

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Nationwide Programmatic Agreement)	WT Docket No. 03-128
Regarding the Section 106 National Historic)	
Preservation Act Review Process)	
_____)	

SPRINT COMMENTS

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August 8, 2003

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Summary

Sprint demonstrates herein that the Commission does not possess the statutory authority to execute the proposed Programmatic Agreement or to adopt and enforce rules implementing the National Historic Preservation Act (“NHPA”) as applied to antenna siting decisions:

- Antenna siting is not a “federal undertaking” subject to NHPA. Courts have held that a “federal undertaking” requires federal funding or federal licensing. The construction of radio towers is neither federally funded nor licensed. Indeed, antenna siting decisions cannot possibly be considered “federal undertakings” when the federal government has no knowledge of the location of most antenna structures.

- Part 17 tower registration does not constitute a “federal undertaking” under NHPA. The FCC’s 1995 conclusion that tower registration constitutes a “federal undertaking” is legally erroneous. Tower registration is a ministerial act, and even the Advisory Council on Historic Preservation has acknowledged that ministerial acts are not subject to NHPA’s requirements. In any event, tower registration cannot be a basis for, and does not justify, application of NHPA to those tower structures that are not registered.

- The Communications Act confirms that antenna siting decisions are not “federal undertakings.” Section 332(c)(7) of the Act vests in local governments authority over “the placement, construction, and modification of personal wireless facilities. Aesthetic and historic considerations are not subject to FCC jurisdiction; the FCC’s role is limited to issues involving RF emissions. If the FCC has no authority under the Communications Act to regulate the placement and construction of antenna structures, it necessarily follows that it may not determine what kind of historic review licensees must perform concerning their proposed facilities. Local governments are to make these determinations.

- The policies underlying NHPA do not apply to antenna siting decisions. Congress adopted NHPA so the public could influence *federal* officials implementing *federal* policies, not private or local government activities with peripheral federal involvement. There is no “federal decision-making” involved in antenna siting, and a local public participation and approval process already exists – because local zoning boards review and approve the location, height and design of proposed towers, including examining the effects a tower might have on historic properties in the area. The NHPA process thus adds an unnecessary and redundant layer of bureaucracy. Indeed, to apply the NHPA process to the local zoning process stands NHPA on its head: NHPA is designed to facilitate local community participation in the federal agency decision-making process. As applied to antenna siting, however, the NHPA process is instead used to interject federal government procedures into local government decisions.

Congress has required agencies like the FCC to conclude matters presented to them within a reasonable time. Sprint respectfully submits that it is time for the FCC to address the core issue of its authority to apply its NHPA rules to antenna siting decisions.

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SPRINT COMMENTS

Sprint Corporation, on behalf of its Wireless Division (“Sprint” or “Company”),¹ submits that antenna siting is not a “federal undertaking” under the National Historic Preservation Act (“NHPA”) and that, as a result, the Commission does not have the legal authority to require telecommunications carriers (or other non-governmental entities) to comply with NHPA in connection with antenna siting, including the draft Nationwide Programmatic Agreement (“Nationwide Agreement”) which the Commission proposes to execute with the Advisory Council on Historic Preservation (“ACHP” or “Council”).²

The Commission’s application of Section 106 to antenna siting activities has resulted in an extremely burdensome process that negatively impacts industry’s ability to deploy facilities in

¹ In addition to its PCS operations, the Wireless Division of Sprint includes Sprint Sites USA, a business unit created to market, manage and maintain the Company’s substantial portfolio of communications towers. Sprint Sites USA, the nation’s fourth largest tower company, offers collocation opportunities to carriers that wish to improve coverage in recognition of the efficiencies inherent in collocating on existing structures.

² See *Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, *Notice of Proposed Rulemaking* FCC 03-125 (June 9, 2003). Sprint will not address particular provisions of the proposed agreement herein. Instead, Sprint focuses its comments on what it considers to be the fundamental jurisdictional issue.

a timely manner, without countervailing benefit.³ The FCC's Section 106 requirements⁴ not only delays deployment of voice and data services, but increases the costs of network deployment.

