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Federal Communications Commission
Office of the Secretary

VOLUNTARY BEST PRACTICES for EXPEDITING THE PROCESS OF COMMUNICATIONS TOWER AND ANTENNA SITING REVIEW pursuant to SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

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I. Introduction.

The Federal Communications Commission (Commission) and the United South and Eastern Tribes, Inc., (USET) have agreed to the principles, procedures, and voluntary Best Practices outlined in this document[1] (Best Practices) to promote cooperation between USET member Tribes and certain entities subject to the jurisdiction of the Commission (Applicants).[2] The Voluntary Best Practices described in this document are meant to guide Applicants in the review under Section 106 of the National Historic Preservation Act (NHPA), 47 U.S.C. § 470f, of the impact of communications facilities on properties of religious and cultural significance to USET Tribes that are listed in or eligible for listing in the National Register of Historic Places (National Register), consistent with the provisions of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (WT Docket 03-128, FCC 04-222, October 5, 2004) (Nationwide Programmatic Agreement or NPA).

The Commission has certain trust responsibilities when dealing with federally recognized American Indian Tribes and Alaska Native villages that devolve from the unique government-to-government trust relationship it shares with Tribes and the inherent sovereign status of Tribes.[3] In accordance with the federal government's trust responsibility and as provided in the NHPA, the involvement of Commission Applicants in the Section 106 process does not nullify or substitute for the Commission's obligations to consult with federally recognized Indian Tribes under Section 101(d)(6) of the NHPA, or abrogate the general trust relationship which the Commission has with Tribes.

The Best Practices described in this document are recommendations. Failure to follow these Best Practices does not by itself establish lack of good faith or a failure to comply with Section 106 of the NHPA or the Commission's rules. These Best Practices are not intended to discourage Tribes and Applicants from entering into alternative procedures that better suit their particular relationship. Adherence to these Best Practices may, however,

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[1] *See Memorandum of Understanding Between the Federal Communications Commission and the United South and Eastern Tribes, Inc., Regarding Recommended Best Practices and the Section 106 Process* (February 3, 2004).

[2] The term "Applicant" for this Best Practices document means a Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.

[3] *See Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* (16 FCC Rcd 4078 (2000)).

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be used to demonstrate a good faith effort to comply with applicable requirements. In evaluating compliance with the Commission's rules, the Commission will examine the totality of the circumstances and the reasonableness of the methods employed.

Overarching Objectives. Applicants are engaged in the construction of wireless communications infrastructure networks that are vital to the economic and social future of the United States. The preservation of properties of Tribal religious and cultural significance is also vital, both to the Tribes, and to the United States in terms of its historic preservation goals and its identity as a nation of diverse and vibrant peoples and cultures. These Best Practices are intended to achieve a simple result - assuring that Applicants have certainty in a timely way regarding Tribal concerns as they construct these networks and that Tribes have the ability to participate in the assessment and mitigation of any effects communications facilities construction may have on Tribal properties of cultural and religious significance.[4] To achieve this, Applicants and Tribes must commit to providing adequate data to each other, facilitating communications, and meeting the strict deadlines set forth herein. All parties must approach these undertakings working in good faith, showing flexibility, and making every effort to build a trusting and responsive relationship.

The specific goals of these Best Practices are to:

- Facilitate the Commission's compliance with its obligations under the NHPA;
- Facilitate Applicants' compliance with their obligations under the Nationwide Programmatic Agreement and the Commission's rules;
- Insure that Tribal interests in the preservation of properties of religious and cultural significance to the Tribes listed in or eligible for listing in the National Register are identified and taken account of early in the process of siting communications facilities;
- Address the needs of the Applicant in a cost-effective and efficient manner and encourage the expeditious development of wireless communications infrastructure networks that are vital to the economic and social future of the United States;
- Expedite USET Tribal review of proposed tower and antenna sitings; and
- Establish a process that will facilitate Commission Applicants' obtaining access to the special expertise held by USET Tribes in the identification, evaluation, and assessment of impacts on properties of cultural or religious significance to Tribes that are listed in or eligible for listing in the National Register.

[4] "Facility" as used herein is defined as a Tower or an Antenna, and may also refer to a Tower and its associated Antenna(s). "Tower" as used herein is defined as any structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna.

These Best Practices are intended to streamline the NHPA Section 106 process for communications facilities by establishing steps whereby Applicants and Tribes can work together in the identification and evaluation of properties of religious and cultural significance to Tribes that are listed, or potentially eligible for listing, in the National Register in areas where towers are planned. Speed of response is significant in the tower siting review process, and all parties should make every effort to meet the timeframes in these Best Practices. These timeframes constitute a maximum, not a minimum, and every effort should be made to expedite communications.

