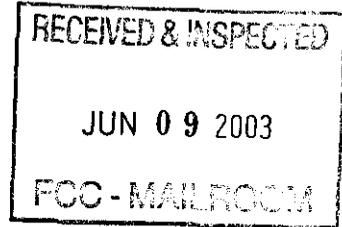


DOCKET FILE COPY ORIGINAL

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



In the matter of)
)
)
NATIONWIDE PROGRAMMATIC)
AGREEMENT REGARDING THE)
SECTION 106 NATIONAL HISTORIC)
PRESERVATION ACT REVIEW PROCESS)
)
)
)

WT Docket No. 03-128

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](mailto: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).

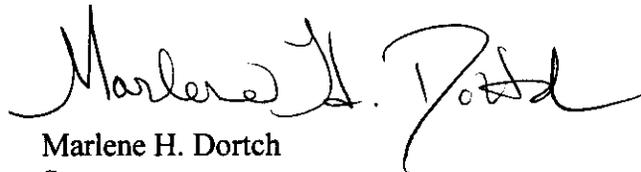
²¹ See Pub. L. No. 104-13.

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

A handwritten signature in cursive script, appearing to read "Marlene H. Dortch".

Marlene H. Dortch
Secretary

APPENDIX A

**NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF
EFFECTS ON HISTORIC PROPERTIES FOR
CERTAIN UNDERTAKINGS APPROVED BY THE FEDERAL
COMMUNICATIONS COMMISSION**

[Month Day], 2003

INTRODUCTION

WHEREAS, Section 106 of the National Historic Preservation Act of 1966, as amended ("NHPA") (codified at 16 U.S.C. § 470f), requires federal agencies to take into account the effects of certain of their Undertakings on Historic Properties (see Section II, below), included in or eligible for inclusion in the National Register of Historic Places ("National Register"), and to afford the Advisory Council on Historic Preservation ("Council") a reasonable opportunity to comment with regard to such Undertakings; and

WHEREAS, under the authority granted by Congress in the Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq.*), the Federal Communications Commission ("Commission") establishes rules and procedures for the licensing of non-federal government communications services, and the registration of certain antenna structures in the United States and its Possessions and Territories; and

WHEREAS, Congress and the Commission have deregulated or streamlined the application process regarding the construction of individual Facilities in many of the Commission's licensed services; and

WHEREAS, under the framework established in the Commission's environmental rules, 47 C.F.R. §§ 1.1301-1.1319, Commission licensees and applicants for authorizations and antenna structure registrations ("Applicants") are required to prepare, and the Commission is required to independently review and approve, a pre-construction Environmental Assessment ("EA") in cases where a proposed tower or antenna may significantly affect the environment, including situations where a proposed tower or antenna may affect Historic Properties that are either listed in or eligible for listing in the National Register, including properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization ("NHO") that meet the National Register criteria; and

WHEREAS, the Council has adopted rules implementing Section 106 of the NHPA (codified at 36 C.F.R. Part 800) and setting forth the process, called the "Section 106 process," for complying with the NHPA; and

WHEREAS, pursuant to the Commission's rules and the terms of this Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Undertakings

Approved by the Federal Communications Commission ("Nationwide Agreement"), Applicants have been authorized, consistent with the terms of the memorandum from the Council to the Commission, titled "Delegation of Authority for the Section 106 Review of Telecommunications Projects," dated September 21, 2000, to initiate, coordinate, and assist the Commission with compliance with many aspects of the Section 106 review process for their Facilities; and

WHEREAS, in August 2000, the Council established a Telecommunications Working Group (the "Working Group") to provide a forum for the Commission, the Council, the National Conference of State Historic Preservation Officers ("Conference"), individual State Historic Preservation Officers ("SHPOs"), Tribal Historic Preservation Officers ("THPOs"), other tribal representatives, communications industry representatives, and other interested members of the public to discuss improved Section 106 compliance and to develop methods of streamlining the Section 106 review process; and

WHEREAS, Section 800.14(b) of the Council's regulations (36 C.F.R § 800.14(b)) allows for programmatic agreements to streamline and tailor the Section 106 review process to particular federal programs, if they are consistent with the Council's regulations; and

WHEREAS, the Commission, the Council, and the Conference executed on March 16, 2001, the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (the "Collocation Agreement"), in order to streamline review for the collocation of antennas on existing towers and thereby reduce the need for the construction of new towers (Attachment 1 to this Nationwide Agreement); and

WHEREAS, the Council, the Conference, and the Commission now agree it is desirable to further streamline and tailor the Section 106 review process for Facilities that are not excluded from Section 106 review under the Collocation Agreement while protecting Historic Properties that are either listed in or eligible for listing in the National Register; and

WHEREAS, the Working Group agrees that a nationwide programmatic agreement is a desirable and effective way to further streamline and tailor the Section 106 review process as it applies to Facilities; and

WHEREAS, this Nationwide Agreement will, upon its execution by the Council, the Conference, and the Commission, constitute a substitute for the Council's rules with respect to certain Commission Undertakings; and

WHEREAS, the Commission has consulted with Indian tribes regarding this Nationwide Agreement; and

WHEREAS, this Nationwide Agreement provides for appropriate public notification and participation in connection with the Section 106 process; and

WHEREAS, Section 101(d)(6) of the NHPA provides that federal agencies “shall consult with any Indian tribe or Native Hawaiian organization” that attaches religious and cultural significance to properties of traditional religious and cultural importance that may be determined to be eligible for inclusion in the National Register that might be affected by a federal undertaking (16 U.S.C. § 470a(d)(6)); and

WHEREAS, the Commission has adopted a “Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes” dated June 23, 2000, pursuant to which the Commission: recognizes the unique legal relationship that exists between the federal government and Indian tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions; affirms the federal trust relationship with Indian tribes, and recognizes that this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian tribes; commits to working with Indian tribes on a government-to-government basis consistent with the principles of tribal self-governance; commits, in accordance with the federal government’s trust responsibility, and to the extent practicable, to consult with tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect tribal governments, their land and resources; strives to develop working relationships with tribal governments, and will endeavor to identify innovative mechanisms to facilitate tribal consultations in the Commission’s regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian tribes; and