Construction of a radio tower (which occurs only with the approval of, and pursuant to conditions imposed by, a local zoning board) is not equivalent to the construction of a nuclear power plant, a major highway or a hydroelectric dam. Applying the same rules and procedures to the construction of a monopole (or even the attachment of an antenna to an existing structure) as are applied to the construction of a multibillion dollar power plant ignores the practical reality and impacts of each. Yet, today, the FCC's position is that the same rules and procedures apply to each activity. The Commission should remedy this problem by ruling that antenna siting is not a "federal undertaking" pursuant to NHPA.⁵

It is important to emphasize at the outset that the issue is *not* whether there will be an impact analysis of proposed radio facilities on nearby historic properties, but rather, whether facility owners must conduct this review pursuant to FCC NHPA rules *in addition to* the processes already utilized by local governments. Congress has made clear in both NHPA and the Communications Act that local governments – and not the federal government – are responsible for reviewing the impact that a wireless facility may have on their communities, including the impact antenna structures may have on nearby historic properties. The Commission lacks

³ As ACHP recognizes, even assuming the Section 106 process applies, it should be "sensible and not burdensome." See ACHP, *Alternatives for Implementing Section 106 of the National Historic Preservation Act: An Assessment*, § III (May 1998).

⁴ The FCC does not actually have rules specific to NHPA or the Section 106 process, but rather, incorporates NHPA into its general National Environmental Policy Act ("NEPA") requirements. See 47 C.F.R. 1.1301 *et. seq.*

⁵ It is the agency itself – and not the ACHP or its regulations -- that determines whether a particular project is an "undertaking" under Section 106 of NHPA. *National Mining Ass'n v. Slater*, 167 F. Supp. 2d 265, 290 (D.D.C. 2001), *rev'd on other grounds sub nom., National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

regulatory authority to impose NHPA requirements on private parties regarding their antenna decisions, and its rules implementing NHPA are null and void as to this activity.

I. THE COMMISSION HAS NEVER EXPLAINED ITS REGULATORY AUTHORITY TO IMPOSE NHPA OBLIGATIONS ON PRIVATE PARTIES ENGAGED IN ANTENNA SITING ACTIVITIES

The Commission has never explained how NHPA requirements, which apply “only to Federal agencies” and “not . . . to private citizens or individuals,”⁶ apply to CMRS licensees, other licensees authorized to provide radio services in specified geographic areas, and non-licensees that are in the business of building communications towers. In 1990, the Commission for the first time required licensees that do not need prior approval before installing antennas to comply with NHPA.⁷ The Commission determined that it was important to protect historic properties, but it never explained how NHPA applies to private parties or to their antenna siting decisions.⁸

In 1995, the Commission in modifying its Part 17 registration rules declared that “registering a structure constitutes a ‘federal action’ or ‘federal undertaking’ such that imposition of environmental responsibilities on the structure owner is justified.”⁹ This conclusion was not supported with analysis, however, and Sprint demonstrates in Part II below that this conclusion is legally erroneous. Importantly, however, even if the Commission is correct that tower registration constitutes a “federal undertaking” under NHPA, that conclusion cannot be used to justify the application of NHPA requirements to the majority of tower structures that are *not* registered.

⁶ ACHP, *Federal Historic Preservation Case Law, 1966-1996*, at § IV.A (“ACHP Legal Memorandum”), available at www.achp.gov/book/TOC2.html.

⁷ See *Amendment of Environmental Rules*, 5 FCC Rcd 2942 (1990).

⁸ See *id.* at 2943 ¶¶ 9-10.

⁹ *Antenna Structure Clearance Procedure Order*, 11 FCC Rcd 4272, 4289 ¶ 41 (1995).