Alternative Procedures. Individual Applicants and individual Tribes may find that there are alternative procedures to these Best Practices that better suit their circumstances or their particular relationship. Consistent with the goals of facilitating dialogue and establishing mutually beneficial relationships, Tribes and Applicants have the option to enter into or continue to follow alternative procedures or agreements in place of these Best Practices. To ensure accurate records, the parties should commemorate their agreements and determinations in writing.

The principles and procedures set forth in these Best Practices are intended to afford Applicants useful guidance in order to facilitate and expedite historic preservation and environmental reviews. Implementation of these Best Practices is not mandated in order to comply with Commission rules. Decisions as to whether to abide by any or all of these Best Practices are left with each Applicant and each Tribe so long as all parties comply with applicable law and regulations.

II. The Tower Construction Notification System (TCNS).

A. Input of Data by Tribes. Tribes should utilize the TCNS to designate with specificity the geographic areas of interest for which they desire notification of proposed facilities construction, to input the name and contact information for the Tribal Official responsible for and authorized to handle historic preservation issues, and to indicate their preferred method of initial contact (eg., email or letter). The TCNS provides for Tribes to make their geographic area designations by county. The Commission will modify the TCNS so that a Tribe may further limit its areas of interest by indicating a more detailed description of non-interest areas within the designated counties

B. Identification of Tribes, Tribal Areas and Tribal Officers. Applicants are encouraged to use the Commission's TCNS to identify Tribes that may attach religious and cultural significance to historic properties in the geographic area in which proposed construction will be located.[5] Applicants should make initial contact with all Tribes that assert such a potential interest. Applicants should also use the TCNS to identify the duly authorized Tribal official (Tribal Official) responsible for historic preservation, with whom all contacts

[5] Although Tribes and Applicants are strongly urged to participate in the TCNS, there may be Tribes with an interest in an area that have not yet taken advantage of TCNS and that will still need to be identified through such other means as talking with Tribal and State Historic Preservation Officers, historic research, and contacting the Bureau of Indian Affairs.

should be made.[6] Tribes should facilitate Applicants' making effective initial contact by supplying the relevant information to the TCNS and updating it promptly upon any changes.

C. Automated Notification Feature. Applicants are encouraged to use the automated notification feature of the TCNS to provide early notice to interested Tribes of proposed construction. For Tribes using the TCNS, automated notice through the TCNS shall constitute the Initial Contact described in Section III.B.

III. Contacting and Working with a Tribe.

A. Contact between Applicants and Tribes is a two-step process. Applicants following these best practices should contact the Tribe in a good faith, respectful, and culturally sensitive manner befitting the nature of correspondence with a sovereign government. The name, address, and telephone number of the Applicant's official responsible for compliance with these Best Practices should be included. Applicants should require their contractors to adhere to these Best Practices, unless alternative procedures, as described above, have been adopted by the Tribe and Applicant. The Applicant, as the entity seeking Tribal contact, retains the responsibility for complying with the Commission's rules.

B. Initial Contact. To facilitate expeditious review, Initial Contact with a Tribe should be made by the Applicant as early in the planning process as reasonably possible, but in no event later than when the Applicant narrows its search to a specific tower site. For Tribes and Applicants participating in the TCNS, Initial Contact shall consist of the notification received through the TCNS of an Applicant's interest in a proposed tower site. For Tribes and Applicants not participating in the TCNS, Initial Contact should be made by the Applicant by telephone or e-mail to facilitate an initial indication of interest and an immediate reply. The purpose of this contact is to ascertain a Tribe's interest in the area under consideration for a siting project not otherwise excluded from this process. Additional purposes for this contact should also be to establish a relationship with the Tribe, and discuss expectations for future contacts in this process.

In his or her response the Tribal Official should advise the Applicant within no more than fourteen (14) calendar days whether the Tribe has:

1. **No Interest.** If the Tribe determines that there is not a likelihood of eligible properties of interest to the Tribe in the area, it should advise the Applicant by letter or e-mail.[7] This letter or e-mail will serve as evidence that the Tribe has issued its response and may be appended to any submission made to the State Historic Preservation Office (SHPO) or the Commission. If a Tribe indicates it has no interest in the area under consideration, the Commission's

[6] In many instances, such official will not be the Tribal leader, but another official designated to represent the Tribe on historic preservation matters. Letters sent to the incorrect official may result in delays in processing. Letters sent to individual Tribal citizens not listed in the Tower Construction Notification System are not consistent with these Best Practices and are likely to cause confusion and result in delay.

