

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

In the Matter of)	
)	
Sprint Nextel Corporation)	TCNS No. 54336 (Valley Peak)
)	
Proposed Communications Facilities on Santa Cruz Island, California)	TCNS No. 54337 (Centinela Peak)
)	
)	

SECOND ORDER ON RECONSIDERATION

Adopted: February 9, 2011

Released: February 10, 2011

By the Deputy Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On December 29, 2010, the Northern Chumash Tribal Council (NCTC) submitted a Petition for Reconsideration (Petition) of the November 23, 2010 decision by the Wireless Telecommunications Bureau’s Spectrum and Competition Policy Division (Division) denying NCTC’s earlier Petition for Reconsideration in the captioned matter.¹ We dismiss the Petition as untimely filed.

II. BACKGROUND

2. The Nature Conservancy (TNC), a not-for-profit environmental organization, made an arrangement with Sprint Nextel Corporation (Sprint Nextel) to install two 15-foot steel poles on two peaks on Santa Cruz Island (the Island), an island located in the Channel Islands off the coast of Southern California. TNC made this arrangement because there was no reliable wireless communications service for those who live, work on, and visit the Island. As part of the Section 106 review process required under the National Historic Preservation Act (NHPA)² and the Commission’s rules,³ TNC notified federally recognized Indian Tribes about the proposed communications facilities through the Commission’s Tower Construction Notification System (TCNS).⁴

3. In response to the TCNS notifications, the Santa Ynez Band of Chumash Indians (Santa Ynez Band), a federally recognized Indian Tribe, expressed an interest in the proposed locations, and

¹ Petitions for Re-Reconsideration and the Setting Aside of FCC Order of November 23, 2010, dated Dec, 29, 2010 (Petition). Although the pleading is styled as encompassing two petitions, the relief sought through “setting aside” the earlier order appears to be the same as that sought through reconsideration.

² 16 U.S.C. § 470f.

³ See 47 C.F.R. § 1.1307(a)(4) and Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process.

⁴ TCNS Nos. 54336 (Valley Peak) and 54337 (Centinela Peak), submitted July 29, 2009.

asked the Division to consider the effects of the two proposed communications facilities on historic properties of cultural and religious importance to that Tribe.⁵ Following the guidance of the California State Historic Preservation Officer (CA SHPO), TNC also sent notifications of the proposed project to the state-recognized Chumash tribes identified by the Native American Heritage Commission for Santa Barbara County.⁶ Division staff participated in a phone meeting with representatives of the Santz Ynez Band, the state-recognized Chumash Tribes, and TNC. Members of these federally and state recognized Tribes subsequently visited the Island with TNC staff to view the proposed project sites. An additional survey was conducted of both proposed sites, and a qualified Chumash site monitor was present while the new survey was being conducted. The additional survey found no evidence at either site that the proposed project would have any adverse effect on historic properties. No party filed comments regarding the additional survey.

4. The CA SHPO subsequently advised that the project would have no adverse effect on historic properties, providing that certain conditions were met during construction, including having a Native American monitor present during all ground-disturbing activities. On June 24, 2010, TNC forwarded the CA SHPO's conditional no adverse effect finding to the Santa Ynez Band and the state-recognized Chumash tribes, with instructions to direct any comments to the Division. Neither comments nor requests for extension of time were filed.

5. By letter of September 8, 2010, the Division found that, subject to the conditions specified by the CA SHPO, the proposed communications facilities would not have an adverse effect on historic properties.⁷ On September 20, 2010, NCTC timely filed a petition for reconsideration of the September 8, 2010 decision and an accompanying request to stay the effectiveness of the Division's determination, arguing that the Division failed properly to consult with Indian Tribes, and arguing that the proposed towers would adversely affect historic properties of religious and cultural importance to the Chumash Indians.⁸

6. On November 23, 2010, the Division affirmed its September 8, 2010 decision that the two proposed towers on the Island will not have adverse effects on historic properties within the meaning of Section 106 of the NHPA.⁹ The Division distinguished the status of state-recognized tribes and intertribal organizations such as NCTC, which may participate in the Section 106 process as members of the public and may request consulting party status, from that of federally recognized Tribes that have specific rights to consultation under the NHPA and the rules of the Advisory Council on Historic

⁵ TCNS replies by Freddie Romero, Santa Ynez Band of Chumash Indians, in response to TCNS Nos. 54336 and 54337, dated Aug. 17, 2009.

⁶ See Letters from Al Martinez, Section Manager Telecommunications Services, Michael Brandman Associates, to the parties on the Native American Heritage Commission's contact listing for Santa Barbara County, California, dated Aug. 13, 2009, and Aug. 27, 2009.

