

**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

COMMENTS OF SBC COMMUNICATIONS INC.

Richard M. Firestone
Donald T. Stepka
Arnold & Porter
555 Twelfth Street N.W.
Washington, D.C. 20004
(202) 942-5000

Paul K. Mancini
Gary L. Phillips
Davida Grant
SBC Communications Inc.
1401 Eye Street, N.W.
Washington, D.C. 20005
(202) 326-8800

Counsel for SBC Communications Inc.

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SUMMARY

SBC Communications Inc. supports the FCC's goals of (i) streamlining the procedures for review of certain telecommunications construction projects pursuant to Section 106 of the National Historic Preservation Act, and (ii) exempting particular classes of projects from detailed review pursuant to Section 106 because they carry little or no risk of affecting historic properties. Bringing increased certainty to the Section 106 process through objective standards will benefit the public by expediting the delivery of advanced services by communications providers.

SBC is concerned, however, that some of the proposals in the draft Nationwide Agreement would hinder, rather than facilitate, the FCC's goals by decreasing certainty and requiring Applicants to take unnecessary and unwarranted extra procedural steps. In particular, the Commission should (1) not require Applicants to consult with tribes regarding exempt Undertakings; (2) allow Applicants to consult directly with tribes regarding non-exempt Undertakings; (3) specify firmly-defined time periods for all procedural steps; and (4) ensure that the goals of objectivity and certainty, and thereby the public interest, are served by adopting exemptions that are clear and are not vitiated by exceptions and unnecessary procedural requirements.

SBC is also concerned about specific language in the proposed regulations and suggests modifications to improve the operation of these rules.

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SBC Communications Inc. (“SBC”) applauds the FCC’s desire to streamline the procedures for reviewing certain Undertakings for communications facilities under the National Historic Preservation Act (“NHPA”), and the idea of adopting a document such as the proposed draft Nationwide Programmatic Agreement (“Nationwide Agreement”) to accomplish that goal. Bringing greater certainty to determinations under the NHPA by creating objective criteria for evaluation of the potential environmental effects of certain Undertakings will assist telecommunications providers in bringing advanced services to the public in a timely and cost-effective fashion.

SBC is concerned, however, that some of the pending proposals inhibit the very certainty and objectivity that the draft Nationwide Agreement promises to establish. Accordingly, SBC urges the Commission not to undercut the potential benefits of the draft Nationwide Agreement by creating exceptions to the exemptions or requiring unnecessary additional procedural steps, which would hinder Applicants’ ability to construct, modify, and operate facilities.

SBC’s Comments focus initially on these overarching concerns and the risks that the current proposal pose. In the Appendix to these Comments, SBC sets forth a number of specific actions the Commission can take to improve significantly the operation of the new framework.

I. The FCC Should Not Require Tribal Consultation Regarding Exempt Undertakings

The Nationwide Agreement wisely establishes a number of specific objective conditions which, if met, would exempt individual projects from requirements necessitating a detailed review. They do so because, when those standards are met, historic preservation interests have been fully protected and any additional proceedings would be needlessly burdensome and would unnecessarily slow the provision of valuable communications services.

Nevertheless, the Navajo Nation proposes that Applicants should 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 a tribe were to indicate that an adverse effect “may” occur, the proposal would require the Applicant to “engage the tribe pursuant to Section IV” of the Nationwide Agreement, a procedure otherwise reserved for non-exempt Undertakings. The Navajo Nation’s assertion that Section 101(d)(6)(B) requires this procedure is incorrect. Furthermore, the proposal is unnecessary and contrary to the public interest. Tribal interests are fully protected by the draft Nationwide Agreement, and tribes also have the additional rights set forth in Sections X and XI of that Agreement.¹

¹ The trigger threshold suggested in the Navajo Nation proposal—identification of “any Indian tribe with aboriginal and/or historic associations to the area in which the Undertaking is to occur”—is also overly broad and unworkable. See the discussion in the Appendix attached hereto.