WHEREAS, the Commission does not delegate under this Programmatic Agreement any portion of its responsibilities to Indian tribes and NHOs, including its obligation to consult under Section 101(d)(6) of the NHPA; and

WHEREAS, the terms of this Nationwide Agreement are consistent with and do not attempt to abrogate the rights of Indian tribes or NHOs to consult directly with the Commission regarding the construction of Facilities; and

WHEREAS, the execution and implementation of this Nationwide Agreement will not preclude Indian tribes or NHOs, SHPO/THPOs, local governments, or members of the public from filing complaints with the Commission or the Council regarding effects on Historic Properties from any Facility or any activity covered under the terms of the Nationwide Agreement; and

WHEREAS, Indian tribes and NHOs may request Council involvement in Section 106 cases that present issues of concern to Indian tribes or NHOs (see 36 C.F.R. Part 800, Appendix A, Section (c)(4)); and

WHEREAS, the Council, the Conference and the Commission recognize that Applicants’ use of qualified professionals experienced with the NHPA and Section 106 can streamline the review process and minimize potential delays; and

WHEREAS, the Commission has created a position and hired a cultural resources professional to assist with the Section 106 process;

NOW THEREFORE, in consideration of the above provisions and of the covenants and agreements contained herein, the Council, the Conference and the Commission (the "Parties") agree as follows:

I. APPLICABILITY AND SCOPE OF THIS NATIONWIDE AGREEMENT

- A. This Nationwide Agreement (1) excludes from Section 106 review certain Undertakings involving the construction and modification of Facilities, and (2) streamlines and tailors the Section 106 review process for other Undertakings involving the construction and modification of Facilities. An illustrative list of Commission activities in relation to which Undertakings covered by this Agreement may occur is provided as Attachment 2 to this Agreement.
- B. This Nationwide Agreement applies only to federal Undertakings as determined by the Commission ("Undertakings"). The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA. Nothing in this Agreement shall preclude the Commission from revisiting or affect the existing ability of any person to challenge any prior determination of what does or does not constitute an Undertaking. Maintenance and servicing of Towers, Antennas, and associated equipment are not deemed to be Undertakings subject to Section 106 review.
- C. This Agreement does not apply to Antenna Collocations that are exempt from Section 106 review under the Collocation Agreement (see Attachment 1). Pursuant to the terms of the Collocation Agreement, such Collocations shall not be subject to the Section 106 review process and shall not be submitted to the SHPO/THPO for review. This Agreement does apply to collocations that are not exempt from Section 106 review under the Collocation Agreement.
- D. This Agreement does not apply on "tribal lands" as defined under Section 800.16(x) of the Council's regulations, 36 C.F.R. § 800.16(x) ("Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities."). This Nationwide Agreement, however, will apply on tribal lands should a tribe, pursuant to appropriate tribal procedures and upon reasonable notice to the Council, Commission, and appropriate SHPO/THPO, elect to adopt the provisions of this Nationwide Agreement. Where a tribe that has assumed SHPO functions pursuant to Section 101(d)(2) of the NHPA (16 U.S.C. § 470(d)(2)) has agreed to application of this Nationwide Agreement on tribal lands, the term SHPO/THPO denotes the Tribal Historic Preservation Officer with respect to review of proposed Undertakings on those tribal lands. Where a tribe that has

not assumed SHPO functions has agreed to application of this Nationwide Agreement on tribal lands, the tribe may notify the Commission of the tribe's intention to perform the duties of a SHPO/THPO, as defined in this Nationwide Agreement, for proposed Undertakings on its tribal lands, and in such instances the term SHPO/THPO denotes both the State Historic Preservation Officer and the tribe's authorized representative. In all other instances, the term SHPO/THPO denotes the State Historic Preservation Officer.

- E. This Nationwide Agreement governs only review of Undertakings under Section 106 of the NHPA. Applicants completing the Section 106 review process under the terms of this Nationwide Agreement may not initiate construction without completing any environmental review that is otherwise required for effects other than historic preservation under the Commission's rules (*See* 47 C.F.R. §§ 1.1301-1.1319). Completion of the Section 106 review process under this Nationwide Agreement satisfies an Applicant's obligations under the Commission's rules with respect to Historic Properties, except for Undertakings that have been determined to have an adverse effect on Historic Properties and that therefore require preparation and filing of an Environmental Assessment (*See* 47 C.F.R. § 1.1307(a)(4)).
- F. This Nationwide Agreement does not govern any Section 106 responsibilities that agencies other than the Commission may have with respect to those agencies' federal Undertakings.

II. DEFINITIONS

- A. The following terms are used in this Nationwide Agreement as defined below:
 - 1. **Antenna.** An apparatus designed for the purpose of emitting radio frequency ("RF") radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna. For most services, an Antenna will be mounted on or in, and is distinct from, a supporting structure such as a Tower, structure or building. However, in the case of AM broadcast stations, the entire Tower or group of Towers constitutes the Antenna for that station. For purposes of this Nationwide Agreement, the term Antenna does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules.

2. Applicant. 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. Area of Potential Effects ("APE"). The geographic area or areas within which an Undertaking may have an effect on Historic Properties, if such properties exist.
4. Collocation. The mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast purposes.
5. Effect. An alteration to the characteristics of a Historic Property qualifying it for inclusion in or eligibility for the National Register.
6. Experimental Authorization. An authorization issued to conduct experimentation utilizing radio waves for gathering scientific or technical operation data directed toward the improvement or extension of an established service and not intended for reception and use by the general public. "Experimental Authorization" does not include an "Experimental Broadcast Station" authorized under Part 74 of the Commission's rules.
7. Facility. A Tower or an Antenna. The term Facility may also refer to a Tower and its associated Antenna(s).
8. Historic Property. Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register criteria.
9. National Register. The National Register of Historic Places, maintained by the Secretary of the Interior's office of the Keeper of the National Register.
10. Special Temporary Authorization. Authorization granted to a permittee or licensee to allow the operation of a station for a limited period at a specified variance from the terms of the station's permanent authorization or requirements of the Commission's rules applicable to the particular class or type of station.
11. Submission Packet. The document to be submitted initially to the SHPO/THPO to facilitate review of the Applicant's findings and any determinations with regard to the potential impact of the proposed

Undertaking on Historic Properties in the APE. There are two Submission Packets: (a) The New Tower Submission Packet (Form NT) (See Attachment 3) and (b) The Collocation Submission Packet (Form CO) (See Attachment 4). Any documents required to be submitted along with a Form are part of the Submission Packet.