[7] A Tribe that has "No Interest" in an area is encouraged to alert the Applicant to any other Tribe that it believes may have an interest.

obligations under Section 106 of the NHPA with regard to that Tribe are satisfied without further discussions with the Tribe. *See also*, Section VI. Inadvertent Finds.

2. **Tribal Interest.** If the Tribe indicates that the proposed facility may impact properties eligible for or included in the National Register, to which that Tribe attaches religious and cultural significance, the Tribe and the Applicant should engage in a discussion regarding whether any further review is necessary and, if so, the terms of that additional review, in accordance with Section D below. Although that discussion will address both Tribal and Applicant interest in the tower site, the Tribe is encouraged to indicate in its response the general nature of its concern.

C. Follow-up Contacts and Consultation. The Tribe should respond to the Initial Contact in no more than fourteen (14) calendar days. If the Tribe does not indicate its interest or non-interest within fourteen (14) calendar days, the Applicant should make a second effort to contact the Tribe clearly indicating that the effort represents a second attempt to solicit Tribal comment. The Applicant concurrently may advise the Commission in writing of its efforts, documenting the dates on which the contacts were made and the means used. If no response has been received after seven (7) calendar days have passed from the time of the second contact, the Applicant may ask the FCC to initiate government-to-government consultation under Section 106. The Commission will promptly initiate consultation to facilitate communications regarding the proposed facility and will use best efforts to complete government-to-government consultation with the Tribe within thirty (30) days after receipt of a request and will advise the Applicant of the status of the consultation no later than five (5) days thereafter. During consultation, the Commission will keep the Applicant informed regarding the process for consultation with the Tribe and will include the Applicant in discussions with the Tribe, to the extent appropriate in the context of the Commission's government-to-government relationship with and trust responsibility to federally recognized Tribes. In the event that the Commission deems it necessary, after the failure of reasonable and good faith efforts to initiate consultation, to authorize the Applicant to complete its assessment of the tower site without Tribal input, the Commission will copy the Tribe, for informational purposes, on any such authorization.

D. Tribal Interest Discussion. The Tribe and the Applicant should enter into a discussion regarding the scope of any further review of the tower site with the purpose of determining specific steps to be followed to properly evaluate the tower site for its potential impact on properties of religious and cultural significance to the Tribe. In this discussion the parties should address the Tribal need for adequate information early enough to have input into decision-making and the Applicant's need to move forward in a cost-effective and timely way. The amount of information needed will vary depending on the character of the tower site. The parties should make efforts to streamline the collection, analysis, and sharing of determinative information. In many situations, it may be sufficient for a Tribe to receive the information required by Form 620, New Tower Submission Packet, or Form 621, Collocation Submission Packet, attached to the Nationwide Programmatic Agreement, and attached hereto as Appendices B and C. In other situations, less information may be

required.[8] Finally, in some situations it may be necessary to engage in a site survey such as that described in section III.E.4, below, and it may be necessary for a Tribe to evaluate a tower site in person. In the event the Tribe and the Applicant cannot reach agreement on the terms of further review, these guidelines provide that if an Applicant provides a site survey as described herein, as well as a Tribal inspection of the tower site, sufficient information for the Tribe to make a determination has been provided. The Tribal Official and Applicant are encouraged to memorialize these matters in writing.

E. Written Request for Review. If a Tribe has indicated during Initial Contact or pursuant to Commission contact that it has an interest in the project area, an Applicant following these Best Practices should, unless otherwise negotiated, send a Request for Review Packet to the Tribal Official. The Request for Review Packet should consist of what the Tribe and Applicant have agreed to in their discussion pursuant to Section III.D., immediately above. The Request for Review Packet may be sent either by USPS First Class Mail, preferably certified and return receipt requested, or by overnight courier service.[9] Facsimile transmissions of information to the Tribe will not be sufficient due to the potential for degradation of graphic information that may be necessary for decision-making.

In addition to a Request for Review Letter, a sample of which is attached as Appendix A, the Request for Review Packet materials provided to the Tribe should include the following information, except as otherwise agreed to by the parties in their discussions during Initial Contact. The timeframe for Tribal review will not begin until all the materials agreed upon or listed below are received.

1. **Name, address, and telephone number** of the Applicant's official responsible for the Written Request for Review.