The NHPA contemplates precisely the sort of exemptions contained in Section III of the draft Nationwide Agreement. Specifically, Section 214 states:

The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this subchapter when such exemption is determined to be consistent with the purposes of this subchapter, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.

16 U.S.C. § 470v. *See also* 36 C.F.R. § 800.14(b) (authorizing programmatic agreements in certain circumstances, notably “[w]hen nonfederal parties are delegated major decisionmaking responsibilities,” *id.* at § 800.14(b)(1)(iii)); *id.* at § 800.14(a)(4) (alternate procedures adopted pursuant to 36 C.F.R. Part 800 “substitute for the Council’s regulations for the purposes of the agency’s compliance with Section 106”); *id.* at § 800.14(c) (establishing criteria for exemptions); *id.* at § 800.14(f) (requiring agencies to consult on a government-to-government basis with relevant Indian tribes and NHOs *at the time a program alternative is considered for adoption*). As a structural matter, this statutory provision requires consultation with the relevant tribe(s) prior to adoption of any exemption, thereby nullifying the need for further tribal consultation for any Undertaking satisfying an adopted exemption.

The Navajo Nation is correct that Section 101(d)(6)(B) of the NHPA² requires federal agencies, as part of their Section 106 responsibilities, to consult Indian tribes and Native Hawaiian Organizations (“NHOs”) that attach religious and cultural significance to historic properties. Contrary to the Navajo Nation’s assertion, however, this requirement is consistent with agencies determining that some undertakings may be presumed not to have an adverse effect on historic properties, which is precisely what the exclusions discussed in Section III of

² 16 U.S.C. § 470f(d)(6)(B).

the draft Nationwide Agreement accomplish.. Further consultation would only be required if the presumption was rebutted in the particular case. Sections X and XI of the draft Nationwide Agreement provide the means for tribes to raise rebuttals in individual cases.

Presumptions of no effect or *de minimis* effect are an eminently reasonable exercise of agency discretion. Four of the six exclusions provided in Section III of the draft Nationwide Agreement all exclude from Section 106 review certain Undertakings that would have no, or at most a *de minimis* effect on historic properties in the context of the effects of existing structures.³ The principle, reduced to its essence, is that a small communications tower is presumed to have, at most, a *de minimis* effect on any historic property near a highway or railroad,⁴ an existing antenna farm,⁵ or an office or industrial park;⁶ or, when the tower structure is already present and the proposed Undertaking would not change its visual appearance significantly or require substantial additional excavation.⁷

The additional certainty given to communications providers, which will enable them more expeditiously and economically to offer advanced services to the public, is not the only public interest benefit of the exclusions in Section III of the draft Nationwide Agreement. The exclusions will also give communications companies an incentive to plan and locate facilities, where possible, so that they will qualify for exclusions—in other words, on existing towers or in

³ The third exclusion pertains to temporary structures. The sixth exclusion pertains to areas that have been pre-designated by the relevant SHPO/THPOs as having limited potential to affect historic properties.

⁴ Section III.A.5.b and c.

⁵ Section III.A.5.a.

⁶ Section III.A.4.

⁷ Sections III.A.1 and 2.

existing tower farms, and near highways, railroads, and existing developments, rather than in undisturbed country—which will benefit historic properties generally.

The NHPA and the implementing regulations promulgated by the Advisory Council on Historic Preservation (“Council”) both anticipate participation, at the adoption stage, of tribal and NHO representatives to allow for precisely the sort of streamlining that the draft Nationwide Agreement implements. Further, the Council regulations explicitly contemplate agencies “delegat[ing] major responsibilities” to non-federal parties such as FCC licensees and applicants. Therefore, the exclusions drafted by the Working Group as Section III of the draft Nationwide Agreement are consistent with Section 101(d)(6)(B) of the NHPA, even if they are viewed as delegations of some portion of the FCC’s obligations. Further, they are reasonable presumptions that, as a practical matter, will allow communications providers to expedite construction of facilities that do not adversely affect particular historic properties, and will guide Applicants to construct in a manner that benefits historic properties generally. Finally, in rare instances when the reasonable presumptions created by the exclusions in Section III can be rebutted for an individual Undertaking, Sections X and XI provide the means to raise an objection and to protect the tribal interests that the Navajo Nation’s proposal purports to address. That proposal is therefore unnecessary and, because it would significantly burden Applicants and the provision of valuable communications services to the public with no corresponding public benefit, the FCC should reject it.

II. The FCC Should Allow Applicants to Consult Directly With Indian Tribes

The draft Nationwide Agreement contains two alternatives for the procedures by which Indian tribes and NHOs would participate in reviews of Undertakings off tribal lands.⁸ The primary difference between the alternatives is that Alternative A authorizes Applicants to consult with Indian tribes and NHOs directly, unless a tribe or NHO requests consultation with the FCC, while Alternative B provides that the FCC would always deal government-to-government with tribes and NHOs. USET argues that Alternative A constitutes an unlawful delegation of the Commission’s obligations under Section 101(d)(6) of the NHPA and the Federal trust responsibility to consult with tribes.

Section 106 of the NHPA provides that “the head of any Federal department or independent agency having authority to license any undertaking shall, . . . prior to the issuance of any license, . . . *take into account* the effect of the undertaking” on Historic Properties.⁹ Section 101(d)(6)(B) as codified¹⁰ provides that “[i]n carrying out its responsibilities under section 470f of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties” of traditional religious and cultural importance.

The procedures identified in Alternative A of the draft Nationwide Agreement are more consistent with the FCC’s obligations and constitute a more appropriate exercise of Commission discretion. First, as discussed in Section I above, both the NHPA and the Council’s

⁸ Section IV, Alternative A (pp. A-11–14), was drafted by the Working Group. Section IV, Alternative B (p. A-14–15) was subsequently proposed by the United South and Eastern Tribes (“USET”).

⁹ 16 U.S.C. § 470f (emphasis added).

¹⁰ 16 U.S.C. § 470a(d)(6)(B).

implementing regulations explicitly provide for (i) delegating major responsibilities to non-federal parties, (ii) exemptions from Section 106 procedures where a federal agency determines that an exemption is consistent with the NHPA, and (iii) consultation with tribes and NHOs prior to adoption of the delegation or exemption rather than on a case-by-case basis. Thus, even if it were treated as a delegation of a part of the FCC's responsibilities, Alternative A is consistent with the FCC's obligation to deal government-to-government with Indian tribes and NHOs. Second, although the NHPA and the rules of the Advisory Council on Historic Preservation¹¹ apply both to actions of federal agencies and actions of federal licensees, the language of their provisions is directed towards actions of federal agencies, and is applied by analogy to licensees. It would be a mistake to infer from this stylistic attribute of the provisions, as USET does, that the FCC is prohibited from delegating some of the mechanical details of its statutory duty to FCC licensees and applicants. As discussed above, to the extent that the procedures specified in the draft Nationwide Agreement may constitute a delegation of the FCC's responsibilities, the NHPA and the Council's regulations explicitly authorize these delegations. Beyond that, these procedures would merely give Applicants and tribes and NHOs the ability to work out satisfactory resolutions informally and expeditiously. No tribe or NHO would be forced to accept any proposed resolution or to lose any rights or protections it has.

Finally, because Alternative A specifically allows tribes and NHOs to request Commission consultation "on any or all matters at any time," there can be no hint of prejudice to Indian tribes and NHOs. They may, on a case-by-case basis, request government-to-government consultation whenever they desire. Alternative A simply allows willing tribes and NHOs to deal directly with Applicants in the interest of timely and efficient consensus resolutions. The FCC

¹¹ See 16 U.S.C. §§ 407 *et seq.* and 36 C.F.R. §§ 800.1 *et seq.*, respectively.

should adopt Alternative A in the interest of expediting the delivery of advanced telecommunications services to all Americans while fully protecting all historic preservation interests.

III. The FCC Should Specify Firmly Defined Time Periods for Each Stage of Consultation and Review

Two proposals in the draft Nationwide Agreement have the potential to cause delay because firm time periods are either not specified or the time periods are ambiguous. Under Alternative A, Sections IV.E and F provide that prior to preparing its Submission Packet, an Applicant must contact Indian tribes and NHOs identified through the Applicant's good-faith efforts as potentially attaching religious and cultural significance to an affected site, and allow these tribes and organizations a "reasonable opportunity" to respond. Section IV.F provides that a "reasonable opportunity" shall be at least 30 days, and provides for reasonable extensions of time. It does not, however, put an upper limit on the time that is presumed to be reasonable.

Section VII.A of the draft Nationwide Agreement provides that an SHPO/THPO may return a Submission Packet to the Applicant within its 30-day review period, and that the Applicant may re-submit it during the following 60 days. It is unclear from the text of Section VII.A, however, how much time the SHPO/THPO has to consider the Submission Packet on re-submission.

SBC favors firm time limits generally, to provide certainty for the parties, and believes that these two issues can be resolved by adopting appropriate fixed time limits. SBC leaves it to the FCC, based on the comments received, to determine the appropriate time limitations, noting only that in the case of an Applicant re-submitting a Submission Packet, the tribe or NHO should not need another 30 days because it would already have considered the bulk of the proposal and would need only to study the proposed amendments.

III. The FCC Should Ensure that the Exemptions Provide Certainty to Applicants and that Their Utility is Not Compromised by Exceptions to the Exemptions

The draft Nationwide Agreement, as with any “program alternative” under 16 U.S.C. § 470v and 36 C.F.R. § 800.14, is predicated on the proposition that there are classes of Undertakings that can be determined generally to have little or no chance of adversely affecting Historic Properties. Like the Council and the Working Group, SBC believes that this proposition is true. Further, as detailed above, SBC believes that the safeguards built into the draft Nationwide Agreement are sufficient to protect all parties’ interests in those individual cases that might prove to be exceptions to this foundational proposition. Accordingly, SBC urges the FCC to fashion its rules for the general case rather than the exceptional cases, and to rely on the existing and effective safeguards to accommodate the exceptions. Meaningful exemptions should not be effectively mooted by substantive or procedural exceptions that make them unworkable. As it considers the comments received in this proceeding, SBC urges the FCC to bear prominently in mind that any decision that reduces certainty or requires Applicants to take extra procedural steps reduces the effectiveness of the draft Nationwide Agreement at achieving its goals.

CONCLUSION

For the reasons given above, SBC respectfully asks the FCC (i) not to require tribal consultation in cases in which an Applicant has determined that an Undertaking is excluded from review pursuant to one or more of the specific, objective exemptions in Section III of the draft Nationwide Agreement; (ii) to adopt Section IV, Alternative A to allow Applicants the option to consult with tribes and NHOs directly; (iii) to establish firm time limits for each step of the procedures; and (iv) to ensure that Applicants receive the full benefit of the Section III exemptions, rather than watering the exclusions down in a mistaken attempt to write rules for the

exceptional cases rather than the general case. Attached hereto as an Appendix are additional specific actions the Commission can take to improve significantly the operation of the new framework. SBC believes that provisions consistent with these requests will protect Historic Properties as required by NHPA and at the same time allow telecommunications providers to expedite delivery of advanced services to all Americans.

Respectfully submitted,

/s/ Richard M. Firestone

Richard M. Firestone
Donald T. Stepka
Arnold & Porter
555 Twelfth Street N.W.
Washington, D.C. 20004
(202) 942-5000

Paul K. Mancini
Gary L. Phillips
Davida Grant
SBC Communications Inc.
1401 Eye Street, N.W.
Washington, D.C. 20005
(202) 326-8800

Counsel for SBC Communications Inc.