12. Tower. 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 as defined herein.

B. All other terms not defined above or elsewhere in this Agreement shall have the same meaning as set forth in the Council's rules section on Definitions (36 C.F.R. § 800.16) or the Commission's rules (47 C.F.R. §§ 1.1301-1.1319).

C. For the calculation of time periods under this Agreement, "days" mean "calendar days." Any time period specified in the Agreement that ends on a weekend or a Federal or State holiday is extended until the close of the following business day.

D. Written communications include communications by e-mail or facsimile.

III. UNDERTAKINGS EXCLUDED FROM SECTION 106 REVIEW¹.

A. Undertakings that fall within the provisions listed in the following sections III.A.1. through III.A.6 are excluded from Section 106 review by the SHPO/THPO, the Commission, and the Council, and, accordingly, shall not be submitted to the SHPO/THPO for review [unless an Indian tribe indicates pursuant to Section III.B that a Historic Property of traditional religious or cultural importance to that tribe may be adversely affected by the proposed Undertaking].² Applicants should retain documentation of their determination that an exclusion applies to an Undertaking. Concerns regarding the application of these exclusions from Section 106 review may be presented to and considered by the Commission pursuant to Section XI.

¹ In general, Cellular Telecommunications and Internet Association, ("CTIA"), Personal Communications Industry Association ("PCIA") and National Association of Broadcasters ("NAB") are concerned that exclusions should not become so diluted or convoluted as to render them ineffective as streamlining measures. CTIA is particularly concerned that proposed language that directly or indirectly results in an exemption to the exclusion would result in a lengthy Section 106 review process.

² See bracketed discussion at the end of Section III.

1. Modification of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement.
2. Construction of a replacement for an existing communications tower and any associated excavation that does not substantially increase the size of the existing tower under elements 1-3 of the definition as defined in the Collocation Agreement (See Attachment 1 to this Agreement, Stipulation 1.c.1-3) and that does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries and any access or utility easement related to the site.
3. Construction of any temporary communications Tower, Antenna structure, or related Facility, including but not limited to the following:
 - a. A Tower or Antenna authorized by the Commission for a temporary period, such as any Facility authorized by a Commission grant of Special Temporary Authority ("STA") or emergency authorization;
 - b. a cell on wheels (COW) transmission Facility;
 - c. a broadcast auxiliary services truck, TV pickup station, remote pickup broadcast station (e.g., electronic newsgathering vehicle) authorized under Part 74 or temporary fixed or transportable earth station in the fixed satellite service (e.g., satellite newsgathering vehicle) authorized under Part 25;
 - d. a temporary ballast mount Tower involving no excavation;
 - e. Any Facility authorized by a Commission grant of an experimental authorization.³

For purposes of this subsection 3, the term "temporary" means "for no more than twenty-four months duration except in the case of those Facilities associated with national security."

4. Construction of a Facility 400 feet or less in overall height above ground level on a property that is in actual use solely for industrial, commercial, and/or government-office purposes and that occupies an area of 10,000 square feet or more, or that together with adjacent industrial, commercial, and/or government-office properties occupies an area of 10,000 square feet or more, where no structure 45 years or

³ The Commission requests comment on whether experimental authorizations should be limited to 24 months.

older is located within 200 feet⁴ of the proposed Facility, and where all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C.4 below.

5. Construction of a Facility 400 feet or less in overall height above ground level located in or within 200 feet of the outer boundary of any of the following, and where all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C.4 below.
 - a. A right-of-way designated by a government for the location of communications Towers or above-ground utility transmission lines and associated structures and equipment, and in active use for such purpose;
 - b. An existing limited access Interstate Highway with a speed limit of 55 MPH or higher; or
 - c. A railway corridor in active use for passenger trains;

However, an Undertaking shall not be excluded from review under this provision if (1) the existing highway, railway line, or communications structure is included in the National Register and the setting or other visual element is identified as a character-defining feature of eligibility on the National Register nomination; (2) the proposed Facility lies within 200 feet of any other structure that is 45 years or older; or (3) the proposed Facility lies within 3/4 mile of and is visible from a unit of the National Park System that is listed or eligible for listing in the National Register, or a National Historic Landmark.⁵

6. Construction of a facility in any area previously designated by the SHPO/THPO at its discretion, following consultation with appropriate

⁴ The Ohio SHPO suggests a distance of 400 feet or, alternatively, a distance equal to the height of the proposed Facility.

⁵ The Conference has proposed a modification to Section III.A.5 that would allow individual SHPOs to "opt out" of this exclusion where historic properties are likely to be present in such corridors. SHPO opt out would be contingent on agreement to consult with applicants and engage in good faith efforts to identify alternate locations for the location of communications facilities pursuant to Section III.A.6. The National Trust is in support of the Conference draft "opt-out" language for railway corridors in active use for passenger trains. CTIA objects to an opt-out provision because it reverts back to addressing key exclusions on a state-by-state basis with no guarantees that the parties will reach consensus. CTIA also expressed its concern that the proposed opt-out provision would result in an additional 12-18 month negotiation process with each state that chooses to opt out in addition to what has already been a lengthy process, i.e., two years.

tribes, as having limited potential to affect Historic Properties. Such designation shall be documented and made available for public review.

- B. [Prior to commencing construction of any Facility excluded from Section 106 review under Section III.A.1, III.A.2., or III.A.4. through III.A.6, an Applicant shall notify any Indian tribe with aboriginal and/or historic associations to the area in which the Undertaking is to occur and provide the tribe a reasonable opportunity to indicate that the Undertaking may adversely affect a Historic Property of traditional religious or cultural importance to that tribe. If the tribe indicates that such an adverse effect may occur, the Applicant shall engage the tribe pursuant to Section IV and shall review the Undertaking and submit it to the SHPO/THPO for review under this Nationwide Agreement notwithstanding the exclusion, unless the tribe subsequently concludes that the Historic Property would not be adversely affected.]