⁷ See Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC, to Freddie Romero, Cultural Preservation Consultant, Santa Ynez Band of Chumash Indians, dated Sept. 8, 2010.

⁸ Frank Arredondo, a member of the Coastal Band of the Chumash Nation, also filed a petition for reconsideration.

⁹ Sprint Nextel Corporation Proposed Communications Facilities on Santa Cruz Island, California, TCNS Nos. 54336 and 54337, *Order*, DA 10-2233 (WTB/SCPD rel. Nov. 23, 2010) (*Order on Reconsideration*).

Preservation (ACHP).¹⁰ The record showed that the Chumash Advisory Alliance had requested consulting party status on behalf of NCTC and others, and as such had received copies of all documents sent to the CA SHPO, as well as an opportunity to comment on those documents. The Division therefore found that NCTC had received all of the rights to which it was entitled as a consulting party and had had a full opportunity to make known any effect the proposed towers would have on historic properties of traditional cultural and religious significance to its members. The Division concluded that its determination of no adverse effect was supported by the record, and affirmed its finding that the two fifteen-foot towers will have no adverse effect on historic properties subject to the conditions recommended by the CA SHPO.

7. On December 29, 2010, Division staff received an e-mail from NCTC with the instant Petition attached.¹¹ The e-mail was received 36 days after the release of the November 23, 2010 *Order on Reconsideration*. In the Petition, NCTC argues that NCTC is a “Tribal Government” as that term is defined under California Senate Bill 18. NCTC argues that Tribal Governments under Senate Bill 18 include federally recognized and state-recognized Tribes, as well as other groups defined in the Bill. NCTC argues that the Division failed properly to consult with and provide special consideration to NCTC in its capacity as a Tribal Government. NCTC requests that the Division set aside the *Order on Reconsideration* and begin the Section 106 process anew.

III. DISCUSSION

8. Section 405(a) of the Communications Act of 1934, as amended, requires that a petition for reconsideration be filed within thirty days from the release date of the Commission’s action.¹² Because the Division denied NCTC’s initial petition for reconsideration on November 23, 2010, the last day for filing a petition for reconsideration of that action was December 23, 2010. NCTC’s Petition was submitted via e-mail on December 29, 2010. We therefore find that the Petition was filed six days late. The Commission has consistently held that it is without authority to extend or waive the statutory thirty-day period for filing petitions for reconsideration specified in Section 405(a) of the Communications Act.¹³ The filing requirement of Section 405(a) of the Act applies even if the petition for reconsideration is filed only one day late.¹⁴ Because the Petition was not received within 30 days of the Division’s *Order on Reconsideration*, we conclude that the Petition must be dismissed as untimely filed.¹⁵

¹⁰ See 16 U.S.C. § 470a(d)(6)(B); 36 C.F.R. § 800.2(c)(2)(ii)(B),(C).

¹¹ See E-Mail from Fred Collins, Tribal Administrator, Northern Chumash Tribal Council, to Anne Marie Wypijewski, Spectrum and Competition Policy Division, Federal Communications Commission, dated Dec. 29, 2010.

¹² 47 U.S.C. § 405(a); see also 47 C.F.R. § 1.106(f) (implementing Section 405(a)).

¹³ See *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); see also Petition for Amendment of the Commission’s Rules to Establish First and Second Class Radiotelephone Operator Licenses, *Order*, 10 FCC Rcd 3196 (WTB 1995).

¹⁴ See, e.g., Panola Broadcasting Co., *Memorandum Opinion and Order*, 68 FCC 2d 533 (1978); Metromedia, Inc., *Memorandum Opinion and Order*, 56 FCC 2d 909, 909-910 (1975).

¹⁵ In addition, the Commission’s rules require that petitions for reconsideration be filed with the Office of the Secretary and that they be served on the parties to the proceeding. 47 C.F.R., §§ 1.7, 1.106(f), 1.106(i). NCTC (continued....)

9. Moreover, if we were to consider the merits of NCTC's arguments, we would deny the Petition. While NCTC contends that it is considered a Tribal Government under state law, it does not and cannot successfully argue that it is a federally recognized Tribe. Since NCTC is not a federally recognized Tribe, it does not enjoy a government-to-government relationship with the United States, nor is it covered by the special provisions applicable to federally recognized Tribes under the NHPA and the ACHP rules. Rather, NCTC's status is that of a consulting party, and as explained in the *Order on Reconsideration*, the process that the Division afforded to NCTC in its Section 106 review is consistent with this status. NCTC's contentions to the contrary are therefore unpersuasive.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration submitted on December 29, 2010, by the Northern Chumash Tribal Council **IS DISMISSED**.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey S. Steinberg
Deputy Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau

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does not appear to have filed its Petition with the Office of the Secretary, and it has not provided a certificate of service with its Petition.