2. **Site Location,** including latitude and longitude coordinates; County, Township, Range, and Section, where applicable, of all areas included in the review site; and a "street address" where applicable.

3. **A USGS 7.5' Series Topographic Map(s)** with the review site(s) identified and plotted.

4. **Draft Site Survey Report.** The site survey report is an important part of the identification phase of Section 106 review. As such, that report should list all known potentially historic properties of religious and cultural significance to Tribes. A draft site survey report should be submitted unless the parties have agreed upon alternative procedures with an Applicant that do not call for a draft site survey report or modify the requirements of that report as provided

[8] Some examples may include, but are not limited to: (1) where the site is on a building in an urban area; (2) where the site is within a building (such as a barn or church steeple); (3) where the site is in an area that has been the subject of a survey (such as for federally funded highways after 1985) and where the survey indicates that Tribal properties would not be affected; or (4) where the site is in an area previously designated by a Tribal historic preservation officer as having limited potential to affect Historic Properties.

[9] Applicants should retain receipts as evidence in the event that questions arise regarding the process that an Applicant has followed.

for in Section III.D. Consistent with the elements detailed below, the draft site survey report may be submitted using FCC Form 620 or 621, as modified to provide all information reasonably necessary for the Tribe to evaluate whether historic properties of religious and cultural significance may be affected (NPA, Section IV.F.3).

The Draft Site Survey Report should include:

- A site and area history, including a detailed description of the land, and indicating the degree of historical and current soil disturbance;
- A bibliographic or narrative review of any relevant prior archeological or historical surveys conducted in the area, which should include viewsheds (Form 620, Attachment 9c);
- A detailed description of proposed construction describing all facets of the project that will entail soil disturbance, including drawings if helpful (Form 620, Attachment 2);
- A list of all known potentially historic properties of religious and cultural significance to Indian Tribes (Form 620, Attachments 8 and 9);
- Research findings resulting from State-Wide Archeological Inventory or Master Site File searches (NPA, Section VI.D.1.a). Applicants should recognize, however, that a finding of "no known properties" in the Inventory or Master File Search is not conclusive evidence that properties are not present and does not automatically relieve the Applicant of the responsibility for conducting an archeological survey;
- An archeological site survey conducted according to accepted professional standards by a professional archeologist who meets the Secretary of the Interior's Standards and has credentials that demonstrate regional knowledge and experience.[10] An archeological site survey need not be included where either (1) the soil has been previously disturbed to at least 2 feet below the proposed construction depth (excluding footings and other anchoring mechanisms) or (2) geomorphological evidence indicates that cultural resource-bearing soils do not occur within the project area or may occur but at depths that exceed 2 feet below the proposed construction depth. In these instances, the Draft Site Survey should include documentation of either or both of these conditions. Pursuant to the Nationwide Programmatic Agreement, if an Indian Tribe or NHO provides evidence that supports a high probability of the presence of intact archeological historic properties within the APE for direct effects, the Applicant shall conduct an archeological field survey (NPA, Section VI.D.2);

[10] Each USET Tribe is encouraged to provide a list of archeological firms that it believes meet these standards and that have established a positive reputation with the Tribe for professionalism and respect of Tribal culture. Applicants are encouraged to use firms from this list to build trust and expedite this process. The designation of a firm(s) by a USET Tribe does not imply that the Tribe believes that such firm(s) has the "special expertise" that the Tribe itself possesses "in assessing the eligibility of historic properties that may possess religious and cultural significance to them" (Advisory Council Regulations, Section 800.4(c)(1)).

- The results of a review of records for historic properties within the Area of Potential Effects (APE), as provided for under the Nationwide Programmatic Agreement (Section VI.C), together with photographs of all identified potentially historic properties within the APE of religious and cultural significance to Tribes (Form 620, Attachment 11);[11]
- An assessment of the undertaking's effect on potentially historic properties of religious and cultural significance to Tribes, including viewsheds (NPA, Section VI.E; Form 620, Attachment 10).

5. **Area of Potential Effect.** If evidence supports it, an archeological examination should be conducted in any area(s) required for construction of a tower, its access road(s) and/or equipment pads inside or outside of the primary tower site; any anchor sites; and all areas of heavy equipment access. In addition, the Draft Site Survey report should identify an area that extends beyond the immediate site in which a review will be performed for eligible National Register sites where the effect may be indirect, including visual effects, subject to the provisions of the Nationwide Programmatic Agreement.

6. **Compliance with alternative agreed upon conditions.** If there have been other alternative conditions agreed to during the Initial Contact, the Applicant should address such conditions.