[Section III.B was proposed by the Navajo Nation. Section 101(d)(6)(B) of the NHPA states that, "[i]n carrying out its responsibilities under Section 106, a Federal agency shall consult with any Indian tribe or native Hawaiian Organization that attaches religious and cultural significance to [Historic Properties]." The Navajo Nation believes that this proposed provision is a minimum necessary accommodation in light of Section 101(d)(6)(B).]

[CTIA, PCIA and NAB are concerned that the Navajo Nation's proposed language provides additional notice requirements rather than streamlining excluded Undertakings from review. PCIA argues that from a practical standpoint, an exclusion that includes a tribal notice requirement may be tantamount to no exclusion at all. Moreover, these parties, the Conference, and the Council maintain that this Nationwide Programmatic Agreement is not the appropriate vehicle to address the notice issue, but that the Commission in consultation with Indian tribes should develop agency procedures with respect to tribal consultation. The Council notes that other programmatic agreements have excluded Undertakings off tribal lands from review without a provision for tribal notice. USET states that tribes were not consulted in the development of those programmatic agreements.]

[We seek comment on the Navajo Nation's proposal, and on this draft Nationwide Agreement generally, in light of Section 101(d)(6)(B).]

IV. PARTICIPATION OF INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS IN UNDERTAKINGS OFF TRIBAL LANDS; TRIBAL CONSULTATION – **Alternative A**⁶

- A. As a part of its responsibilities in connection with Section 106 of the NHPA (16 U.S.C. 470f) and the regulations of the Council (36 C.F.R. Part 800) and pursuant to Section 101(d)(6) of the NHPA (16 U.S.C. § 470(a)(d)(6)), the Commission recognizes its responsibility to consult with any Indian tribe or NHO that attaches religious and cultural significance to a Historic Property if the property may be affected by an Undertaking. Through its rules and the terms of this Agreement, the Commission has authorized Applicants to initiate contacts with Indian tribes and NHOs on its behalf, and to conclude the process of tribal participation consistent with this Agreement where the tribe has not requested government-to-government consultation.
- B. Consistent with their right to government-to-government consultation, tribal authorities may request Commission consultation on any or all matters at any time, including when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO.
- C. The Commission recognizes that Indian tribes exercise inherent sovereign powers over their members and territory. The Commission also recognizes the unique relationship that the federal government has with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Each Applicant must recognize these facts and conduct all communications with Indian tribes in a sensitive manner, respectful of tribal sovereignty. Contacts shall be directed to the appropriate representative designated or identified by the tribal government or other governing body.
- D. Applicants should be aware that frequently, Historic Properties of religious and cultural significance to Indian tribes and NHOs are located on ancestral, aboriginal, or ceded lands of such tribes and organizations and Applicants should take this into account when complying with their responsibilities. Accordingly, Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to

⁶ This alternative was discussed in the Telecommunications Working Group and represents the collective effort of Working Group members, including tribal representatives, to address issues raised in the Working Group discussions. The Working Group did not have an opportunity to address the proposal in Alternative B prior to publication for comment.

Historic Properties that may be affected by an Undertaking. Such reasonable and good faith efforts may include, but are not limited to, seeking relevant information from the relevant SHPO/THPO, Indian tribes, state agencies, the U.S. Bureau of Indian Affairs (“BIA”), or, where applicable, any federal agency with land holdings within the state (e.g., the U.S. Bureau of Land Management). Although these agencies can provide useful information in identifying potentially affected Indian tribes, contacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes that may attach religious and cultural significance to a potentially affected Historic Property, as described below.

- E. In order to ensure that each identified Indian tribe or NHO has a full opportunity to participate in the Section 106 process and to request government-to-government consultation, the Applicant shall, early in the project planning process, contact in writing any Indian tribe or NHO identified pursuant to Section IV.D. above. The communication shall include the elements specified in Section V.C., below, and offer the Indian tribe or NHO an opportunity to provide to the Applicant information about Historic Properties in the APE that should be considered and included in the Submission Packet. The initial communication should explain the Applicant’s authority and the tribe’s right to request government-to-government consultation as outlined in Section IV.A. and B above.
- F. The Applicant must ensure that each identified Indian tribe or NHO has a reasonable opportunity to respond to its communication. Ordinarily, 30 days from the time the relevant tribal representative may reasonably be expected to have received an inquiry shall be considered a reasonable time, and in no event shall a reasonable time be less than 30 days unless otherwise agreed by a tribe. Should the tribe request additional time to respond, the Applicant shall afford additional time as reasonable under the circumstances. Notification to the Applicant of the need for additional time should be made, where practical, at least 5 days prior to the close of the initial 30-day period. In general, an Applicant should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating, but should make reasonable efforts to follow up. Such efforts may include, for example, an additional attempt at written communication, provision of the

Submission Packet at the time it is submitted to the SHPO/THPO, and/or, where practical, contact by telephone.⁷

- G. If the Applicant receives a comment or objection from an Indian tribe or NHO regarding Historic Properties, the Applicant shall pursue further discussions with the tribe, unless the tribe requests consultation with the Commission. All requests for government-to-government consultation shall be immediately forwarded to the Commission. If the Applicant receives a comment from an Indian tribe or NHO, it shall invite the commenting tribe or organization to become a consulting party. If the Indian tribe or NHO agrees to become a consulting party, it shall be afforded that status and shall be provided with all of the information, copies of submissions, and other prerogatives of a consulting party as provided for in 36 C.F.R. § 800.2.
- H. The Applicant shall submit to each Indian tribe and NHO that it has identified pursuant to Section IV.D., above, or that has informed the SHPO/THPO, the Applicant or the Commission that it attaches religious and cultural significance to a Historic Property within the APE, a Submission Packet as provided in Section VII.A. Such submission is not necessary where the Indian tribe or NHO has previously made clear that it does not believe any Historic Property of religious and cultural significance to it may potentially be affected or has failed to respond to repeated attempts at communication.
- I. In the event an Applicant and an Indian tribe or NHO are unable to agree regarding a tribe's assertion prior to construction of an adverse effect on a Historic Property of religious and cultural significance to that tribe, the Applicant shall not commence construction without authorization from the Commission. The Commission, in consultation with the tribe, shall carefully consider all positions and rule on all such disagreements with reasonable promptness.
- J. Information regarding Historic Properties to which Indian tribes attach religious and cultural significance may be highly confidential, private, and sensitive. If a tribe or NHO requests confidentiality from the Applicant, the Applicant shall honor this request and shall, in turn, request confidential treatment of such materials or information in accordance with Section 304 of the NHPA (16 U.S.C. § 470w-3(a)) in the event they are submitted to the

⁷ PCIA has expressed concern that this paragraph is difficult to apply and understand because its timing is indefinite. The Conference believes the Programmatic Agreement should not add deadlines to those already in 36 C.F.R. Part 800.

