

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

I. INTRODUCTION

The National Telecommunications Cooperative Association (NTCA) hereby files comments in support of the Petition for Reconsideration filed in the above-captioned proceeding on April 25, 2011.¹ The Petition requests the Commission to reconsider the conclusion reached in footnote 3 of Public Notice DA 11-558, wherein the Commission stated in regard to proposed antenna structure registration (ASR) rules that “[n]otice and comment . . . 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.”² In contrast, the Petition asserts that the draft rules would generate significant, substantive changes 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. . . .”³ For these reasons, the

¹ *Petition for Reconsideration* of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (filed Apr. 25, 2011) (*Petition*).

² “Wireless Telecommunications Bureau Invites Comment on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program,” FCC Public Notice DA 11-558, Docket Nos. 08-61, 03-187, at 1 (Mar. 25, 2011) (Public Notice).

³ *Petition* at 1.

Petition argues that the proposed rules exceed the limits of amendments that are excepted from APA requirements, and accordingly submits that the proposed changes are subject to the complete rulemaking processes, including opportunities for both comments and reply comments. For the reasons stated herein, NTCA supports the Petition, and urges the Commission to reissue the Public Notice as a regular Notice of Proposed Rulemaking, and to conduct the proceeding in accordance with Section 1.415 of the Commission's Rules.⁴

II. THE PROPOSED RULE AMENDMENTS ARE SUBJECT TO APA REQUIREMENTS

A. ANTENNA STRUCTURE REGISTRATION PROCEDURES

NTCA represents more than 570 rural rate-of-return incumbent local exchange carriers (ILECs) throughout the United States. Approximately 300 of these carriers provide wireless voice and broadband services, and many either own towers and antennas subject to the instantly relevant regulations, or collocate equipment on similarly-regulated towers, or both. As providers of services that rely on tower facilities, NTCA members' obligations are implicated directly by the proposed rule changes.

Under current Commission rules, an ASR applicant must complete and file an Environmental Assessment (EA) if the relevant facility is, *inter alia*, to be located in an officially designated wilderness area, or designated wildlife preserve; may affect listed threatened or endangered species or designated critical habitats; or likely jeopardize the continued existence of any proposed endangered or threatened species.⁵ If those or other enumerated conditions are not

⁴ 47 C.F.R. § 1.415.

⁵ 47 C.F.R. § 1.1307(a).

present (*e.g.*, that a facility may affect adversely sites, buildings, or objects, that are listed, or are eligible for listing, in the National Register of Historic Places),⁶ then an ASR applicant may self-certify on the registration Form 854 that grant of the application would not have a significant environmental effect,⁷ and no EA is required. Typically, when the applicant self-certifies that the application does not trigger an EA requirement, the application is granted without opportunity for public comment; where an EA is required, it is filed concurrent with the ASR application. In the PN, however, the Commission proposes to bifurcate the filing process, and to require that the matter of addressing a potential environmental impact be concluded prior to the filing of the ASR application. The proposed changes are intended to respond to a court ruling that the Commission's current ASR procedures do not provide the public with sufficient opportunity to request an EA.⁸

In sum, the Commission now proposes that applicants complete the environmental notification process prior to the filing of the ASR application. This requirement would require the applicant to provide notice of the ASR application in a local newspaper of general circulation or other similar means; the Commission would be required to itself provide notice of the application for 30 days following the local notice by the applicant.⁹

⁶ 47 C.F.R. § 1.1307(a)(4).

⁷ *See*, FCC Form 854, line 38.

⁸ *American Bird Conservancy v. FCC*, 516 F.3d 1027 (D.C. Cir 2008).

⁹ Public Notice at 2.

B. ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS

The Administrative Procedure Act (APA) requires agencies to publish notice of rules in order to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”¹⁰ This mandate finds expression in the Commission’s rules that require opportunities for comments and reply comments in rulemaking proceedings.¹¹ The instant PN, however, does not allow the full complement of APA-mandated opportunity, since it does not contemplate an opportunity for “interested persons” to file reply comments on the proposed rule amendments. The Commission argues that the proposed new rules can be implemented without adhering to the strictures of the APA because they are mere “rules of agency . . . procedure.” NTCA disagrees.