F. Tribal Response to the Request for Review. The Tribe should respond to the Applicant, in writing, no later than 30 days after receipt of the Request for Review. The Tribal Officer may indicate:

1. **Request for Additional Information.** The Tribe should review the materials package as soon after receipt as possible in an effort to identify any additional information needed and should make a request for additional information by letter or e-mail immediately thereafter. If the review materials package originally provided by the Applicant does not provide all of the required information, as established in Sections III.D and E, or is otherwise insufficient for the Tribe to make an assessment regarding the presence of properties of religious and cultural significance to the Tribe that are listed or eligible to be listed in the National Register or to assess the effect on such properties, the Tribe may request additional information. This request may be made in writing, at project meetings, or during teleconferences and should be conveyed to the Applicant at the earliest possible time. The Tribe's 30-day deadline for responding to the Applicant will begin anew, upon receipt of the response from the Applicant. *See also*, NPA Section VII.A.4. If after a request for additional information the Tribe believes the Applicant's response

[11] Color images of the site and eligible features can be submitted in digital formats if they are of sufficient quality to allow review.

remains insufficient either party may, at its discretion, ask the Commission to provide guidance.

2. **No Interest.** If the Tribe determines that there is not a likelihood of eligible properties of religious and cultural significance to the Tribe in the area, it should advise the Applicant by letter or e-mail from a duly authorized Tribal Official. This letter or e-mail will serve as evidence that the Tribe has issued its response and may be appended to any submission made to the State Historic Preservation Office (SHPO) or the Commission. If a Tribe indicates it has no interest in the area under consideration, the Commission's obligations under Section 106 of the NHPA are satisfied without further discussions with the Tribe. *See also*, Section VI. Inadvertent Finds.

3. **Request for Additional Time.** Both the Tribe and the Applicant will make good faith efforts to expedite the review process and abide by the time frames provided in these Best Practices. If extraordinary circumstances (*e.g.,* insufficient information provided by Applicant, staffing constraints, unusual research requirements, or Tribal deliberation schedules) would make it difficult to provide an adequate evaluation of the Applicant's request in a particular instance, the Tribe may request additional time to evaluate the Applicant's request not to exceed thirty (30) calendar days. If an extension is required the Tribe should notify the Applicant by letter or e-mail, stating the reasons for the extension, as early as possible in the initial 30-day review period. Applicants should accommodate a reasonable request for extension, but if unable to do so, Applicants should notify the Commission and the Tribe and provide the Commission with an opportunity to review the matter.

4. **No Effect.** If, after reviewing the Request for Review Packet, the Tribal Official determines either that there are no properties of religious and cultural significance to the Tribe that are listed or eligible to be listed on the National Register within the APE or that the proposed project will have no effect on any such properties that may be present, the Tribe should in the most expeditious manner possible notify the Applicant. The Tribe should confirm the determination in writing, via letter or e-mail. A letter or e-mail advising the Applicant of a No Effect response will serve as evidence that the Tribe has reviewed the Request for Review Packet and provided its views on the proposed project. The confirming letter or e-mail may be appended to any submission made to the SHPO or the Commission. *See also*, Section VI. Inadvertent Finds.

5. **No Adverse Effect.** If, after reviewing the Request for Review Packet, the Tribal Official identifies properties of cultural and religious significance that he or she believes are eligible for listing in the National Register within the APE, for which there would be no adverse effect, he or she should notify the Applicant in the most expeditious manner possible. The Tribe should confirm the determination in writing, via letter or e-mail. A letter or e-mail advising the Applicant of No Adverse Effect will serve as evidence that the Tribe has

reviewed the Request for Review Packet and provided its views on the proposed project. The confirming letter or e-mail may be appended to any submission made to the SHPO or the Commission. *See also*, Section VI. Inadvertent Finds.

6. **Adverse Effect.** If, after reviewing the Request for Review Packet, the Tribal Official identifies properties of cultural and religious significance eligible for listing in the National Register within the APE, that he or she believes would be adversely affected by the proposed project, he or she should notify the Applicant in the most expeditious manner possible, stating the basis of the Tribal Official's determinations. The Tribe should confirm the determination in writing or via e-mail. The Applicant should notify the Commission of the Tribal Official's opinion and forward to the Commission a copy of the Tribal response.