Commission. The Commission shall provide such confidential treatment consistent with applicable federal laws.⁸

- K. Nothing in this Section shall be construed to prohibit or limit Applicants and Indian tribes from entering into or continuing pre-existing arrangements or agreements governing their contacts, provided such arrangements or agreements are otherwise consistent with federal law.

IV. PARTICIPATION OF INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS IN UNDERTAKINGS OFF TRIBAL LANDS – **Alternative B**⁹

- A. The Commission recognizes its responsibility to initiate and carry out consultation with any Indian tribe or NHO that attaches religious and cultural significance to a Historic Property if the property may be affected by a Commission undertaking. This responsibility is founded in Sections 101(d)(6)(a-b) and 106 of the NHPA (16 U.S.C. §§ 470a(d)(6)(a-b) and 470f), the regulations of the Council (36 C.F.R. Part 800), the Commission's environmental regulations (47 C.F.R. §§ 1.1301-1.1319), and the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions. This historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. (*Commission Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*).

⁸ The Conference notes that "The confidentiality provision in the National Historic Preservation Act is equally applicable to all historic properties not just traditional cultural properties. The reasons for withholding information are significant invasion of privacy, risk of harm to the resource and impeding the use of a traditional cultural property." The Council proposes that this provision be revised to read as follows: "If a Tribe or Native Hawaiian Organization requests confidentiality from the Applicant, the Applicant shall notify the Commission. The Commission shall honor this request and shall, in turn, request confidential treatment of such materials or information consistent with applicable Federal laws." USET states that confidentiality is of central importance to tribes and that confidentiality restrictions should be in place on Applicants whether or not a tribe or NHO has requested confidentiality.

⁹ This alternative is proposed by the United South and Eastern Tribes, Inc. USET argues that Alternative A is an unlawful delegation to non-governmental entities of the Commission's obligation under both Section 101(d)(6) and the Federal trust responsibility to consult with tribes. USET proposes Alternative B as a practical solution to this problem that maintains the Commission's consultation obligation, addresses the concerns of industry in a timely manner, and enables tribes to provide their expertise for the identification and evaluation of sites thus contributing to the appropriate preservation of those sites of value to tribes. USET states that it is committed to supporting implementation of Alternative B in a practical manner that works for all parties.

- B. Except as provided in Section IV.C. below, the Commission shall engage in direct and meaningful consultation with an Indian tribe or NHO when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO. Such consultation shall be carried out in accordance with the regulations adopted by the Advisory Council on Historic Preservation implementing Section 106 of the NHPA (codified at 36 C.F.R. Part 800). Notwithstanding the foregoing, the Commission encourages the use of the alternative process set forth in Paragraph C as an effective way of addressing the concerns of Applicants and Indian Tribes or NHOs that generally will be faster than government-to-government consultation between the Commission and Indian tribes or NHOs.
- C. The Commission shall not be required to engage in consultation with an Indian tribe or NHO where an Applicant has secured a letter of certification from that Indian tribe or NHO stating that such consultation is unnecessary because either: (1) the tribe or NHO has *no interest in the affected property*; or (2) the Undertaking will not have an adverse effect on a Historic Property of religious and cultural significance to that tribe or NHO. Where a tribe or NHO believes that a proposed Undertaking would have an adverse effect on a property of religious and cultural significance to that tribe or NHO and the Applicant wishes to pursue mitigation, the tribe or NHO may, at its discretion, discuss mitigation directly with the Applicant consistent with Section VII.D. Alternatively, consultation shall not be required if a written agreement between the Applicant and the tribe or NHO that has been filed with the Commission provides that the tribe or NHO will be deemed to have determined that Commission consultation is unnecessary if the Applicant has provided certain information and the tribe or NHO has not responded within a certain period of time, and the Applicant has fulfilled the terms of that agreement. [Additional guidance in implementing this paragraph would be provided either in an appendix or by separate publication]

V. PUBLIC PARTICIPATION AND CONSULTING PARTIES

- A. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide the local government that has primary land use jurisdiction over the site of the planned Undertaking with written notification of the planned Undertaking.
- B. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide written notice to the public of the planned Undertaking. Such notice may be accomplished (1) through the public notification provisions of the relevant local zoning or local historic preservation process for the proposed

Facility; or (2) by publication in a local newspaper of general circulation. In the alternative, an Applicant may use other appropriate means of providing public notice, including seeking the assistance of the local government.

- C. The written notice to the local government and to the public shall include: (1) the location of the proposed Facility including its street address; (2) a description of the proposed Facility including its height and type of structure; (3) instruction on how to submit comments regarding potential effects on Historic Properties; and (4) the name, address, and telephone number of a contact person.
- D. A SHPO/THPO may make available lists of other groups, including tribes and organizations of tribes, which should be provided notice for Undertakings to be located in particular areas.
- E. If the Applicant receives a comment regarding potentially affected Historic Properties, the Applicant shall consider the comment and either include it in the initial submission to the SHPO/THPO, or, if the initial submission has already been made, immediately forward the comment to the SHPO/THPO for review. An Applicant need not submit to the SHPO/THPO any comment that does not substantially relate to potentially affected Historic Properties.
- F. The relevant SHPO/THPO, local government, and Indian tribes and NHOs that attach religious and cultural significance to Historic properties that may be affected are entitled to be consulting parties in the Section 106 review of an Undertaking. The Council may enter the Section 106 process for a given Undertaking, on invitation or on its own decision, according to its rules. An Applicant shall consider all written requests of other individuals and organizations to participate as consulting parties and determine which should be consulting parties. An Applicant is encouraged to grant such status to individuals or organizations with a demonstrated legal or economic interest in the Undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation. Any such individual or organization denied consulting party status may petition the Commission for review of such denial. Applicants may seek assistance from the Commission in identifying and involving consulting parties.^{10 11}

¹⁰ The Conference, the Ohio SHPO, and Verizon Wireless suggest that this section be amended to specify a period for public and local government response.