Consistent with the Petition that it supports, NTCA submits that draft rules and procedures are not mere changes to “rules of agency . . . procedure.” Rather, they fundamentally amend the nature of the ASR process by according heretofore unidentified parties rights to participate in, and potentially alter, the usual actions an ASR applicant would need to pursue. The proposal implicates significant administrative costs for applications, as well as delay in deploying critical communications facilities. The PN transcends mere procedure, and accordingly must be subjected to the rigorous standards of APA rulemaking.

The PN itself evidences the fact the proposed rules are intended to address more than administrative tasks related to application processing. The PN states, “[t]hese draft rules and procedures are intended to further the Commission’s implementation of the National

¹⁰ 5 U.S.C. § 553(b).

¹¹ 47 C.F.R. § 1.415.

Environmental Policy Act (NEPA)”¹² It is difficult to reconcile the APA carve-out for “rules of agency . . . procedure” with the substantive objectives of the Commission’s proposed rule amendment. Although the APA does not define “substantive rule” that has the “force and effect of law,” and which “must . . . be the product of certain procedural requisites,” the Supreme Court has held that a rule that “affect[s] individual rights and obligations” is substantive.¹³ Substantive rules have also been defined as those that “effect[] a change in existing law or policy which affect[] individual rights and obligations.”¹⁴ Despite the Commission’s implication that the proposed changes affect merely ministerial measures, the outcomes are far more substantial. As noted above, the proposed rule, if adopted, would split the ASR process and require all environmental issues to be settled before the application can proceed. The amendments would impose public notice costs upon the applicant, delay by at least 30 days any Commission action on an application, and enable any party to seek environmental review of a subject antenna construction or modification. Combined, these changes implicate significant costs and delay to the ASR applications processes, as well as the Commission’s stated intent to “preserv[e] the ability of communications providers rapidly to offer innovative and valuable services to the

¹² Public Notice at 1.

¹³ *Chrysler Corp. v. Brown*, 411 U.S. 281, 300, 302 (1979), citing *Morton v. Ruiz*, 415 U.S. 199 (1974) (distinguishing between “substantive rule” and “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

¹⁴ *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, at 927 (9th Cir. 1990) (examining whether patent examiner’s discretion to disallow certain applications would affect alleged rights of general public in statutory limitations to patentability)

public.”¹⁵ The potential impacts create concerns that tower over mere “rules of agency . . . procedure.”

The obligations of tower operators that are subject to the proposed rule change are substantial. As described previously by NTCA, tower owners that are national or regional carriers can absorb reasonable financial impacts, but those same costs can be “devastat[ing] to small rural carriers.”¹⁶ The allocation of resources to either tower redesign, or producing an EA, or litigating an administrative proceeding diminishes resources available for network deployment, maintenance, and upgrades. Given the significant costs and extended effects that may accrue from the new rules, they are substantive in nature, and do not fall within the rubric of exempted procedural actions. While the PN attempts to hide a rulemaking elephant in a procedural mouse hole, the rules and their anticipated impacts must be subject to the full complement of APA rulemaking requirements.

Accordingly, the PN issued by the Commission should be reissued as an NPRM so that all interested parties can comment fully on the potential impacts implicated by the proposal.

¹⁵ Public Notice at 1.

¹⁶ *See, Petition for Expedited Rulemaking and Other Relief Filed on Behalf of American Bird Conservancy, Defenders of Wildlife, and National Audobon Society Regarding Commission Implementation of the National Environmental Policy Act, the Endangered Species Act, and the Migratory Bird Treaty Act: Comments of the National Telecommunications Cooperative Association*, Docket Nos. 08-61, 03-187, DA 09-904, at 6 (May 29, 2009).

III. CONCLUSION

For the reasons stated herein and above, NTCA recommends the Commission to reissue the PN as a regular Notice of Proposed Rulemaking, and to afford interested parties the opportunity to submit the full measure of comments and reply comments on the proposed rule changes.

Respectfully submitted,



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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. 08-61 and WT Docket No. 03-187, DA 11-558, was served on this 5th day of May 2011 via electronic mail to the following persons:

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