

FHH Telecom Law
November 2006

**FCC Fines For Failure
To Comply With Historic
Preservation Requirements**

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We have been beating the drums in these pages for some time about the need for communications facilities constructors to be mindful of the new historic preservation requirements that went into effect about a year and half ago. The now not-so-new rules require anyone constructing a tower or collocating a tower on an existing building to jump through some fairly high hoops in order to ensure that no adverse effect on historic properties is caused by the communications facility. Among other things, you must send notices to potentially affected Indian tribes, check the subsoil of the construction site for historic material, review the impact on nearby historic properties within sight of the tower, and provide extensive back-up information to the local state historic preservation office in order to get their blessing for the proposed construction – all before you initiate construction. These requirements can be especially burdensome on cellular or other geographically licensed operators who build scores of transmitter sites. We have been waiting for the FCC to catch someone in a failure to navigate these straits, and recently they did.

It seems that PCS carrier T-Mobile was planning to affix a 12-foot antenna to the top of a church steeple in Philadelphia. Although this was obviously not new construction, the building was more than 45 years old, and under those circumstances the rules require a historic preservation evaluation to be performed prior to initiating construction. This is true despite the fact that the 12-foot height addition would not even have merited FAA consideration.

T-Mobile dutifully hired a consultant outfit to perform a historic analysis, and the consultant sent off notices to Indian tribes, and local planning and historical agencies. All of these contacts concurred with T-Mobile that the addition to the steeple would not have any adverse effect on historical properties – either the church itself or nearby buildings. The problem? T-Mobile had gone ahead and constructed the tower *before* it completed the evaluation process and before the state historic preservation office (SHPO) had signed off on the construction. T-Mobile realized its mistake about a month later and informed the SHPO and the FCC of its error. It acknowledged its mistake but said that it had immediately notified the authorities and it was providing further environmental training for its employees to be sure this did not happen again.

After mulling it over, the FCC's Enforcement Bureau decided that a base fine of \$7,000 should apply to this kind of offense. This base level is then subject to adjustment upward

or downward based on the particular circumstances. Here the FCC doubled the base amount to \$14,000 simply because T-Mobile is big, but then reduced that amount to \$11,000 because the company had voluntarily disclosed its error and had taken immediate steps to correct the problem even before the FCC began investigating. On the same day as the T-Mobile action, another cellular company, Panhandle, was fined by the FCC for a similar failure to undertake the historic preservation review prior to construction, though its fine was lower due to its smaller size.

In the scheme of regulatory violations, these offenses seem like minor ones – not only was there no actual adverse impact on any protected historic properties, but the infractions were inadvertent and promptly disclosed. Ordinarily, this would probably have been a good situation for a “no-call” by the FCC refs. The FCC may, however, have been looking for an opportunity to make an example of someone in order to send a warning signal to the industry. T-Mobile and Panhandle just happened to be in the wrong place at the wrong time.

Complying with the historic preservation rules can be daunting and frustratingly slow. FHH is therefore establishing relationships with qualified historical experts to assist us and our clients in avoiding the problem that T-Mobile and Panhandle ran into. The experts can provide the needed certification of no adverse effects to historic properties (or help in mitigating adverse effects to an acceptable level). We remind potential constructors that it is important to begin the historic evaluation process well before your proposed construction date since the lead time to get feedback from the tribes, the SHPO’s, and sometimes the FCC can be weeks or even months.