¹¹ CTIA has concerns regarding consulting parties' treatment of confidential and proprietary information that may be included in an Applicant's Submission Packet. Accordingly, CTIA strongly recommends including a

- G. Consulting parties are entitled to: (1) receive notices, copies of submission packets, correspondence and other documents provided to the SHPO/THPO in a Section 106 review; and (2) be provided an opportunity to have their views expressed and taken into account by the Applicant, the SHPO/THPO and, where appropriate, by the Commission.

VI. IDENTIFICATION, EVALUATION, AND ASSESSMENT OF EFFECTS

In preparing the Submission Packet for the SHPO/THPO pursuant to Section VII of this Nationwide Agreement and Attachments 3 and 4, the Applicant must: (1) define the area of potential effects (APE); (2) identify Historic Properties within the APE; (3) evaluate the historic significance of identified properties; and (4) assess the effects of the Undertaking on Historic Properties. The standards described below shall be applied by the Applicant in preparing the Submission Packet, by the SHPO/THPO in reviewing the Submission Packet, and where appropriate, by the Commission in making findings.

Identification, evaluation, and assessment are most expeditiously accomplished by individuals with historic preservation and cultural resource management expertise and experience.

A. Consideration of Direct Effects and Visual Effects

A SHPO/THPO, consistent with relevant state procedures, may specify geographic areas in which no review for direct effects on archeological resources is required or in which no review for visual effects is required.

B. Definition of the Area of Potential Effects

1 Direct Effects

The APE for direct effects is limited to the area of potential ground disturbance and the portion of any Historic Property that will be destroyed or physically altered by the Undertaking.

2 Visual Effects

- a. Unless otherwise established in consultation with the SHPO/THPO, the presumed APE for visual effects for the

confidentiality clause binding upon all Parties. The Ohio SHPO believes there should not be a blanket provision for the confidentiality of "proprietary" information on the part of the carriers, since information regarding their consideration of alternative sites is invaluable to the SHPO where there are historic properties present and there is a need to look for ways to avoid or reduce effects. The Ohio SHPO states that this provision would be especially problematic for SHPOs that are subject to strong state-level FOIA requirements.

construction of new Facilities is the area from which the tower will be visible:

- 1) Within a half mile of the proposed tower, if the proposed tower is 200 feet or less in overall height;
 - 2) Within 3/4 mile of the proposed tower, if the proposed tower is more than 200 feet but no more than 400 feet in overall height;
 - 3) Within 1 1/2 miles of the proposed tower, if the proposed tower is more than 400 feet in overall height.¹²
- b. In the event the Applicant determines, or the SHPO/THPO recommends, that an alternative APE for visual effects is necessary, the Applicant and the SHPO/THPO may mutually agree to an alternative APE.
- c. If the parties, after using good faith efforts, cannot reach agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution. The Commission shall make its determination concerning an alternative APE within a reasonable period of time.

C. Identification of Historic Properties

1. The Applicant, using research techniques and employing methodology generally acceptable to the preservation profession and considering public comments, shall identify Historic Properties in the APE, including Historic Properties to which any Indian tribe or NHO attaches religious or cultural significance.
2. The level of effort and the appropriate nature and extent of identification efforts will vary depending on the location of the project, the likely nature and location of Historic Properties within the APE, and the current nature of and thoroughness of previous research, studies, or Section 106 reviews.
3. No archeological survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites. Disagreements

¹² The Conference asks the following be added: "4) For proposed Facilities 1,000 feet or taller, the applicant shall, in consultation with the SHPO, determine the APE for each Facility." The National Trust concurs with this request.

regarding the necessity for an archeological survey may be referred to the Commission for resolution.

4. It may be assumed that no archeological resources exist within the APE where all areas to be excavated related to the proposed Facility will be located on ground that has been previously disturbed to a depth of (1) two feet or (2) six inches deeper than the general depth of the anticipated disturbance (excluding footings and similar limited areas of deep excavation), whichever is greater, and where no archeological resources are recorded in files of the SHPO/THPO or any potentially affected Indian tribe or NHO.

D. Evaluation of Historic Significance

1. The Applicant shall apply the National Register criteria (36 C.F.R. Part 63) to properties identified within the APE and request SHPO/THPO concurrence as part of the review of the Submission Packet.
2. Where there is a disagreement regarding the eligibility of a resource for listing in the National Register and, after attempting in good faith to resolve the issue, the Applicant and the SHPO/THPO continue to disagree regarding eligibility, the Applicant may submit the issue to the Commission. The Commission shall handle such submissions in accordance with 36 C.F.R. § 800.4(c)(2).

E. Evaluation of Effects

1. Applicants shall evaluate effects of the Undertaking on Historic Properties using the Criteria of Adverse Effect (36 C.F.R. § 800.5(a)(1)).
2. In determining whether Historic Properties in the APE may be adversely affected by the Undertaking, the Applicant should consider factors such as the topography, vegetation, known presence of Historic Properties (including locally designated historic districts and traditional cultural properties), and existing land use.
3. An Undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register. Construction of a Facility will not cause a visual adverse effect except where visual setting or visual elements are character-defining features of eligibility. Examples include: (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a

traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape.¹³

4. For collocations not excluded from review by the Collocation Agreement or this Agreement, the assessment of effects will consider only effects from the newly added or modified Facilities and not effects from the existing Tower or Antenna.

