary registrations. Some antenna structure owners find filing voluntary registrations to be beneficial in complying with environmental and local municipality rules. Local jurisdictions may also require a voluntary ASR as part of the siting and permitting process. Consequently, the Commission should not prohibit or prevent voluntary ASR filings.

3. ASR notice provisions for posting, tenants, construction or dismantling.

The FCC proposes to require the ASR number to be posted so it would be visible to a member of the public who reaches the closest publicly accessible location near the base of the

³¹ *Id.* ¶ 36.

³² *Id.* ¶ 37.

³³ *Id.* ¶ 39.

³⁴ *Ibid.*

³⁵ *Ibid.*

antenna.³⁶ If the structure abuts two roads, the ASR number would have to be posted visible from both roads, and the Commission seeks comment on this approach.³⁷ The FCC also proposes to change the FCC Form 854R notice rules by allowing antenna structure owners to either provide a copy of Form 854R to tenant licensees, or give the tenants the ASR number and a link to the FCC's ASR website.³⁸ Also, the FCC seeks comment on whether to increase to five days (following FAA protocol) the current 24-hour time limit within which an antenna structure owner must notify the FCC of antenna structure construction or dismantlement, height or ownership changes.³⁹ These changes are offered to Sections 17.4 and 17.57.

The Commission should permit antenna structure owners to post the ASR along a perimeter fence or gate surrounding the structure. NTCA agrees with the proposal to give tenants the ASR number and the FCC's ASR website, rather than delivering paper copies of the ASR to the tenant.⁴⁰ FCC should permit antenna structure owners up to five days to notify construction or dismantling an antenna structure, as per FAA rules and for changes in height or ownership. This time extension will help mitigate the regulatory burden of notification for small rural telcos.

II. THE COMMISSION MUST CONSIDER THE ECONOMIC IMPACTS ON SMALL RURAL TELCO PROVIDERS WHO OWN CELL TOWERS WHEN CONSIDERING ANTENNA STRUCTURE LIGHTING AND MARKING RULE CHANGES.

Rule modifications may impact small rural telco providers who own on cell towers.

These small telcos, many of whom are NTCA members, qualify as "small business entities"

³⁶ *Id.* ¶ 41.

³⁷ *Ibid.*

³⁸ *Id.* ¶¶ 42, 43.

³⁹ *Id.* ¶¶ 44, 45.

⁴⁰ The FCC's ASR website is: <http://wireless.fcc.gov/antenna/index.htm?job=home>.

under the definitions protected by the federal Regulatory Flexibility Act (RFA).⁴¹ The US Circuit Court of Appeals for the District of Columbia, in *NTCA v. FCC*, reviewed the Commission's obligations in 2009 in the context of the RFA and the federal Administrative Procedures Act (APA) when considering rules that may impact small business entities.⁴²

According to the federal appellate court,

The Regulatory Flexibility Act requires that agencies issuing rules under the Administrative Procedure Act publish a final regulatory flexibility analysis. See 5 U.S.C. § 604. Such an analysis must meet certain statutory requirements. It must state the purpose of the relevant rule and the estimated number of small businesses that the rule will affect, if such an estimate is available. In addition, each analysis must summarize comments filed in response to the agency's initial regulatory flexibility analysis, along with the agency's assessment of those comments. Finally, each analysis must include "a description of the steps the agency has taken to minimize the significant economic impact" that its rule will have on small businesses, "including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." § 604(a)(5).⁴³

The Court also held that:

The Regulatory Flexibility Act makes the interests of small businesses a "relevant factor" for certain rules. Therefore, the APA together with the Regulatory Flexibility Act require that a rule's impact on small businesses be reasonable and reasonably explained.⁴⁴

Any rule changes the Commission adopts as a result of this proceeding must comply with the strictures of the RFA. The D. C. Circuit correctly observed that the Commission must analyze the economic impacts, and list its steps taken to minimize significant economic impacts of its proposed rules on small business entities like NTCA members. The Commission's final regulatory analysis of the "factual, policy, and legal reasons for selecting the alternative adopted in the final rule" will help ensure that small rural tower owners are not subjected to unreasonably

⁴¹ 5 U.S.C. § 604.

⁴² *National Telephone Cooperative Association v. the Federal Communications Commission*, U.S. Court of Appeals, D. C. Circuit, Slip Opinion No. 08-1071, (D.C. Cir. 2009) (*NTCA v. FCC*) (rel. Apr. 28, 2009).

⁴³ *Id.* at 5.

⁴⁴ *Id.* at 6-7.

burdensome rules regarding lighting, marking and notification for antenna structures. Adhering to NTCA's recommendations will assist in minimizing the regulatory burden on small rural telcos who own antenna structures. The Commission should follow NTCA's recommendations.

III. CONCLUSION.

For these reasons, the Commission should adopt the proposed FCC tower lighting and marking regulations that are consistent with the FAA regulations, as discussed in these comments. Coordination with FAA rules will minimize confusion and conflict for NTCA's small rural telcos who are antenna structure owners. Any new regulation adopted, though, should reflect the Commission's careful analysis of impacts on small rural telco providers who are also antenna structure owners to reduce the regulatory burden on these small carriers.

Respectfully submitted,



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July 20, 2010

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WT Docket No. 10-88, RM 11349, FCC 10-53, was served on this 20th day of July 2010 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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