

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

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| Wireless Telecommunications Bureau Invites |) | WT Docket No. 08-61 |
| Comments on Draft Environmental Notice |) | WT Docket No. 03-187 |
| Requirements and Interim Procedures |) | |
| Affecting the Antenna Structure Registration |) | |
| Program |) | |

To: The Commission

PETITION FOR RECONSIDERATION

Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (“Blooston”), on behalf of its affected clients (“Petitioners”), hereby requests, pursuant to Section 1.106 of the Commission’s Rules, reconsideration of the position taken by the Commission in footnote 3 of its Public Notice, dated March 25, 2011 (DA 11-558) (“EA Public Notice”), that the draft rules and procedures are only procedural in nature and therefore exempt under Section 553(b)(A) of the Administrative Procedure Act (“APA”) from notice and comment rulemaking.

For the reasons set forth below, this position taken by the Commission is erroneous and violates the Administrative Procedure Act because the draft rules and procedures, when taken in their totality, would give unidentified members of the public new substantive rights which do not exist under current regulations, to the detriment of all proposed constructors of any antenna structure requiring registration by the

Commission. Accordingly, the EA Public Notice should be rescinded and an appropriate Notice of Proposed Rulemaking issued.

I. Factual Background and Statement of Interest

In 2008, the US Court of Appeals for the D.C. Circuit held that the Commission's current antenna structure registration ("ASR") procedures improperly failed to provide the public with a meaningful opportunity to request an Environmental Assessment for antenna towers that had otherwise been categorically excluded from review under the National Environmental Policy Act ("NEPA").¹ Based upon this ruling, and in accordance with the requirements of the Council on Environmental Quality ("CEQ"), the Commission issued its EA Public Notice seeking public comment in compliance with CEQ regulations.

The Petitioners are small businesses that provide telecommunications service and/or are in the tower construction and rental business. Because the proposed process, which would provide substantive rights to third parties that do not presently exist potentially threatens their economic well being, Petitioners have sufficient interest to petition the Commission with respect to the EA Public Notice.²

¹ *American Bird Conservancy v. FCC*, 516 F.3d 1027 (DC Cir. 2008) (hereinafter, *American Bird Conservancy*).

² See *FCC v. Sanders Brothers Radio Station*, 309 US 470 (1940).

II. The EA Public Notice Proposes the Conveyance of Third Party Rights that Do Not Presently Exist and Violates the APA's Requirement for Notice and Comment Rulemaking.

Contrary to the Commission's assertion,³ the proposed interim rules are substantive in nature and require notice and comment rulemaking under Section 553 of the APA (5 U.S.C. 553).⁴ Under the Commission's current ASR application process, applications for new registrations are typically granted instantaneously, without an opportunity for public comment, if the applicant has self-certified, under penalty of perjury, that the grant of the application would not result in a major environmental action under Section 1.1307 of the Commission's Rules. In circumstances where the applicant has certified that the grant of the application would constitute a major environmental action, the EA is filed concurrently with the ASR application.

Based upon the requirements of *American Bird Conservancy* and the CEQ, the Commission has proposed new Rule Section 17.4(c), which would convey specific substantive rights to third parties that do not currently exist under the Commission's Rules. In particular, the Commission has proposed that applicants complete the environmental notification process prior to the filing of the Form 854 ASR application that is not categorically excluded.⁵ This process would provide unidentified third parties

³ EA Public Notice at n. 3, wherein the Commission stated "[n]otice and comment regarding these draft rules is not required under the Administrative Procedure Act because the draft rules would change only the Commission's procedures governing the submission of certain applications."

⁴ *Jem Broadcasting Company, Inc. v. FCC*, 22 F.2d 306, 326 (DC Cir. 1994) (hereinafter, *Jem Broadcasting*).