Two years ago, the Commission staff stated that Commission rules implementing NHPA are “statutorily mandated,” and recommended that the Commission retain these rules.¹⁰ Staff reached this conclusion, however, without providing legal analysis. Moreover, the staff reached this conclusion even though Sprint had argued that “the application of NHPA to tower siting is legally unjustified.”¹¹ Sprint repeated this point during the 2002 Biennial Review,¹² but staff, after recognizing this core jurisdictional argument, nonetheless chose not to take any action as a result.¹³

Sprint, in comments filed prior to the adoption of the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“PA”) over two years ago, demonstrated that the Commission does not possess the authority to apply NHPA requirements to antenna siting decisions.¹⁴ Although the Wireless Bureau stated it had “considered all comments received in response to the *Public Notice*,” it executed the PA without addressing the core jurisdictional arguments that Sprint had made.¹⁵ Sprint thereafter petitioned the Commission to reconsider this decision, again documenting that the Commission lacks legal authority to apply NHPA requirements to antenna siting decisions.¹⁶ This petition remains pending although it was

¹⁰ See Updated Staff Report at 12, *appended to 2000 Biennial Regulatory Review*, CC Docket No. 00-175, *Report*, FCC 00-456 (Jan. 17, 2001).

¹¹ *Id.* See also Sprint Biennial Review 2002 Comments, CC Docket No. 00-175, at 9 (Oct. 10, 2000).

¹² See Sprint Reply Comments, WT Docket No. 02-310, at 7-8 (Nov. 4, 2002).

¹³ See Wireless Bureau Staff Report, *2002 Biennial Regulatory Review*, WT Docket No. 02-310, DA 03-129, at 7-9 (Dec. 31, 2002).

¹⁴ See Sprint Comments, DA 00-2907 (Jan. 23, 2001).

¹⁵ See *Public Notice*, Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures, 16 FCC Rcd 5574 (2001), 66 Fed. Reg. 17554 (April 2, 2001).

¹⁶ See Sprint Petition for Reconsideration and Clarification, DA 00-2907 (May 2, 2001). See also Verizon Wireless Comments, DA 00-2907 (May 14, 2001).

filed over two years ago; indeed, the Commission has not released a public notice requesting comment on the Sprint petition.¹⁷

Two points are clear from the foregoing. First, the Commission has never conducted a legal analysis explaining how NHPA requirements apply to private parties or to their antenna siting decisions. Second, the Commission has, to date, avoided addressing this core jurisdictional issue, even though Sprint has raised it on numerous occasions.¹⁸ Despite this omission, the Commission continues to apply its NHPA rules and has even commenced an enforcement action against a carrier for allegedly violating these rules.¹⁹

Congress has required agencies to conclude matters presented to them “within a reasonable time.”²⁰ It is time for the Commission to explain how NHPA requirements can be applied to private parties and their antenna siting decisions.²¹ Sprint submits that once the Commission analyzes the issues, it will agree that it does not have regulatory authority to apply its NHPA rules to antenna siting decisions.

¹⁷ See Letter from Luisa L. Lancetti, Sprint, and John T. Scott, III, Verizon Wireless, to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, DA [00-2907] (June 7, 2002)(requesting that the Sprint petition promptly be put on public notice).

¹⁸ The question of Commission authority over tower siting decisions was recently challenged in a related context in the D.C. Circuit Court of Appeals. See Response of Intervenors CTIA et al. filed April 30, 2003 in *In re Forest Conservation Council, Inc.*, 2003 U.S. App. Lexis 13517 (D.C. Cir., July 2, 2003). (“NEPA has no application to the construction and modification of communications towers, because that construction and modification occurs almost exclusively within the realm of private decisionmaking, without federal funding or substantial participation or oversight of the construction by the FCC.”)

¹⁹ See, e.g., *Western Wireless Corporation*, File No. EB-02-TS-659, *Notice of Apparent Liability for Forfeiture*, FCC 03-109 (May 12, 2003). Notably, Western Wireless raised the issue of FCC authority over antenna siting in its response to the Commission’s Notice of Apparent Liability. See Response of Western Wireless Corporation and WWC Holding Co., Inc. at 60 (June 13, 2003).

²⁰ 5 U.S.C. § 555(b).