VII. PROCEDURES

A. Use of the Submission Packet

1. For each Undertaking within the scope of this Nationwide Agreement, the Applicant shall initially determine whether there are no Historic Properties affected, no adverse effect on Historic Properties, or an adverse effect on Historic Properties. The Applicant shall prepare a Submission Packet and submit it, together with the required documentation, to the SHPO/THPO and to all consulting parties, including any Indian tribe or NHO that is participating as a consulting party.¹⁴
2. The SHPO/THPO shall have 30 days from receipt of the requisite documentation to review the Submission Packet.
3. If the Applicant forwards to the SHPO/THPO a comment or objection, in accordance with Section V.F, more than 25 but less than 31 days following its initial submission, the SHPO/THPO shall have five calendar days to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the Commission.
4. If the SHPO/THPO determines the Applicant's Submission Packet is inadequate, the SHPO/THPO will immediately return it to the

¹³ PCIA suggests the following language: "...Construction of a Facility will not cause a visual adverse effect except where the Facility noticeably diminishes the visual elements of setting, feeling or association within the boundary of a Historic Property, where such elements are important elements of that historic property's eligibility. Examples include Facilities located within the actual, or, for unlisted properties, the most logical or reasonable boundary of: (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape."

¹⁴ PCIA would add following this paragraph: "Any consulting party may, within the 30-day review period provided below, submit to the Applicant a description of its reasons for disagreement. The Applicant may consult with the party to resolve the disagreement or ask the Commission to review the finding to which objection is made."

Applicant with a description of any deficiencies. The Applicant may resubmit an amended Submission Packet to the SHPO/THPO any time within 60 days following its receipt of the returned Submission Packet.¹⁵

B. Determinations of No Historic Properties Affected

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no Historic Properties affected, it is deemed that no Historic Properties exist within the APE or the Undertaking will have no effect on any Historic Properties located within the APE. The Section 106 process is then complete, and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.
2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no Historic Properties affected within 30 days following receipt of a complete Submission Packet, it is deemed that no Historic Properties exist within the APE and the Undertaking will have no effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.
3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no Historic Properties affected, it should provide a short and concise explanation of exactly how the criteria of eligibility and or criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement.
4. If the SHPO/THPO and Applicant do not resolve their disagreement, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.

C. Determinations of No Adverse Effect

¹⁵ CTIA and PCIA recommend language that specifically states when the 30-day period is tolled and when and if the clock restarts with respect to the 30-day review period. PCIA would eliminate the 60-day limit on resubmissions, and would provide for Commission resolution of disputes regarding the adequacy of a submission.

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no adverse effect, the Facility is deemed to have no adverse effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.
2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no adverse effect within thirty days following its receipt of a complete Submission Packet, the SHPO/THPO is presumed to have concurred with the Applicant's determination. The Applicant shall, pursuant to procedures to be promulgated by the Commission, forward a copy of its Submission Packet to the Commission, together with all correspondence with the SHPO/THPO and any comments or objections received from the public, and advise the SHPO/THPO accordingly. The Section 106 process shall then be complete unless the Commission notifies the Applicant otherwise within a period of time to be specified by the Commission.
3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no adverse effect, it should provide a short and concise explanation of exactly how the criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement.
4. If the SHPO/THPO and Applicant do not resolve their dispute, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.
5. Whenever the Applicant or the Commission concludes, or a SHPO/THPO advises, that a proposed project will have an adverse effect on a Historic Property, after applying the criteria of Adverse Effect, the Applicant and the SHPO/THPO are encouraged to investigate measures that would avoid the adverse effect and permit a conditional "No Adverse Effect" determination.¹⁶
6. If the Applicant and SHPO/THPO mutually agree upon conditions that will result in no adverse effect, the Applicant shall advise the

¹⁶ The Council would like to change "encourage" to "shall" and USET agrees. Verizon Wireless disagrees with the Council and USET.

SHPO/THPO in writing that it will comply with the conditions. The Applicant can then make a determination of no adverse effect subject to its implementation of the conditions. The Undertaking is then deemed conditionally to have no adverse effect on Historic Properties, and the Applicant may proceed with the project subject to those conditions. Where the Commission has previously been involved in the matter, the Applicant shall notify the Commission of this resolution.¹⁷

D. Determinations of Adverse Effect

1. If the Applicant determines at any stage in the process that an Undertaking would have an adverse effect on Historic Properties within the APE(s), or if the Commission so finds, the Applicant shall submit to the SHPO/THPO a plan designed to avoid, minimize, or mitigate the adverse effect.
2. The Applicant shall forward a copy of its submission with its mitigation plan and the entire record to the Council and the Commission. Within fifteen days following receipt of the Applicant's submission, the Council shall indicate whether it intends to participate in the negotiation of a Memorandum of Agreement by notifying both the Applicant and the Commission.
3. Where the Undertaking would have an adverse effect on a National Historic Landmark, the Commission shall request the Council to participate in consultation and shall invite participation by the Secretary of the Interior.
4. The Applicant, SHPO/THPO, and consulting parties shall negotiate a Memorandum of Agreement that shall be sent to the Commission for review and execution.
5. If the parties are unable to agree upon mitigation measures, they shall submit the matter to the Commission, which shall coordinate additional actions in accordance with the Council's rules, including 36 C.F.R. §§ 800.6(b)(1)(v) and 800.7.¹⁸

VIII. EMERGENCY SITUATIONS

¹⁷ PCIA suggests permitting the Commission to make its own determinations with respect to conditional no adverse effect when the SHPO and Applicant cannot agree.

¹⁸ CTIA requests specific time estimates for completing activities in VII.D.1-5.

Unless the Commission deems it necessary to issue an emergency authorization in accordance with its rules, or the Undertaking is otherwise excluded from Section 106 review pursuant to Section III of this Agreement, the procedures in this Agreement shall apply.

