IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 05-1008

CTIA – THE WIRELESS ASSOCIATION,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The parties, intervenors, and amici are listed in the brief of petitioner.

B. Rulings Under Review

Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 20 FCC Rcd 1073 (2004) (JA 43)

C. Related Cases

The order on review has not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes and Regulations

** Authorities principally relied upon are marked with asterisks.*

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents Federal Communications Commission submit this supplemental brief in response to the Court's order of December 8, 2005, to address the question "[w]hether, as discussed at oral argument, this court has jurisdiction over the petition for review in light of our decision in *PanAmSat Corp. v. FCC*, 193 F.3d 890, 897 (D.C.Cir. 1999), and related cases."

Petitioner CTIA seeks review of an FCC *Report & Order* adopted in October 2004 (JA 43). CTIA challenges the FCC's rule that carriers must comply with certain environmental

requirements prior to construction of a wireless communications tower, arguing that the Commission erred in concluding that such construction is a federal undertaking within the meaning of Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f. However, the rule at issue has been in place since at least 1990, and the Commission's previous orders adopting and explaining the rule are no longer subject to judicial review.[1] The Commission did not indicate an interest in reconsidering the rule in this proceeding, and, in fact, "declined to revisit" the issue. *Nationwide Programmatic Agreement*, 20 FCC Rcd 1073, 1079, 1083 ¶¶16, 24 (2004) (JA 49, 53). For these reasons, although we do not disagree with CTIA's view that it would be desirable for the Court to resolve the issue of whether wireless tower construction is a federal undertaking within the NHPA, we believe that a proper reading of this Court's precedent requires dismissing CTIA's petition for lack of jurisdiction.

As the Court noted in the *PanAmSat* opinion, a previously settled issue can be reopened. *See* 198 F.3d at 893-94, 897. Judicial review of an established agency regulation "is not barred when an agency reopens an issue covered in, or changes its interpretation of, that regulation; *e.g.*, if an agency in the course of a rulemaking proceeding solicits comments on a pre-existing regulation or otherwise indicates its willingness to reconsider such a regulation by inviting and responding to comments, then a new review period is triggered." *Kennecott Utah Copper Corp. v. United States Dept. of Interior*, 88 F.3d 1191, 1213 (D.C.Cir. 1996), *citing Ohio v. EPA*, 838

[1] *See, e.g., Amendment of Environmental Rules*, 5 FCC Rcd 2942 (1990)(adopting 47 C.F.R. 1.1312, which requires compliance with environmental rules prior to tower construction for facilities for which no preconstruction authorization is required); *see also Streamlining the Commission's Antenna Structure Clearance Procedure*, 11 FCC Rcd 4272, 4289 ¶41 (1995)(concluding that tower registration is a federal undertaking to which environmental rules apply). 47 U.S.C. 402(a) and 28 U.S.C. 2342(1) and 2344 require that a petition for review of a final Commission regulation be brought "within 60 days after its entry." The 60-day statutory deadline is jurisdictional. *CTIA v. FCC*, 330 F.3d 502, 508 (D.C.Cir. 2003).

F.2d 1325, 1328-29 (D.C.Cir. 1988); *see also Public Citizen v. NRC*, 901 F.2d 147, 152-53 (D.C. Cir.)("[W]here an agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that such a rule or policy is contrary to law will not be held untimely because of a limited statutory review period."), *cert. denied*, 498 U.S. 992 (1990). The Court added in *Kennecott*, however, that

> when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. *Massachusetts v. ICC*, 893 F.2d 1368, 1372 (D.C.Cir. 1990). Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter.

88 F.3d at 1213.

Under the law of this circuit, the agency did not reopen the federal undertaking question in this proceeding. Specifically, as the Commission pointed out, the Notice of Proposed Rule Making in this proceeding "did not seek comment on the question whether the Commission should, assuming it possesses the statutory authority to do so, continue our current treatment of tower construction as an 'undertaking' for purposes of the NHPA." *R&O*, 20 FCC Rcd at 1083 ¶24 (JA 53).

CTIA contends that it is "at least arguable" that the NPRM reopened this issue. Supp. Br. at 3. However, this contention is based solely on the Commission having sought comment on "any other issues related to the draft Nationwide Agreement." JA 205. This Court has previously rejected that kind of argument. In *National Association of Reversionary Property Owners v. Surface Transportation Board*, 158 F.3d 135, 145 (D.C.Cir. 1998), the Court addressed a similar general request for comments on relevant issues. It held that it could not "construe the reopener doctrine to mean that the [agency], by that one sentence, threw the rulemaking open to any

possible changes that any member of the public might conjure up with the result that summary denial of such changes becomes reviewable by the courts."[2]