²¹ As noted in footnote 5, *supra*, courts have confirmed that “it is the agencies themselves – and not the [ACHP’s] regulations – that determine whether a particular project is an ‘undertaking’ under section 106.” *National Mining Ass’n v. Slater*, 167 F. Supp. 2d 265, 290 (D.D.C. 2001), *rev’d on other grounds sub nom.*, *National Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

II. NHPA DOES NOT APPLY TO THE SITING OF WIRELESS TELECOMMUNICATIONS FACILITIES

The National Historic Preservation Act, courts have declared, is “a narrow statute.”²² Congress enacted NHPA for “the Federal Government to accelerate *its* historic preservation programs and activities.”²³

[T]he NHPA is aimed solely at discouraging federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control.²⁴

Importantly, NHPA requirements apply “only to Federal agencies,” and they do “not apply to private citizens or individuals” or “to State or local governments.”²⁵

Section 106 of NHPA requires federal agencies to “take into account the effect of [their proposed] undertakings on any district, site, building structure, or object that is included in or eligible for inclusion in the National Register.”²⁶ For Section 106 to apply to a particular agency activity, there must be “a proposed Federal or federally assisted undertaking.”²⁷ As the ACHP has stated, “[t]he existence of a Federal undertaking is the trigger for Section 106 compliance.”²⁸

Sprint submits that antenna siting decisions made by private (non-governmental) parties and reviewed/authorized by local governments are not “federal undertakings” within NHPA –

²² *Lee v. Thornburgh*, 877 F.2d 1053, 1058 (D.C. Cir. 1989). See also *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287, 1290 (4th Cir. 1992) (“[T]he scope of the obligations imposed upon federal agencies by the enactment of section 106 is quite narrow.”); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 515 (4th Cir. 1992) (“NHPA, by its terms, has a narrow reach and is triggered only if a federal agency has the authority to license a project or approve expenditures for it.”)(internal citations omitted).

²³ 16 U.S.C. § 470(b)(7)(emphasis added).

²⁴ *McMillan Park Committee v. National Capital Planning Comm'n*, 968 F.2d 1283, 1284 (D.C. Cir. 1992)(internal quotations omitted). See also *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287, 1290 (4th Cir. 1992) (“Congress did not create a primary role for federal agencies to protect historic sites.”).

²⁵ ACHP Legal Memorandum at § IV.A.

²⁶ 16 U.S.C. § 470f.

²⁷ *Id.*

²⁸ ACHP Legal Memorandum at § IV.A.

when, as the Commission has acknowledged, the federal government is not even aware of the location of most towers and other antenna structures used by commercial wireless service providers.²⁹

A. ANTENNA SITING IS NOT A “FEDERAL UNDERTAKING” TRIGGERING NHPA REVIEW

The obligation of a federal agency like the Commission to comply with NHPA is set forth in Section 106 of NHPA.³⁰ If NHPA applies, the agency “shall . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register” and afford the ACHP “a reasonable opportunity to comment with regard to such undertaking.”³¹ Section 106 further specifies when this historic review is to occur: “*prior* to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.”³²

Importantly, NHPA does not apply to all undertakings. Federal courts have held that a “federal undertaking” requires either federal funding or federal licensing. For example, the D.C. Circuit recently held the ACHP’s interpretation of its definition of an undertaking was invalid because it was too expansive and included activities outside the ACHP’s statutory authority.³³

²⁹ See Wireless Telecommunications Bureau, National Wireless Facilities Siting Policies, Fact Sheet No. 2, at 28 (Sept. 17, 1996) (“[T]he Commission does not maintain any technical information on file concerning the majority of PCS licensees’ base stations.”)

³⁰ See 16 U.S.C. § 470f (“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or Federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the [ACHP] a reasonable opportunity to comment with regard to such undertaking.”)

³¹ *Id.*

³² *Id.* (emphasis added).

³³ See *National Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

The Court reaffirmed that for a project to be considered an undertaking under Section 106, “the project [must] be federally funded or licensed.”

[S]ection 106 confers on the Council jurisdiction over “*federally funded* or *federally licensed* undertakings” only.³⁴

Clearly, the construction of antenna structures by radio licensees or by non-licensee tower companies is not federally funded. Accordingly, the only possible way the Commission could justify application of NHPA to antenna structures is through the statutory clause that federally licensed undertakings are subject to NHPA. In this regard, courts have held that the term “license” as used in NHPA should be given a technical meaning and defined as “a written document constituting permission or right to engage in some governmentally supervised activity.”³⁵ Thus, courts have held, for example, the fact that a federal agency must be consulted and possesses a right to veto a project does not constitute a “license” within NHPA and does not, as a result, bring the project within NHPA review.³⁶ As the D.C. Circuit has declared:

A judicial interpretation of “license” as including not only explicitly written permission but also a failure to veto a project when possible would read all limitations out of the Act.³⁷

Notably, a federal agency’s NHPA obligations are not triggered in all instances where there is “a Federal permit, license, or approval.”³⁸ As the ACHP has recognized, “courts have placed limitations on [NHPA’s] breadth” and have declined to find an undertaking “even if a

³⁴ *Id.* at 759-60 (emphasis in original). See also *Sheridan Kalorama Historical Ass’n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995) (“[T]he text of section 106 still applies by its terms only to *federally funded* or *federally licensed* undertakings.”)(emphasis in original); *id.* at 756 (“[U]nless Turkey’s efforts to replace its chancery are either federally funded or federal licensed, § 106 simply does not apply to its project.”); *Waterford Citizens’ Ass’n v. Reilly*, 970 F.2d 1287, 1292 (4th Cir. 1992) (“[F]ederal licensing or funding is required for there to be a statutory undertaking.”)

³⁵ *National Trust for Historic Preservation v. Department of State*, 834 F. Supp. 443, 450 (D.D.C. 1993), quoting *Weintraub v. Rural Electrification Ass’n*, 457 F. Supp. 78, 92 (M.D. Pa. 1978).

³⁶ See, e.g., *Sheridan Kalorama Historical Ass’n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995).

³⁷ *Id.* at 756 (internal citations and quotations omitted).

³⁸ 16 U.S.C. § 470w(7)(definition of the word “undertaking”).

Federal agency approves of a project or issues a permit.”³⁹ The ACHP summarizes governing case law as follows:

Courts will examine the type of approval given by the Federal agency and, whether the approval was a prerequisite to the project, or was merely a non-binding recommendation, in which case the approval does not rise to the level of an undertaking, according to the courts. Similarly, if permit issuance was merely a ministerial act or authorized truly inconsequential activities, the Federal action is not viewed as an undertaking by some courts. Generally, when the Federal agency has minimal control over or involvement in the project, courts have increasingly found that Section 106 does not apply. Additionally, if portions of a project are federally funded or approved, courts will examine the relationship between those aspects of the project to the project as a whole in order to determine whether an undertaking exists. The courts tend to look at such factors as the independent utility of the federally funded section, the stated purpose of the Federal action, and the magnitude of the Federal portion of the action in relation to the action as a whole.⁴⁰

To be sure, Sprint and other licensees provide their authorized services pursuant to federal radio licenses. In 1982, however, Congress eliminated the requirement that common carrier radio licensees obtain a construction permit for each antenna structure.⁴¹ Thus, PCS and many other types of licensees receive “blanket” permission to provide their radio services within a specified geographic area – without the need to obtain site-by-site Commission approval or licensing.⁴² Because the construction of a wireless facility does *not* “requir[e] a Federal permit, license, or approval,”⁴³ such activity by definition cannot be an undertaking under NHPA.

³⁹ ACHP Legal Memorandum at § IV.A.2.

⁴⁰ *Id.*

⁴¹ See 47 U.S.C. § 319(d)(1982) (“A permit for construction shall not be required for . . . stations licensed to common carriers, *unless* the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations.”)(emphasis added).

⁴² See, e.g., Wireless Telecommunications Bureau, Fact Sheet No. 2, National Wireless Facilities Siting Policies, at 28 (Sept. 17, 1996) (“PCS licensees are issued a blanket license by the Commission for their entire geographic area, and therefore they are not required to individually license each transmitter site within the market area.”)

⁴³ 16 U.S.C. § 470w(7)(c).

That the issuance of a CMRS radio license by itself does not constitute a “federal undertaking” is further confirmed by other NHPA requirements. Section 106 of NHPA provides unequivocally that an “agency having authority to license any undertaking shall . . . *prior to the issuance of any license* . . . take into account the effect of the undertaking on “certain historic sites.”⁴⁴ The statute thus requires an assessment of the proposed undertaking *before* a license is issued. Section 106 cannot sensibly be read to permit the issuance of CMRS radio licenses to justify NHPA review of all *subsequent* tower construction, because by definition, the assessment of the impact of a particular wireless facility would not have taken place “prior to” the issuance of the license.