IX. INADVERTENT OR POST-REVIEW DISCOVERIES

- A. In the event that an Applicant discovers a previously unidentified site within the APE that may be a Historic Property that would be affected by an Undertaking, the Applicant shall promptly notify the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, and within a reasonable time shall submit to the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, a written report evaluating the property's eligibility for inclusion in the National Register. The Applicant shall seek the input of any potentially affected Indian tribe or NHO in preparing this report. If found during construction, construction must cease until evaluation has been completed.
- B. If the Applicant and SHPO/THPO concur that the discovered resource is eligible for listing in the National Register, the Applicant will consult with the SHPO/THPO, and tribes as appropriate, to evaluate measures that will avoid, minimize, or mitigate adverse effects. Upon agreement regarding such measures, the Applicant shall implement them and notify the Commission of its action.
- C. If the Applicant and SHPO/THPO cannot reach agreement regarding the eligibility of a property, the matter will be referred to the Commission for review in accordance with Section VI.D.2. If the Applicant and the SHPO/THPO cannot reach agreement on answers to avoid, minimize, or mitigate adverse effects, the matter shall be referred to the Commission for appropriate action.
- D. If the Applicant discovers any human or burial remains during implementation of an Undertaking, the Applicant shall cease work immediately, notify the SHPO/THPO and Commission, and adhere to applicable State and Federal laws regarding the treatment of human or burial remains.

X. CONSTRUCTION PRIOR TO COMPLIANCE WITH SECTION 106

- A. The terms of Section 110(k) of the National Historic Preservation Act (16 U.S.C. § 470h-2(k)) ("Section 110(k)") apply to Undertakings covered by this Agreement. Any SHPO/THPO, potentially affected Indian tribe or NHO, the Council, or a member of the public may submit a complaint to the Commission alleging that a facility has been constructed or partially constructed after the effective date of this Agreement in violation of Section 110(k). Any such complaint must be in writing and supported by substantial

evidence specifically describing how Section 110(k) has been violated. Upon receipt of such complaint the Commission will assume responsibility for investigating the applicability of Section 110(k) in accordance with the provisions herein.

- B. If upon its initial review, the Commission concludes that a complaint on its face demonstrates a probable violation of Section 110(k), the Commission will immediately notify and provide the relevant Applicant with copies of the Complaint and order that all construction of a new tower or installation of any new collocations immediately cease and remain suspended pending the Commission's resolution of the complaint.
- C. Within 15 days of receipt, the Commission will review the complaint and take appropriate action, which the Commission may determine, and which may include the following:
1. Dismiss the complaint without further action if the complaint does not make out a probable violation of Section 110(k) even if the allegations are taken as true;
 2. Provide the Applicant with a copy of the complaint and request a written response within a reasonable time;
 3. Request a background report which documents the history and chronology of the planning and construction of the Facility;
 4. Request a summary of the steps taken to comply with the requirements of Section 106 as set forth in this Nationwide Agreement, particularly the application of the Criteria of Adverse Effect;
 5. Request copies of any documents regarding the planning or construction of the Facility, including correspondence, memoranda, and agreements;
 6. If the Facility was constructed prior to complying with the requirements of Section 106, request an explanation for such failure, and possible measures that can be taken to mitigate any resulting adverse effects on Historic Properties.
- D. If the Commission concludes that there is a probable violation of Section 110(k) (*i.e.*, that "with intent to avoid the requirements of Section 106, [an Applicant] has intentionally significantly adversely affected a Historic

Property”)¹⁹, the Commission shall notify the Applicant and forward a copy of the documentation set forth in Stipulation X.C. to the SHPO/THPO, Council, and other consulting parties along with the Commission’s opinion regarding the violation of Section 110(k). The Commission will consider the views of the consulting parties in determining a resolution, which may include negotiating a Memorandum of Agreement (MOA) that will resolve any adverse effects. The Commission, SHPO/THPO, Council, and Applicant shall sign the MOA to evidence acceptance of the mitigation plan and conclusion of the Section 106 review process.

- E. Nothing in Section X or any other provision of this Agreement shall preclude the Commission from continuing or instituting enforcement proceedings under the Communications Act and its rules against an Applicant that has constructed a Facility prior to completing required review under this Agreement. Sanctions for violations of the Commission’s rules may include any sanctions allowed under the Communications Act and the Commission’s rules.
- F. The Commission shall provide copies of all concluding reports or orders for all Section 110(k) investigations conducted by the Commission to the original complainant, the relevant local government, and other consulting parties.
- G. Facilities that are excluded from Section 106 review pursuant to the Collocation Agreement or Stipulation III of this Agreement are not subject to review under this provision. Any parties who allege that such Facilities have violated Section 110(k) should notify the Commission in accordance with the provisions of Stipulation XI, Public Comments and Objections.

XI. PUBLIC COMMENTS AND OBJECTIONS

Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement. Comments related to telecommunications activities shall be directed to the Wireless Telecommunications Bureau and those related to broadcast facilities to the Media Bureau. The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate,

¹⁹ PCIA suggests that a complete statement of Section 110(k) is preferable to a synopsis or incomplete statement.

take appropriate actions. The Commission shall notify the objector of the outcome of its actions.

XII. AMENDMENTS

The signatories may propose modifications or other amendments to this Agreement. Any amendment to this Agreement shall be subject to appropriate public notice and comment and shall be signed by the Commission, the Council, and the Conference.

XIII. TERMINATION

- A. Any signatory to this Agreement may request termination by written notice to the other parties. Within sixty (60) days following receipt of a written request for termination from a signatory, all other signatories shall discuss the basis for the termination request and seek agreement on amendments or other actions that would avoid termination.
- B. In the event that this Agreement is terminated, the Commission and all Applicants shall comply with the requirements of 36 C.F.R. Part 800.

XIV. ANNUAL REVIEW

The signatories to this Nationwide Agreement will meet annually on or about the anniversary of the effective date of the Agreement to discuss the effectiveness of this Agreement, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Agreement.

XV. RESERVATION OF RIGHTS

Neither execution of this Agreement, nor implementation of or compliance with any term herein, shall operate in any way as a waiver by any party hereto, or by any person or entity complying herewith or affected hereby, of a right to assert in any court of law any claim, argument or defense regarding the validity or interpretation of any provision of the Act or its implementing regulations contained in 36 C.F.R. Part 800.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective authorized officers as of the day and year first written above.

FEDERAL COMMUNICATIONS COMMISSION

Chairman

Date _____

ADVISORY COUNCIL ON HISTORIC PRESERVATION

_____ Date _____
Executive Director

NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS

_____ Date _____
President