⁵ Exclusions are limited to administrative changes such as ownership or contact information or dismantlement of the antenna tower; a reduction in antenna structure height; removal of obstruction marking and lighting or moving from

with the right to receive local notice in a newspaper of general circulation (or alternatively through other appropriate means such as through the local zoning process) which contains the detailed information regarding the proposal, including ownership, contact information and the technical parameters for the antenna structure and anticipated obstruction marking and lighting, as well as the relevant information necessary for interested third parties to file Requests for Environmental Processing. Further, under proposed Rule Section 17.4(c), the FCC will be required to provide national notice for a period of 30 calendar days, commencing after the date of local notice by the applicant. Based upon these notices, interested third parties will have the right to submit a Request for Environmental Processing – which, if timely filed, will then commence a pleading cycle for evaluation by the Commission.

In releasing the EA Public Notice, the Commission stated that the proposed rule changes were exempt from notice and comment rulemaking in accordance with Section 553(b)(A) of the APA “because the draft rules would change only the Commission’s procedures governing the submission of certain applications.”⁶ However, the draft rules and procedures are not simply a change in the procedure for filing ASR applications. To the contrary, they are legislative in nature since the draft rules and procedures provide newly created substantive rights to unidentified third parties that do not presently exist –

one type of obstruction marking and lighting to a more favorable type of obstruction marking and lighting; replacement of an existing antenna tower that would otherwise not require the filing of an EA, provided that the new structure does not use lights if the prior structure was unlighted or, if it was lighted, does not use a less favorable type of lighting system; any change that does not alter the physical structure, lighting or geographic location of an existing structure; or if the antenna structure is located on federal lands – the federal agency involved has assumed responsibility for the EA.

⁶ EA Public Notice at n. 3.

namely the right to be notified of and the opportunity to seek environmental review on each and every proposed antenna tower construction and modification requiring FCC registration.⁷ Moreover, no standards for seeking review are specified. From all that appears, any member of the public that claims to be “interested” would be able to throw a monkey wrench into the ASR approval process by requesting an EA review, regardless of how frivolous the request or the claim of interest. Even if the request is ultimately denied, the proposed tower constructor may have suffered substantial injury by being subjected to what would likely be considerable delay in the approval process – a delay that does not now exist under the present procedure. As a result, the provisions of proposed Section 17.4(c) of the Commission’s Rules are substantive in nature and require notice and comment rulemaking.

It is well settled that agency attempts to avoid notice and comment rulemaking under the APA will be closely scrutinized.⁸ Further, the D.C. Circuit Court of Appeals has been clear that a procedural rule has the potential to become a substantive or legislative rule. The Court’s much cited criteria “holds that the ‘critical feature’ of the procedural exception ‘is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present

⁷ *Chao v. Rothermel*, 327 F. 3d 223, 227 (3d Cir. 2003) (“Legislative rules that impose new duties upon the regulated party have the force and effect of law and must be promulgated in accordance with proper procedures under the *Administrative Procedures Act (APA)*”).

⁸ *National Women, Infants, and Children Grocers Association v. Food and Nutrition Service*, 416 F. Supp 2d 92, 104 (D.D.C. 2006) citing *New Jersey Dept. of Environmental Protection v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980) (holding that exceptions under Section 553 must be “narrowly construed and only reluctantly countenanced” in order to assure that “an agency’s decisions will be informed and responsive”); *Asiana Airlines et. al. v. Federal Aviation Administration*, 134 F. 2d 393, 396 (D.C. Cir. 1998) (“we have looked askance at agencies’ attempts to avoid the standard notice and comment procedures”).

themselves or their viewpoints.”⁹ Here, the Commission has proposed the alteration of substantive rights by creating and conveying rights that presently do not exist, thereby going well beyond the pale of the exemption established in the APA for rules of procedure. Accordingly, the proposed interim rules are not exempt from notice and comment rulemaking under the APA and are subject to the Commission’s notice and comment rulemaking procedures contained in Section 1.411 *et. seq.* of the Commission’s Rules.

