

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

In the matter of)
)
NATIONWIDE PROGRAMMATIC)
AGREEMENT REGARDING THE) WT Docket No. 03-128
SECTION 106 NATIONAL HISTORIC)
PRESERVATION ACT REVIEW PROCESS)
)
)

Notice of Proposed Rulemaking

Adopted: May 27, 2003

Released: June 9, 2003

Comments due: August 8, 2003
Replies due: September 8, 2003

By the Commission: Chairman Powell issuing a statement.

I. INTRODUCTION AND BACKGROUND

1. In this Notice of Proposed Rulemaking ("NPRM"), we seek comment on a draft Nationwide Programmatic Agreement ("Nationwide Agreement") among the Federal Communications Commission ("Commission"), the Advisory Council on Historic Preservation ("Council"), and the National Conference of State Historic Preservation Officers ("Conference") that would tailor and streamline procedures for review of certain Undertakings for communications facilities under the National Historic Preservation Act of 1966 ("NHPA"),¹ as well as a related revision of the Commission's Rules.² In November 2001, representatives of the Commission, Council and Conference, American Indian tribes, the communications industry, and historic preservation consultants, as part of a working group sponsored by the Council, began drafting a proposed Nationwide Agreement. Consistent with Section 800.14(b)³ of the Council's rules and Section 1.1307(a)(4) of the Commission's rules,⁴ the draft

¹ See 16 U.S.C. § 470 et seq. An "Undertaking" subject to review under the NHPA is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. § 470w(7).

² The proposed Nationwide Agreement would incorporate an existing Programmatic Agreement that excludes most collocations of antennas on existing structures from routine historic preservation review. See 16 FCC Rcd 5574 (Wireless Tel. Bur. 2001).

³ 36 C.F.R. § 800.14(b).

⁴ 47 C.F.R. § 1.1307(a)(4).

Nationwide Agreement is intended to tailor the Section 106 review⁵ in the communications context so as to improve compliance and streamline the review process for construction of towers and other Commission Undertakings.⁶ At the same time, the parties intend to advance and preserve the goal of the NHPA to protect historic properties, including historic properties to which Indian tribes and Native Hawaiian organizations (“NHOs”) attach religious and cultural significance.

II. DISCUSSION

2. We request comment on the draft Nationwide Agreement, attached as Appendix A to this NPRM. In particular, we seek comment on several issues that members of the Working Group have specifically raised during the course of negotiating the current draft Nationwide Agreement. For example, members of the Working Group have proposed certain modifications to the language in the draft Nationwide Agreement regarding exclusion of certain Undertakings from routine Section 106 review.⁷ These and other issues on which the members of the Working Group did not reach full consensus are indicated in footnotes throughout the draft Nationwide Agreement. We seek comment on these and any other issues related to the draft Nationwide Agreement, including issues related to the potential economic impact of the draft Nationwide Agreement on small entities.

3. We also request comment regarding how the draft Nationwide Agreement should be crafted consistent with the Commission's government-to-government relationship with and trust responsibility to federally recognized Indian tribes (including Alaska Native Villages),⁸ and statutory and regulatory provisions governing the Commission's relationship with such Indian tribes and NHOs.⁹ Several issues in this regard have been brought to our attention both through tribal participation in the Working Group and through Commission staff consultation with the United South and Eastern Tribes, Inc. For instance, do the NHPA, the Council's rules or other governing principles require notification or more, prior to construction, to Indian tribes and NHOs with historic associations to the area in which an Undertaking is to occur, even though the parties to a Nationwide Agreement identify certain classes of Undertakings as unlikely to have an effect on historic properties and therefore excluded from routine review?¹⁰ Similarly, should the Nationwide Agreement prescribe procedures for licensees and applicants to invite the participation of Indian tribes and NHOs in the Section 106 process, or should it recommend that, as an alternative to direct Commission consultation on each site, the parties implement alternative processes pursuant to guidance to be provided separately by the

⁵ 16 U.S.C. § 470f.

⁶ The Commission's environmental rules currently treat construction of licensed communications facilities as “Undertakings.” An illustrative list of Commission activities in relation to which Undertakings covered by the draft Nationwide Agreement may occur is attached as Attachment 2 to Appendix A.

⁷ See Draft Nationwide Agreement Section III.

⁸ See In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement, 16 FCC Rcd 4078, 4080 (2000).

⁹ See 16 U.S.C. § 470a(d); 36 C.F.R. § 800.2(c)(2); 47 C.F.R. § 1.1308(b) Note (when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe).

¹⁰ See Draft Nationwide Agreement at Section III.B.

Commission after consultation with Indian tribes and NHOs?¹¹ We seek comment on these issues.

4. In addition, we request comment regarding the treatment of Section 106 reviews that are in process at the time a Nationwide Agreement becomes effective. For example, to what extent should the timelines, processes and standards in a Nationwide Agreement replace the Council's rules (36 C.F.R. Part 800) for Section 106 reviews that are pending before a SHPO/THPO, or at other stages in the process, on the date that a Nationwide Agreement goes into effect? We seek comment on this and other transitional issues.