G. Addressing Adverse Effects. If the Applicant seeks to proceed at a tower site where the Tribe believes there would be an Adverse Effect, it should attempt to resolve the Tribe's concerns. Negotiations should commence as soon as possible after a response of adverse effect is made by the Tribe and the Applicant has notified the Tribal Official that it seeks to develop the tower site. It should be the goal of the parties to reach a final plan to resolve concerns and avoid or mitigate the Adverse Effect no later than thirty (30) days after the commencement of negotiations ("Resolution Plan"). Such a deadline may be extended by the mutual consent of the parties. The Resolution Plan should be in writing and signed by the parties. Where the parties are unable to reach agreement on a Resolution Plan, the procedures set forth in Section V.B should be followed.

The Resolution Plan should satisfy the Tribe's concerns regarding protection and preservation of the historic properties at issue. The Resolution Plan may include on-site monitoring by a qualified professional archeologist. It is noted that the Resolution Plan is a tool to address Tribal concerns, not the interest(s) of the general public or other parties who may have expressed preservation concerns about the tower site.

Construction should occur so as to avoid any adverse effect on human burials. Absent Commission and Tribal consent, no construction or other development activities should occur at a tower site on which human remains are known to exist or are likely to be encountered.

The Resolution Plan signed by the Tribe and Applicant will serve as evidence that the Applicant has made a good-faith effort to satisfy the Tribe's concerns regarding the tower site, and has reached agreement with the Tribe. The Resolution Plan may be appended to any submission made to the SHPO or the Commission.

If the Resolution Plan will only mitigate, and will not entirely avoid, an adverse effect, the Commission remains obligated as the responsible Federal agency under the NHPA to review and proceed with a Memorandum of Agreement (MOA). The FCC will invite the affected Tribes to be consulting and signing parties for any such MOA. A Resolution Plan

does not supersede, or in any way alter, the Applicant's responsibilities under Section 1.1307(a)(4) of the Commission's environmental rules.

If the Applicant chooses to abandon the tower site in favor of an alternate tower site, it should discuss and identify alternative project sites that will be acceptable to the Tribe.

H. Written Request for Review Follow-up Contacts and Consultation. The Tribe should respond to an Applicant's Written Request for Review within thirty (30) calendar days after receipt of the Request for Review Packet. If the Tribe does not respond within thirty (30) calendar days, the Applicant should contact the Tribe to inquire as to the reason(s) for the delay, and request a Tribal response.

If, following affirmative follow up contact, an Applicant does not receive a response to a Written Request for Review within seven (7) calendar days thereafter, the procedures set forth in Section III.C shall apply.

In instances where the proposed tower site is not on Tribal lands or where a Tribe has not, pursuant to Section 101(d)(2) of the NHPA, assumed the functions of the SHPO with respect to Tribal lands, the Applicant may submit a copy of the Commission's authorization to the SHPO to serve as evidence of the Applicant's attempts to contact the Tribe.

I. Early Identification of Tribal Concerns. At any point during this recommended Best Practices process, should a Tribe have concerns that cannot reasonably be resolved with the Applicant, it should contact the Chief of the Commission's Consumer & Governmental Affairs Bureau in writing as early in the process as possible so that the concerns are addressed in the context of the special government-to-government relationship which the Commission shares with federally recognized Tribes.

IV. Materially Inaccurate or Incomplete Information, and Discoveries.

A Tribal position, based upon a Request for Review, may be relied upon by the Applicant and the Commission as evidence that the Tribe has reviewed the Request for Review Packet and provided its views on the proposed project. The Tribe may subsequently revise such views in writing, for good cause. Good cause may include a discovery that the information on which the Tribe based its decisions was materially inaccurate or incomplete or that during the construction process artifacts or human remains were discovered. The Tribe should notify the Commission and the Applicant simultaneously of its revised position as soon as possible after learning of an inadvertent find or its discovery of significant deficiencies in the materials supplied by the Applicant. Such notification shall set forth the basis of the Tribe's action to revise its position.

V. Non-Agreement.

A. Eligibility of Historic Properties for Inclusion in the National Register. If the Tribe and the Applicant fail to agree on whether a property of religious and cultural significance to

the Tribe is included or eligible for inclusion in the National Register, a request may be presented to the Commission for resolution. The Commission will handle such requests in accordance with Section 800.4(c) of the ACHP's rules. As provided in Section 800.4(c)(2), the Tribe retains the right to ask the ACHP to request that the Commission submit such issues to the Keeper of the National Register.