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APPENDIX

In addition to its Comments, which are directed toward broad issues of concern raised by the Nationwide Agreement, SBC offers the following specific recommendations to improve the operation of rules that may be adopted under the new framework. Each recommendation is keyed to a specific Section of the Nationwide Agreement.

Section III(A)(4): One of the items in the list of exemptions from the detailed review process applies to construction of a facility on property that is in use solely for industrial, commercial, and/or government-office purposes on an area that occupies at least 10,000 square feet of space. However, this exception only applies “where no structure 45 years or older is located within 200 feet of the proposed Facility.” This exception could swallow a significant portion of the rule if it applies to small utilitarian structures such as road overpasses, culverts, and the like. This problem could be alleviated if the definition of “structure” is limited.

Section III(A)(5)(b): One of the exemptions from the detailed review process applies to facilities within 200 feet of “an existing limited access Interstate Highway with a speed limit of 55 MPH or higher.” It would usefully expand the reach of the exemption, without further risk to Historic Properties, if it was clear that this exemption also applied to interchanges and entrance and exit ramps to and from such roads.

Section III(A)(5): An exception to this exemption would apply to a Facility that “is visible from a unit of the National Park System that is listed or eligible for listing in the National Register.” Determining whether a unit is “eligible for listing” is extremely difficult and subjective. It would be much better if this said, “or has been declared eligible by the State Historic Preservation Officer for listing....”

Section III.B: The Navajo Nation’s proposal that Applicants should be required to notify “any Indian tribe with aboriginal and/or historic associations to the area” is needlessly overinclusive. Tribes have been so displaced over the centuries that, for example, there are tribes now living in Montana that may have had their origins in Pennsylvania, none of whose living members have any knowledge of the particular locations that once might have had great meaning, let alone just any “association to the area.” But a literal reading of this language could be viewed as suggesting that it is necessary to do a study of all prior Indian occupations of every site in the U.S., and then search out what became of each of these tribes. SBC argues in its Comments that the FCC should reject the Navajo Nation’s proposal for several reasons. Should the Commission nevertheless decide to incorporate it into the Nationwide Agreement, it should follow the language of the statute in adopting any requirements: applicants should be required to notify “any Indian tribe or Native Hawaiian Organization that attaches religious and cultural significance to [properties of traditional religious and cultural importance].” 16 U.S.C. § 470a(d)(6)(A) and (B).

Section IV(C), Alternative A: This Section begins, “The Commission recognizes that Indian tribes exercise inherent sovereign powers over their members and territory.” This is an over-generalization. It would be better to say, “The Commission acknowledges that federally recognized Indian tribes exercise certain inherent sovereign powers over their members and territory.”

Section VI(B)(2): The term “Area of Potential Effects” (APE) is defined to include areas from which the tower would be visible. SBC suggests that an exception be added such that if there is a major transportation corridor between the site and the tower, it is no longer within the APE. If one is at an historic site, and there is an interstate highway between oneself and the tower, it is probably not the tower that will disrupt one’s enjoyment of the site.

Section VI(C)(4): This Section begins, “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....” SBC suggests adding at the end: “or where all areas where construction of the proposed Facility will take place will be filled with at least two feet of fill.” It is generally recognized that you are not disturbing a buried historic feature if you are merely piling more dirt on top of it, where the feature is not being touched.

Section IX(A): This Section begins, “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... If found during construction, construction must cease until evaluation has been completed.” The APE is defined on p. A-6 as “[t]he geographic area or areas within which an Undertaking may have an effect on Historic Properties, if such properties exist.” This is an extremely vague definition, and thus Section IX(A) has the potential to severely disrupt ongoing construction activities; someone might even say, for example, that a newly discovered collection of arrowheads a mile from a tower construction site is within the APE, and construction must cease. SBC believes that it would be reasonable to say that under these circumstances, construction must cease only if the work would physically disturb the previously unidentified site.