As noted above, the Commission has never explained its rationale for applying NHPA requirements to licensees holding geographic licenses. It is possible that some might contend that the siting of towers is simply part of a larger “undertaking” – the wireless business itself – that is conducted pursuant to an FCC license.⁴⁵ Such an argument, however, is at odds with the plain language of the NHPA, which requires an assessment of the impact of the proposed undertaking “prior to the issuance of any license.” Such an argument would also mean that *every* proposed action taken by a radio licensee (*e.g.*, construction or demolition of an office building or network switching center) could be considered a “federal undertaking” and subject to NHPA review – an absurd result. Taken to its conclusion, such an argument would also mean that licensee-constructed antenna structures are subject to NHPA requirements while antenna structures owned by non-licensee firms are exempt from NHPA – again, an absurd result. Such an argument would, moreover, be at odds with the Communications Act, as discussed below.

⁴⁴ 16 U.S.C. § 470f (emphasis added).

⁴⁵ FCC staff has adopted this approach with Sprint. *See* Letter from Rose Crellin, FCC, to Roger C. Sherman, Sprint PCS, at 1 (April 20, 2000)(“[B]ecause the subject facilities will be constructed pursuant to a federal license, it is a federal undertaking. . .”).

In summary, tower siting decisions cannot credibly be deemed “federal undertakings” under NHPA when the federal government is not even aware of the location of most towers and antenna structures used by commercial wireless services.

B. PART 17 TOWER REGISTRATION DOES NOT CONSTITUTE A “FEDERAL UNDERTAKING” UNDER NHPA

In 1995, the Commission summarily concluded that the act of registering a tower under its Part 17 rules constituted a “federal undertaking” under NHPA:

[R]egistering a structure constitutes a “federal action” or “federal undertaking,” such that the imposition of environmental responsibilities on the structure owner is justified.⁴⁶

This conclusion is incorrect. Further, this conclusion cannot possibly be used to justify the application of NHPA to tower structures that are not registered.

The ACHP has recognized that “if a permit issuance was merely a ministerial act . . . the Federal action is not viewed as an undertaking.”⁴⁷ In *Sugarloaf Citizens Ass’n v. FERC*, 959 F.2d 508 (4th Cir. 1992), the Federal Energy Regulatory Commission (“FERC”) issued a certificate confirming that a new incinerator qualified as a small power production facility, and the argument was made that this FERC certificate constituted a “federal undertaking” under NHPA. The appellate court held that NHPA did not apply because FERC, in issuing its certificate, “exercised no discretion”:

Other Circuits have held that when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to [NHPA]. . . . It is further apparent that the FERC does not have sufficient control over the incinerator project to federalize it. . . .

⁴⁶ *Antenna Structure Registration*, 11 FCC Rcd 4272, 4289 ¶ 41 (1995).

⁴⁷ ACHP Legal Memorandum at § IV.A.2.

'[T]he federal agency must possess actual power to control the nonfederal activity.'⁴⁸

At issue in *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988) was whether a "notice of mines" constituted federal "regulation" and "approval" and, therefore, a "major Federal action" under the National Environmental Policy Act ("NEPA").⁴⁹ Under Bureau of Land Management ("BLM") regulations, certain mines were categorized as "notice mines." Although the BLM did approve mining operations at these mines, an operator could not commence mining until it submitted a "notice of mines" and received a BLM letter indicating that the notice was complete. In addition, operators were subject to enforcement if they did not comply with their representations in the notice of mines.⁵⁰ The appellate court nonetheless held this regulatory procedure constituted "only a marginal federal action rather than a major action" because "BLM does not sufficiently involve itself in the approval process to render notice mine review a major Federal action requiring NEPA compliance."⁵¹

Similarly, at issue in *National Trust for Historic Preservation v. Department of State*, 834 F. Supp. 443 (D.D.C. 1993), *rev'd in part on other grounds sub nom., Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995), was the Republic of Turkey's

⁴⁸ *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513-14 (4th Cir. 1992)(internal citations omitted) (emphasis added). *See also Atlanta Coalition on the Transportation Crisis v. Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979)(Federal agency "certification" of state/local transportation plan does not constitute a "major federal action" under NEPA); *Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990)(Army Corps of Engineers wetlands permit is not sufficient to "federalize" a local project and trigger NEPA review).