B. Adverse Effects. If the Tribe and the Applicant fail to agree on the effects of proposed construction on a historic property of cultural and religious significance to the Tribe, or cannot agree upon a Resolution Plan, they may present their separate findings to the Commission for resolution. The Commission will then commence consultation, as required by Federal law, directly with the Tribe concerning the proposed project. Once the Commission and the Tribe enter into consultation, the requirements and remedies of the NHPA will apply, including the development of a Memorandum of Agreement.

VI. Inadvertent Finds.

A. Applicant Responsibility. In the event of an inadvertent find of cultural features, human remains, and/or artifacts, including grave goods, the Applicant must comply with the requirements of Section IX of the Nationwide Programmatic Agreement. The Applicant should take reasonable and immediate steps to protect the site from environmental destruction, vandalism, and/or theft, and should ensure the confidentiality of the site. In addition to notifying any potentially affected Tribes immediately by telephone, Applicants following these Best Practices should follow up within three days with written notification by first class U.S. mail or overnight courier.

Treatment of human remains and associated grave goods is of particular interest to Tribes. To the extent permitted by federal, state and Tribal law, Tribal wishes regarding the disposition of the human remains and associated grave goods should be honored in decisions.

When the land on which the communications facility is being constructed is owned by an entity or individual other than the Applicant, the Applicant should, subject to Tribal wishes, make a good faith effort to represent Tribal interests relating to the disposition and preservation of discovered artifacts to the land owner.

B. Tribal Responsibility. In the event of an inadvertent discovery during the construction process, the Tribe should respond with a determination of its desires concerning the inadvertent find as quickly as practicable. In no case should a response to the Applicant occur later than seven days after written notice of an inadvertent find has been received by the Tribal Officer. The affected Tribes are encouraged to confer among themselves on the appropriate disposition of remains and/or artifacts.

C. Compliance with the Law. In the event of an inadvertent find, nothing in this Best Practices is intended to supersede any pertinent Federal and state laws and regulations including, but not limited to, the Native American Graves Protection and Repatriations Act, Archaeological Resources Protection Act, American Indian Religious Freedom Act,

National Environmental Policy Act, and Executive Order 13007—Indian Sacred Sites to which the Applicant would be subject.

VII. Multiple Tribal Interests.

In those cases where the proposed project is located on or near properties of significance to more than one USET member Tribe, there is a responsibility to contact each appropriate Tribe individually. The Tribes should respond individually, per Section III.

VIII. Confidentiality.

A. Applicant Concerns. USET and the Commission acknowledge that both the Applicant and the Tribe have substantial confidentiality concerns. When the Applicant considers tower site locations, project design, or other data to be confidential, and advises the Tribe that it is presenting proprietary business information, the Tribe shall agree to treat the material received from the Applicant as confidential, except where disclosure is authorized in writing by the Applicant or otherwise required by law.

B. Tribal Concerns. USET and the Commission acknowledge that Tribes consider the location of many properties of cultural and religious significance to be proprietary cultural information, and seek confidentiality in order to protect those properties. The Applicant shall not disclose information it has acquired, whether from the Tribe or from another source, that relates to properties of cultural and religious significance to the Tribe, except where disclosure is authorized in writing by the Tribe or otherwise required by law. The Commission and USET acknowledge that there may be some circumstances in which the Tribe cannot divulge to the Applicant the exact nature or location of a Tribal cultural or religious property. In such circumstances, the Tribe should endeavor, in good faith and to the extent consistent with its need for confidentiality and Tribal custom or law, to provide as much relevant information as possible to the Applicant.

C. Authorized Disclosure. Notwithstanding Section VIII.B. of these Best Practices, the Applicant may disclose such Confidential Information only to those employees, contractors, representatives and agents, including subtenants and entities collocated on the Applicant's tower (Receiving Party), who have a need to know such Confidential Information for compliance with laws and regulations governing the preservation of historic properties. The Applicant and the Receiving Party shall hold such Confidential Information in strict confidence, and use at least the same degree of care as they use to safeguard their own most confidential and proprietary information so as to insure that no unauthorized person has access to it. The Applicant shall ensure that the Receiving Party is aware of and abides by the Tribal restrictions regarding the use of such Confidential Information, and should bind the Receiving Party legally from improperly disclosing Confidential Information.