This is not a situation in which there may be "two ways of characterizing the issue raised by the Commission's rulemaking notice." *Association of American Railroads v. ICC*, 846 F.2d 1465, 1473 (D.C.Cir. 1988). There is no ambiguity in the NPRM. The Commission did not invite comments on or otherwise reopen in the NPRM in this proceeding the question whether wireless tower construction is a federal undertaking subject to NHPA. *See United Transp. Union v. Surface Transp. Bd.*, 132 F.3d 71, 75-76 (D.C.Cir. 1998)(agency did not reopen issue when, among other things, it did not propose to change rules and policies or seek comment upon them). Moreover, this rule making proceeding was intended to implement the Nationwide Programmatic Agreement the Commission had entered into with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers. The goal of that agreement was to streamline the Section 106 historic review process under NHPA for FCC undertakings. *See NPRM*, 18 FCC Rcd 11664 ¶1 (2003) (JA 204-05). The draft programmatic agreement expressly included wireless tower construction as within the scope of federal undertakings. *See* JA 214, 264-66. Those provisions were retained in the final agreement. *See* JA 120, 153-55. There is nothing in the terms of the agreement that would have led any commenter to think that

[2] CTIA notes (Supp. Br. at 4) that the Initial Regulatory Flexibility Analysis "tentatively conclude[d] that we have authority under … Section 106 of the [NHPA] … to adopt the proposals set forth in the order" and that the "contention that the FCC lacks statutory authority to impose any NHPA obligations squarely responds to that 'tentative[] conclu[sion].'" This language, however, does not reflect any more intention by the Commission to reopen the federal undertaking question than does the general request for comments on "any other issues related to the draft Nationwide Agreement." Moreover, as the Commission subsequently noted, only one commenter actually responded to the Initial Regulatory Flexibility Analysis, and that comment was unrelated to the federal undertaking question. *See R&O*, 20 FCC Rcd at 1204 (JA 181).

the Commission was rethinking the decided issue of whether wireless tower construction is a federal undertaking for purposes of the NHPA. Accordingly, this case is unlike *American Ass'n of Railroads v. ICC*, 846 F.2d at 1473 (finding reopening where agency's proposed new regulations indicated to the court that the consideration of new rules "might lead to a rethinking of old positions").

The agency, of course, may still reopen a question in resolving a rule making proceeding, either in response to comments or on its own initiative. However, the reopening rule "is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue." *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C.Cir. 1989).

CTIA observes that commenters in this proceeding "provided extensive discussion of the undertaking issue" and that "the FCC devoted six substantial paragraphs to articulating its legal theory and responding directly to those comments"; CTIA then concludes that this "is more than sufficient to effect a reopening." Supp. Br. at 5. We disagree. Where the agency has not raised the issue in the NPRM, parties cannot make the issue part of the proceeding merely by providing extensive comment. Moreover, the fact that the Commission responded to those comments does not in itself demonstrate that it was reopening the question. An agency does not reopen an issue when it responds "to comments that are beyond the scope of the rulemaking" and "merely reaffirms its prior position." *United Transp. Union*, 132 F.3d at 76; *accord Kennecott Copper*, 88 F.3d at 1213 (merely responding to unsolicited comments by reaffirming prior position on settled issue is not reopening); *American Iron & Steel Inst. v. EPA*, 886 F.2d at 398 (same).

Here, the fact that the Commission "directly addressed its statutory authority" (Supp. Br. at 5) demonstrates no more than that it was responding to the comments and explaining its basis

for deciding not to reopen the question. Contrary to CTIA's claims, the Commission's brief discussion of this question was not to articulate for the first time "its reasons for treating tower construction as a federal undertaking," but to respond to specific arguments raised in the comments.[3] Because the Commission did not "propose to make changes" in the rule, did not "request comment upon" the rule, and the discussion regarding its legal authority "came only in response to … unsolicited comments," the reopening doctrine should not apply to save CTIA's claim. *United Trans. Union*, 132 F.3d at 76.

Moreover, unlike in *PanAmSat*, 198 F.3d at 897, here the Commission suggested that it "had settled the matter conclusively" in prior orders -- it specifically "declined to revisit" its previous determination that construction of wireless communications towers constituted a federal undertaking under the NHPA. *R&O*, 20 FCC Rcd at 1079, 1083 ¶¶16, 24 (JA 49, 53). In fact, this case fits comfortably within the Court's description in *PanAmSat* of a situation in which the agency can respond to the substance of an attack on its regulation without reopening the issue and "risking loss of the benefits of the 60-day rule." 198 F.3d at 897. Here, the Commission "first relied on the fact that the matter was settled" previously, and "then discussed the continued justification" of its rule in response to the commenters' challenges. *Id.* Under *PanAmSat* and related cases, there is thus no basis to find that the agency's response to the comments explicitly or implicitly reconsidered the rule and reopened the matter.

CTIA cites several examples of what it considers the context of the Commission's decision to support its argument that the agency reopened the issue of the status of wireless tower constructions as federal undertakings subject to NHPA. We do not disagree that there are cir-

[3] *See, e.g.*, Sprint Comments at 6-20 (JA 304-318)(raising the Section 319(d), Section 303(q) and Section 332(c)(7) arguments specifically addressed by the Commission in the *Report & Order*, 20 FCC Rcd at 1082-83 ¶¶24-28 (JA 52-54)).

cumstances where the context of the agency's decision can be helpful in determining whether a reopening of an established issue has occurred. Here, however, CTIA's evidence of context is ultimately unpersuasive.

CTIA relies in large part on a staff order, which, CTIA asserts, "read the order under review as having reopened, considered, and decided the question of the FCC's statutory authority to treat tower construction as a federal undertaking under NHPA." Supp. Br. at 10, *citing In the Matter of Sprint PCS, LLC*, 20 FCC Rcd 4084 (WTB 2005). However, even if any weight were to be given to a staff characterization of an agency order, the staff ruling merely said that the Commission "considered" arguments and "rejected" them. *See* 20 FCC Rcd at 4084 ¶5. That description is equally consistent with a reading of the *Report & Order* as having responded to unsolicited comments concerning the status of wireless tower construction as federal undertakings by reaffirming its prior position and explaining its basis for rejecting the arguments in the comments.

CTIA's reliance on interested parties' characterizations of statements made by FCC staff in ex parte meetings is equally unpersuasive. For example, CTIA cites statements made in a letter it wrote memorializing an ex parte meeting between wireless industry representatives and the Commission's general counsel for the proposition that "the industry convinced the FCC to end its delay" in addressing industry complaints that the FCC was improperly treating wireless tower construction as federal undertakings within the NHPA. *See* Supp. Br. at 9 and Appendix. While it no doubt was the industry's goal to convince the Commission to change its established approach, the language of the *Report and Order* demonstrates that the Commission declined the industry's importunings.

Moreover, whatever the agency's general counsel may have said in an ex parte meeting (and the record reflects only CTIA's characterization of what he said), such statements by agency staff cannot change the language of a Commission order adopted six months later. The Court has held repeatedly that the meaning of Commission orders may not be modified by statements of the agency's staff. *See Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004)(citing cases).

Finally, CTIA, pointing to the statements of the two dissenting commissioners (JA 111, 114), contends that "resolution of an issue in the face of reasoned dissents is powerful evidence that the issue was in fact reopened and re-decided." Supp. Br. at 7. Whether there is any basis for such a position is open to question. It is well established that the intent or meaning of an agency order cannot be controlled by statements made by a dissenting commissioner. *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C.Cir. 2000). In any event, the language of the two dissenting commissioners here can easily be read simply to reflect their disagreement with the agency's decision not to reopen and modify the rules. Indeed, Commissioner Abernathy stated her "hope that the Commission carefully reexamines this important issue in the near future to ensure that all of our actions in this area are consistent with our statutory authority and the NHPA." JA 112. This does not appear to reflect the view, advanced by CTIA (Supp. Br. at 7), that "the issue was in fact reopened and re-decided" in the order under review.

In sum, there can be a fine line between an agency, on the one hand, responding to comments and explaining the basis for not reopening an issue and, on the other hand, reopening and resolving an issue. For the reasons we have discussed, we believe that the better reading of the express language of the *NPRM* and the *Report & Order* in this case, as well as the context in

which those orders were adopted, is that the Commission did not reopen the question whether wireless tower construction is a federal undertaking for purposes of the NHPA.

The Court has held that "the appropriate way to challenge a longstanding regulation on the ground that it is 'violative of statute' is ordinarily 'by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition.'" *Kennecott,* 88 F.3d at 1214, *quoting Public Citizen v. NRC,* 901 F.2d at 152; *Geller v. FCC,* 610 F.2d 973, 978 (D.C.Cir. 1979)(same). In addition, the "court will entertain challenges beyond a statutory time limit to the authority of an agency to promulgate a regulation … following enforcement of the disputed regulation." *CTIA v. FCC,* 330 F.3d at 508; *see also Functional Music, Inc. v. FCC,* 274 F.2d 543, 546 (D.C.Cir. 1958), *cert. denied,* 361 U.S. 813 (1959). CTIA has followed neither course here.

Accordingly, CTIA is barred by 28 U.S.C. 2344 from seeking now to challenge the determination as to the federal undertaking question and the rules implementing that determination by way of a petition for review of the Commission's action in the current proceeding because the Commission did not in this proceeding modify or otherwise reopen consideration of these rules.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review. Alternatively, should the Court conclude that it has jurisdiction, the Court should affirm for the reasons set forth in our opening brief.

Respectfully submitted,

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