⁴⁹ Courts have consistently held that because of the similarity in triggers between NEPA (a major federal action) and NHPA (a federal undertaking), NEPA cases are useful precedent in NHPA cases. *See, e.g., McMillan Park Committee v. National Capital Planning Comm'n*, 968 F.2d 1283, 1290 (D.C. Cir. 1992) (J. Randolph, concurring); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 514 (4th Cir. 1992); *Edwards v. First Bank of Dundee*, 534 F.2d 1242, 1245 n.2 (7th Cir. 1976); *Gettysburg Battlefield Preservation Ass'n v. Gettysburg College*, 799 F. Supp. 1571, 1580-81 (M.D. Pa. 1992), *aff'd* 989 F.2d 487 (3d Cir. 1993).

⁵⁰ *See Sierra Club v. Penfold*, 857 F.2d 1307, 1309-10 (9th Cir. 1988).

⁵¹ *Id.* at 1314.

proposal to demolish its existing chancery building and replace it with a new one. Turkey was required to submit its proposal to the Department of State, which had the power to veto the proposal. The State Department did not exercise its veto authority, and the plaintiffs argued that the Department's failure to disapprove the proposal constituted a "federal undertaking." The district court rejected this argument, holding that "[t]he failure to veto complained of is not the functional equivalent of issuing a permit":

[T]he action of the Department of State is not a "license" as contemplated by NHPA. The State Department did not give written permission to Turkey. Nor was permission by the State Department a prerequisite to the FM-BZA's consideration of the application. Because no license was issued, the State Department was not required to comply with NHPA.⁵²

The court of appeals affirmed, holding that "no tenable reading" of NHPA supported plaintiff's expansive reading of NHPA:

At most, Turkey's project – not the Secretary's failure to disapprove it – is an "undertaking" within the meaning of § 106. In any event, the statute applies only to an "undertaking" that receives federal funding or a federal license, and Turkey's chancery project received neither.⁵³

In summary, federal courts have held that a federal agency has obligations under NHPA "only in relation to projects or programs they initiate or control through funding or approvals."⁵⁴ As another court has held, the environmental assessment "process is supposed to inform the decision-maker. This presupposes he has judgment to exercise."⁵⁵

⁵² *National Trust for Historic Preservation v. Department of State*, 834 F. Supp. 443, 449, 450 (D.D.C. 1993).

⁵³ *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 754 (D.C. Cir. 1995). *See also Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989) ("Clearing" of local project with a federal agency that did not have "the authority to grant or refuse permission" did not amount to federal licensing of the project.)

⁵⁴ *Lee v. Thornburgh*, 877 F.2d 1053, 1058 (D.C. Cir. 1989).

⁵⁵ *Village of Los Ranchos v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990).

[I]f the relevant federal agency retains no authority to terminate or significantly impact the project, a NHPA remedy similarly makes no sense.⁵⁶

Again, NHPA defines an undertaking as requiring “a Federal permit, license, or approval.”⁵⁷ The Commission’s antenna structure registration program, however, does not constitute “a Federal permit, license, or approval” under NHPA. In fact, the Commission’s own rules specify that tower registration is not approval, but solely “notice of proposed construction.”⁵⁸ In no circumstances can it be said that, in receiving tower registration notices, the Commission somehow “initiates or controls through funding or approvals” any part of the antenna siting process.⁵⁹ Accordingly, under the ACHP’s own interpretation of NHPA and the cases applying that Act, tower registration is not sufficient to trigger Section 106 review.

Further, Commission confirmation that tower registration constitutes a “federal undertaking” under NHPA would lead to absurd results. If the Commission based a Section 106 review obligation on its tower registration rules, then a Section 106 review need be performed only on those towers that must be registered.⁶⁰ The Commission has estimated, however, that only 15 percent of all towers require registration.⁶¹ It makes no sense to hold that NHPA review is required for the 15 percent of the towers that are registered, but not required for the 85 percent of the towers not registered. Either NHPA applies to tower construction, or it does not apply.