IX. Compensation for Professional Services.

The Advisory Council regulations state that the "agency official shall acknowledge that Indian Tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." (§ 800.4(c)(1)). Consistent with the ACHP Memorandum on *Fees in the Section 106 Review Process*, payment to a Tribe is appropriate when an Agency or Applicant "essentially asks the Tribe to fulfill the role of a consultant or contractor" when it "seeks to identify historic properties that may be significant to an Indian Tribe, [and] ask[s] for specific information and documentation regarding the location, nature and condition of individual sites, or actually request[s] that a survey be conducted by the Tribe."[12] In providing their "special expertise," Tribes are fulfilling a consultant role. To the extent compensation should be paid, it should be negotiated between the Applicant and the Tribe. USET has adopted a model cost recovery schedule for such consultant or contractor services, which it states is intended solely to cover Tribal costs.

X. Government-to-Government Consultation between a Tribe and the FCC.

Consistent with ACHP guidance, when an agency seeks the governmental views of an Indian Tribe regarding an agency undertaking to fulfill the agency's legal obligation to consult, the agency is not required to pay the Tribe for providing its views. If the agency has made a reasonable and good faith effort to consult with an Indian Tribe and the Tribe refuses to respond without receiving payment, the agency has met its obligation to consult, and is free to proceed with the project review and approval process.[13]

XI. Dispute Resolution.

In instances where the Tribe and the Applicant are unable to reach any agreement, the dispute should revert to the Commission as the Federal agency responsible for complying with Section 106 of the NHPA. When the parties cannot agree, the Commission will complete Tribal consultation, pursuant to its government-to-government responsibilities. Consistent with its obligation under the NHPA, the Commission, as the responsible agency, will then render a substantive decision in writing resolving the matter.

XII. Amendments and Future Meetings

These Best Practices may only be amended by agreement in writing by the Commission and USET. The Commission and USET agree that, no later than six (6) months after these Best Practices are adopted, the Commission will hold a meeting with USET and communications tower industry officials to review and evaluate the effectiveness of the provisions of these

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[12] *See* Executive Director Memorandum of John Fowler, Advisory Council on Historic Preservation, regarding *Fees in the Section 106 Review Process*, at 3 (July 6, 2001).

[13] *Id.*, at 2-3.

voluntary Best Practices and discuss the need for any amendments. Thereafter, the Commission and USET agree to meet at one-year intervals to discuss the continued effectiveness of and the need for these Best Practices. These discussions will include input from all affected stakeholders.

Dated: October 25, 2004

USET MODEL EXPLANATORY COST RECOVERY SCHEDULE

Introduction. This schedule is intended to provide a model for applicants who seek to access the "special expertise"[1] of USET tribes in assessing the historic property[2] and environmental[3] impact of proposed cell tower construction. The amounts in this schedule are intended, in the aggregate, to reimburse tribes for their costs. While utilizing tribal expertise is not a substitute for the Federal Communication Commission's (FCC) Section 106 consultation obligation,[4] USET tribes have committed to waiving that obligation where they have reached agreement with Applicants that it would not be necessary.

COST RECOVERY SCHEDULE

Review Phase	Amount
I. Identification of Potentially Interested Tribes – Tower Construction Notification System (TCNS). This phase is intended to quickly identify tribes interested in a specific geographic region and to eliminate unnecessary efforts to contact tribes that have no interest in that region. USET has committed to using the FCC-administered TCNS.	**0**
II. Initial Contact. This phase involves a personal contact between the applicant and a tribe's historic preservation official to determine if the tribe has an *actual* interest in a particular cell tower siting. There are many situations where a cell tower array may be placed within a tribe's area of cultural interest but is not likely to be of interest to a tribe, such as (1) where the possibility of impact is minimal (e.g., placements on buildings in urban areas, placement inside structures like church steeples, barns, grain silos, etc.) or (2) where an adequate survey has been conducted and no native sites have been identified (e.g., most new highway construction since 1985). USET would like to note that ground disturbance due to previous construction, while a factor in considering the impact on an historical resource, does not of itself mean that further disturbance would not create further harm that should be prevented.	**0**
III. Review of Survey Materials (if necessary). For sites that remain of potential concern, a tribe can only make a proper evaluation if it can review an adequate survey of the site. This amount is to cover the tribe's cost in conducting such a review and providing a response that the Applicant can rely upon. The range of cost is intended to reflect regional differences.	**$300 - $500 Flat Cost**
IV. Site Visit (if necessary). This amount is to reimburse the tribe's cost where, after evaluation of survey materials, a tribe determines that it needs to visit a site to properly evaluate the effects of a proposed tower. Again, the range of cost is intended to reflect regional differences.	**$300 - $500 Flat Cost**

Note: An applicant and a tribe that are involved in a large number of cell tower sitings are encouraged to work out a cost recovery schedule that reflects any economies of scale that may be achieved, potentially lowering overall costs to the applicant.