III. The Comment Cycle Specified in the Commission’s EA Public Notice Must Follow its Notice and Comment Rules

The Commission has established, in the EA Public Notice, a 30-day period for the acceptance of comments – starting with the publication of the EA Public Notice in the Federal Register. No provision is made for the submission of comments in reply. As a result, even assuming that the Commission’s EA Public Notice serves as a Notice of Proposed Rule Making for purposes of the APA, the comment cycle specified in the EA Public Notice does not meet the requirements of Section 1.415 of the Commission’s Rules.

The Commission has established procedures for notice and comment rulemaking proceedings. In particular, Rule Section 1.412(a)(1) provides in pertinent part, as follows:

⁹ *Jem Broadcasting* at 326 citing *Batterton v. Marshall*, 648 F.2d 07 (D.C. Cir. 1980) (underlining added). See also *Rothermel* at 327 (“Interpretive, or ‘procedural,’ rules do not themselves shift the rights or interests of the parties, although they may change the way in which the parties present themselves to the agency.”) citing *Chamber of Commerce of the United States v. U.S. Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

Except as provided in paragraphs (b) and (c) of this section, prior notice of proposed rulemaking will be given.

- (1) Notice is ordinarily given by publication of a “Notice of Proposed Rule Making” in the FEDERAL REGISTER. A summary of the full decision adopted by the Commission constitutes a “Notice of Proposed Rule Making” for purposes of FEDERAL REGISTER publication.

Further, Rule Section 1.415 provides in pertinent part, as follows:

- (a) After notice of proposed rulemaking is issued, the Commission will afford interested persons an opportunity to participate in the rulemaking proceeding through submission of written data, views or arguments, with or without the opportunity to present the same orally in any manner.
- (b) A reasonable time will be provided for submission of comments in support of or in opposition to the proposed rules, and the time provided will be specified in the notice of proposed rulemaking.
- (c) A reasonable time will be provided for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rulemaking.

These rules clearly establish that when the Commission undertakes a proceeding to amend its rules that involves notice to the public with an opportunity for comment – whether exempt from the APA or not – it must follow established procedures. In the instant proceeding, the Commission has asserted that it is categorically exempt from the provisions of the APA. Nonetheless, it is still required by CEQ to publish its draft procedures in the Federal Register for comment.¹⁰ This is because the procedures can only be adopted “after an opportunity for public review and after review by [CEQ] for conformity with [NEPA] and [CEQ’s] regulations.”¹¹

¹⁰ EA Public Notice at 1.

¹¹ *Id.* at n. 2.

The Petitioners submit, at a minimum, that the Commission's notice and comment in this proceeding must follow the provisions of Rule Section 1.415 which allows for the filing of comments and reply comments by interested parties. While the CEQ may not require the filing of reply comments, the Commission's rules are more stringent in order to ensure the opportunity for the development of a full record. As a result, the comment cycle specified in Rule Section 1.415 is binding upon the Commission until such time, if any, as it is changed or eliminated.¹² Because the EA Public Notice does not contain a provision for the filing of reply comments, it is defective and cannot serve as a proper notice of proposed rulemaking. Accordingly, the Commission should reissue the EA Public Notice as a formal Notice of Proposed Rulemaking with an appropriate comment and reply comment cycle.

¹² See e.g. *United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as the regulation remains in force the Executive Branch is bound by it"); *Service v. Dulles*, 354 U.S. 363, 372 (1957) (A claimant who has been prejudiced by an agency's failure to adhere to its own internal practices or procedures has the right to assert a claim and obtain review by a federal court); *US ex rel Accardi v. Shaughnessy*, 347 US 260 (1954) (Government agencies are bound to follow their own rules, even if those rules are self imposed and limit what would otherwise be entirely discretionary decision making) *superseded on other grounds*.

IV. Conclusion.

For the reasons stated above, proposed Rule Section 17.4 is substantive in nature and should be the subject of notice and comment rule making in accordance with the APA and Rule Sections 1.411 *et. seq.*

Respectfully submitted,

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