5. Finally, in conjunction with the proposed execution of the Nationwide Agreement, we propose to revise the Note to Section 1.1307(a)(4) of our rules.¹² Under Section 1.1307(a)(4), applicants are required to evaluate whether their proposed facilities may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places and, if so, to file an Environmental Assessment and obtain a Finding of No Significant Impact (or procure completion by the Commission of an Environmental Impact Statement) prior to construction.¹³ The Note to Section 1.1307(a)(4) provides guidance as to how applicants should perform this evaluation consistent with the NHPA. In order to make clear that the procedures in the Nationwide Agreement will be binding on applicants, and that non-compliance with these procedures would subject a party to potential enforcement action by the Commission, we propose to amend the Note to Section 1.1307(a)(4) to read as follows:

The National Register is updated and re-published in the FEDERAL REGISTER each year in February. To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 66 FR 17554, and the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, ___ Fed. Reg. __.

We seek comment on this proposed revision to our rules.

III. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

6. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁴ Persons making oral *ex parte* presentations are

¹¹ *Id.* Section IV, Alternatives A and B.

¹² 47 C.F.R. § 1.1307(a)(4) Note.

¹³ *Id.* § 1.1307(a)(4); *see also* 47 C.F.R. §§ 1.1308, 1.1311.

¹⁴ *Id.* §§ 1.1200-1.1216.

reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹⁵ Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.¹⁶

B. Comment Filing Procedures

7. Pursuant to sections 1.415 and 1.419 of the Commission's rules,¹⁷ interested parties may file comments on or before **August 8, 2003**, and may file reply comments on or before **September 8, 2003**. All filings should refer to Docket No. 03-128. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹⁸ Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket numbers, which in this instance is Docket No. 03-128. Parties may also submit an electronic comment by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form<your e-mail address>." A sample form and directions will be sent in reply. Or you may obtain a copy of the SCII Electronic Transmittal Form (FORM-ET) at www.fcc.gov/e-file/email.html.

8. Parties who choose to file by paper must file an original and six copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

9. This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18, 2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554.

10. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be

¹⁵ *See Id.* § 1.1206(b)(2).

¹⁶ *See Id.* § 1.1206(b). Under the Council's rules, the Council and Conference must be parties to the Nationwide Agreement. Therefore, for purposes of the Commission's *ex parte* rules, in this proceeding we shall treat presentations from these entities and their staffs as exempt presentations under 47 C.F.R. § 1.1204(a)(5).

¹⁷ *See Id.* § 1.415, 1.419.

¹⁸ *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8:00 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters actually goes to our Capitol Heights facility for screening prior to delivery at the Commission.

If you are sending this type of document or using this delivery method...	It should be addressed for delivery to...
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110 Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)
United States Postal service first-class mail, Express Mail, and Priority Mail	445 12 th Street, SW Washington, DC 20554

11. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the filing window at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket numbers, in this case, Docket No. 03-128), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy -- Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554.

12. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at qualexint@aol.com. Commission staff will forward copies of all comments received to the Council and the Conference.

13. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.48 and all other applicable sections of the Commission's rules.¹⁹ We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in the NPRM in order to facilitate our internal review process.

¹⁹ See 47 C.F.R. § 1.48.

C. Initial Regulatory Flexibility Analysis

14. The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA), attached as Appendix B, for the NPRM, as required by the Regulatory Flexibility Act. The Commission requests written public comment on the analysis. Comments must be filed in accordance with the same filing deadlines as comments filed in response to the NPRM, and must have a separate and distinct heading designating them as responses to the IRFA. The Consumer and Governmental Affairs Bureau, Reference Information Center shall send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).²⁰

D. Paperwork Reduction Act

15. This NPRM may contain proposed information collections. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995.²¹ Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

16. Written comments by the public on the proposed information collections are due ***[60 days from date of publication in the Federal Register.]*** Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on the proposed and/or modified information collections on or before ***[60 days from date of publication in the Federal Register.]*** In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Judith.B.Herman@fcc.gov and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 via the Internet to Kim_A_Johnson@omb.eop.gov or by fax to 202-395-5167.

E. Further Information

17. For further information about this proceeding, contact Frank Stilwell at 202-418-1892, fstilwel@fcc.gov, or Amy Pike at 202-418-1331, apike@fcc.gov. Media inquiries should be directed to Meribeth McCarrick at 202-418-1654, mmccarri@fcc.gov.

²⁰ See 5 U.S.C. 603(a).

²¹ See Pub. L. No. 104-13.

IV. ORDERING CLAUSES

18. IT IS ORDERED, pursuant to Sections 1, 4(i), 303(q), 303(r), 309(a), 309(j) and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(q), 303(r), 309(a), 309(j) and 319, Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470f, and Section 800.14(b) of the rules of the Advisory Council on Historic Preservation, 36 C.F.R. § 800.14(b), that this NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

19. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary