

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
Proposed Amendments to)	
The National Programmatic Agreement)	Docket No. 15-180
For the Collocation of Wireless Antennas)	

Comments of PTA-FLA, Inc.

PTA-FLA, Inc. (PTA) hereby offers these comments in connection with the Commission’s commendable efforts to streamline the Section 106 process as it applies to smaller cells and structures where little historic impact is likely. PTA-FLA certainly endorses the Commission’s efforts to reduce the number of situation where formal 106 review is required. However, the volume of required reviews could be reduced much more significantly by simply applying the National Historic Preservation Act to only those construction projects which are actually federal undertakings subject to the Act’s purview, as will be set forth below.

Background. PTA-FLA recently filed a petition for declaratory ruling with the Commission seeking to clarify the scope of the obligations of persons constructing or modifying certain structures under the provisions of Section 106 of the National Historic Preservation Act¹ and the National Programmatic Agreement (“NPA”). The clarifications sought include both (i) the extent to which Section 106 and the NPA apply *at all* to structures which do not require registration under the Commission’s tower registration rules or an environmental assessment under the National Environmental Protection Act, and (ii) the extent to which coordinating

¹ 54 U.S.C. Section 306108.

historic preservation issues with Tribal representatives can be streamlined to ensure that the interests of Indians in historic places are respected while eliminating unnecessary coordination efforts that are burdensome and expensive to Tribes and structure constructors alike. This Comment will address only the first of those issues – the extent to which Section 106 applies at all. PTA-FLA submitted a copy of its Declaratory Ruling Petition in this Docket on May 3, but it does not seem to have been taken into account in the Commission’s May 12 Public Notice explaining its proposal and seeking formal comment from the public.

A. The Section 106 Review Process

The process of developing a new site for a telecommunications tower under the best of circumstances involves running a gauntlet of regulatory requirements. After locating a suitable site for development, the tower constructor must buy, lease, or obtain an option on the site to assure its availability. Then there are often zoning regulations which must be met accommodated or variances which must be sought. Local building permits normally must be applied for and obtained. There is always an environmental screening, and if the site is environmentally sensitive, the site must be examined for impacts on local flora and fauna, including endangered or threatened species. FAA approval must be sought if the tower is above 200 ft. or near an airport. And we are not even counting the relatively rare situations where an environmental assessment must be done due to potential adverse impacts on the environment. Each of these overlapping federal and local regulatory schemes serves an important purpose in the pre-construction process, but each of them also interposes delay in the construction timetable. Here we intend to address one particular regulatory hurdle: the historic preservation part of the process.

The historic review process under the Commission’s current interpretation of the National Programmatic Agreement is triggered in the vast majority of new tower construction projects. Typically this involves coordination with state historic preservation offices (SHPOs) and Indian tribes that have asserted an interest in the particular county or state or region where the construction is proposed (THPOs). The application of the process to tens of thousands of cell sites obviously imposes a far greater burden on the tower industry, the Commission, interested Indian tribes, and SHPOs. One solution to this problem is to limit the breadth of the Section 106 obligation to the towers understood by the federal courts to be covered by the Act’s reach.

To consider this approach, we must first recall the scope of Section 106. As the D.C. Circuit has pointed out, Section 106 only requires federal agencies to take into account the effects of their undertakings on historical properties included or eligible for inclusion in the National Register of Historic Places. It does “not require [a federal agency] to engage in any particular preservation activities; rather Section 106 only requires that the [agency] consult the [SHPO]² and the [Advisory Council on Historic Preservation] and consider the impacts of its undertaking.” *CTIA-The Wireless Association v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (hereafter, “*CTIA*”), quoting *Davis v. Latschar*, 202 F. 3d 359, 370 (D.C. Cir. 2000). Importantly, Section 106 does not come into play at all if there is no federal undertaking involved in the construction.

This was the key issue in *CTIA* when the wireless industry challenged the Commission’s application of the rule to sites that were constructed under the non-site-specific geographic licenses typical of cellular systems: is there a “federal undertaking” when no federal agency

² THPOs (Tribal Historic Preservation Offices) and NHOs (Native Hawaiian Organizations) must also be consulted.

reviews or approves the construction at issue? To decide this issue, the Court in *CTIA* first reviewed its previous ruling in *Sheridan Kalorama Historical Ass'n v. Christopher*, which found that a federal “undertaking” for Section 106 purposes could be a project funded or licensed by the federal government, but also one which requires federal approval. Then, in looking at the Commission’s rules implementing the National Programmatic Agreement, the Court had no trouble finding that *where a tower registration is required*, there is a federal approval. *CTIA* at pp 113-114. In a footnote, the Court made clear that a federal undertaking is present *only* when tower registration is actually required. *Id.* at footnote 4. The Commission had suggested that an undertaking occurs “at least” where a registration is required, but the Court re-stated that to apply “only” where registration was required. *Id.*

The FCC also proffered a second basis for finding a federal undertaking: the “limited approval authority” retained when an environmental assessment must be submitted in connection with a construction activity. *CTIA* at p 114. The Court found that FCC review and approval of environmental assessments is indeed a federal undertaking. But environmental assessments as opposed to an environmental checklist are, of course, undertaken in only a very small handful of situations. The Court was therefore basing its decision upholding the FCC’s 106 procedures on the assumption that the “vast majority of towers” are not covered by tower registrations or environmental assessments, do not involve federal undertakings, and therefore are not covered by the NPA. *CTIA* at footnote 4. Given the Court’s clear view that a Section 106 obligation is not triggered under the NPA by a licensee who constructs a site pursuant to non-site specific license that does not require any federal approval, we must assume that the Commission’s NHPA writ runs only to situations where a licensee or applicant is seeking a site specific authorization or where tower registration is required. A fortiori, where a site is being constructed by an entity

that is not even a license holder or applicant and where no tower registration or environmental assessment under Section 1.1308 of the rules is required, it is impossible to find a federal undertaking that triggers 106 obligations.

The Court's reasoning is confirmed by simple reference to the terms of Section 106 itself. The statute requires a Federal "independent agency having authority to license any undertaking" to take into account the effects of the undertaking on historical sites "prior to the issuance of any license." 16 U.S.C. Section 470f. (emph., added) Congress could not possibly have intended Section 106 to apply to geographically defined, non-site specific licenses because the Commission cannot even know where the proposed sites are until long *after* the licenses have been issued. Because the Section 106 process must be tied to a licensing activity that occurs prior to, and thus specific to, a given construction project, the mere fact that a site is constructed or used under the authority of a geographic area license does not, and could not constitute the federal "approval" which Section 106 encompasses. Rather, the Court's narrower view of what constitutes a federal approval – one which is specifically addressed to a specific site – is the only view that makes sense under the "pre-license approval" language of the statute.

The gist of all this is that Congress intended Section 106 to apply not to *all* construction activity but only to activity that requires site-specific federal approval. All other construction activity can continue to take place under whatever local or state rules that apply. Congress deliberately limited the application of the NHPA to situations where federal approval is involved, and there is no suggestion, much less a mandate, that federal agencies apply the Act so as to capture a far broader range of construction activity.

Despite the *CTIA* decision – and perhaps because the decision was based on a premise set forth in a footnote but not discussed at length by the Court -- the Commission has informally

applied the Section 106 process to all communications-related tower construction, regardless of whether registration is required. There is no need for, and no authorization for, the Commission to impose the significant cost burdens and delays that are associated with the Section 106 process on small towers which do not require specific approval or registration any more than they or other federal agencies require Section 106 obligations to be applied to home building, commercial construction, a pool installation, or any number of generally more disruptive projects. The burdens and delays associated with broadening the Section 106 process beyond the scope intended by Congress will become more critical and more oppressive as the industry moves to small cells that will almost never be of historical concern but would nevertheless be subject to the full panoply of Section 106 processing. The Commission should therefore take this opportunity to make clear that towers not requiring FCC registration and not otherwise requiring an FCC environmental assessment are not subject to the 106 process would not only speed the deployment of cell towers at lower cost, but would also relieve SHPO's and THPO's of the unnecessary burdens associated with reviewing sites that will rarely cause historical or tribal concern.

The Commission must of course justify under the Paperwork Reduction Act³ the enormous burdens which continued application of Section 106 treatment to unlicensed or non-site-specific construction activity imposes on the industry. Surely the hundreds of thousands of hours of time and effort expended in conducting historical reviews of activity which is not actually federally licensed or federally undertaken constitutes a high hurdle to overcome in justifying the benefits vs. the costs of this obligation under the Paperwork Reduction Act. As

³ 44 U.S.C. Section 3507.

NTCH has elsewhere noted,⁴ its own experience has been that tribal reviews in over 99% of the cases result in a finding that there is no adverse effect on a tribal place of historical significance. This means that NTCH and all other firms engaged in tower erection are required to undergo a heavy paperwork burden involving months of delay and hundreds of pages of paperwork with virtually no public interest benefit. This is exactly the kind of useless and costly red tape that the Paperwork Reduction Act was enacted to eliminate. RCR Wireless predicts that there will be about 65,000 cell towers constructed in the next ten years.⁵ Even if tribal review fees do not continue their recent dramatic increases, these fees alone add up to \$325 million in that time period – a number in itself 250% higher than the \$130 million cost of historic preservation compliance over ten years which the FCC used as the projected regulatory burden of the historic review process. And that does not even count the other costs inherent in such reviews. At a minimum, OMB must be given another opportunity to adjudge the burdensomeness of this program against the extraordinary costs.

The initiatives discussed in the current proceeding would of course still be of useful for the much smaller subset of cell site installations that would fall within Section 106's purview. The Commission's initiative in this regard is timely and much needed, given the looming advent of thousands of very small cell installations in connection with 5G deployments. The Commission seemed to recognize that in the vast majority of cases, these deployments will have no impact on historical structures or tribal interests, and the proposed improvements to the current system will help to prevent the Section 106 from getting in the way of this next wave of technological advancement. The industry almost unanimously supported the Commission's

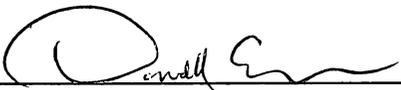
⁴ See Petition for Declaratory Ruling filed in Docket 15-180.

⁵ See <http://www.rcrwireless.com/20150715/cell-tower-news/report-predicts-tower-trends-through-2025-tag20>

initiative in this area, pointing to many of the same needless delays and expenses in the small cell arena that we have here identified more generally. PTA-FLA applauds this effort and simply suggests here that limiting Section 106's application as described above would significantly further the objectives that the Commission is trying to achieve.

Respectfully submitted,

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