⁵⁶ *Gettysburg Battlefield Preservation Ass’n v. Gettysburg College*, 799 F. Supp. 1571, 1580-81 (M.D. Pa. 1992), *aff’d* 989 F.2d 487 (3d Cir. 1993).

⁵⁷ 16 U.S.C. § 470w(7).

⁵⁸ *See* 47 C.F.R. § 17.4(a).

⁵⁹ *See Lee v. Thornburgh*, 877 F.2d 1053, 1058 (D.C. Cir. 1989).

⁶⁰ The FCC recognized long ago that it does not have jurisdiction over towers that are not registered under Section 303(q). *See NEPA Order*, 49 F.C.C.2d 1313, 1331 ¶ 42 (1974).

⁶¹ *See Antenna Structure Registration*, 11 FCC Rcd at 4274 ¶ 5.

C. THE COMMUNICATIONS ACT CONFIRMS THAT ANTENNA SITING DECISIONS ARE NOT “FEDERAL UNDERTAKINGS”

The Communications Act confirms that antenna siting is not a “federal undertaking” under NHPA. The Act once required the Commission to issue a separate construction permit for each radio tower.⁶² During the time this requirement was in effect, the Commission declined to examine land use issues pertaining to the siting of radio towers, recognizing that such matters were properly within the domain of local governments and that “Commission interference” in such local matters would place “a considerable strain on our concept of the federal system”:

Traditionally, in authorizing the construction of communications facilities, the Commission’s concern with the physical plant has been limited to its communications efficiency. Other considerations related to the physical facilities or to their construction have been the concern of local building, zoning, and planning agencies and State and Federal land use authorities.⁶³

The Commission further confirmed that radio licensees need not undertake an environmental review of the buildings on which they placed their antennas because the Communications Act “does not authorize the construction of buildings as such.”⁶⁴

Congress codified this “hands off” policy in 1996 by adopting “a comprehensive framework for the exercise of jurisdiction by state and local zoning authorities over the

⁶² See 47 U.S.C. § 319(a)(1934)(“No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor.”)

⁶³ *NEPA Order*, 49 F.C.C.2d 1313, 1238 ¶ 39 (1974). See also *1986 NEPA Order*, 60 R.R.2d 13 at ¶ 17 (1986).

⁶⁴ *NEPA Reconsideration Order*, 56 F.C.C.2d 635, 639 ¶ 12(4) (1975). The FCC similarly held that LECs and cable companies have no obligation to undertake an NHPA review of their facilities because it does “not regulate the activities of intrastate common carriers by wire and does not authorize the construction of the distribution facilities by cable television systems. Actions with regard to these matters are State or local actions, *not Federal actions*, and are therefore not ‘major’ Federal actions.” *Id.* at ¶ 12(3)(emphasis added).

construction, modification and placement of facilities such as towers.”⁶⁵ In Section 704 of the Telecommunications Act of 1996, Congress expressly prohibited the Commission from exercising preemptive authority over “the placement, construction, and modification of personal wireless service facilities”:⁶⁶

[N]ew section 704 . . . prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.⁶⁷

While Congress did impose limits on state and local decisions concerning the siting of antenna structures,⁶⁸ it vested federal courts with exclusive jurisdiction to entertain challenges to local government siting decisions.⁶⁹ As a practical matter, therefore, the Commission has no statutory authority over the placement, construction, and modification of personal wireless service facilities – functions, the Commission acknowledged recently, “include ‘visual, aesthetic

⁶⁵ Wireless Telecommunications Bureau, Fact Sheet, [New National Wireless Facilities Siting Policies], at 1 (April 23, 1996).

⁶⁶ 47 U.S.C. § 332(c)(7)(A). The phrase, “personal wireless service facilities,” is defined as “facilities for the provision of personal wireless services.” *Id.* at § 332(c)(7)(C)(ii). The FCC has recognized that CMRS “antenna structures” fall within this definition. *See* Wireless Telecommunications Bureau, Fact Sheet No. 2, [National Wireless Facilities Siting Policies], at 4 (Sept. 17, 1996).

⁶⁷ CONF. REP. NO. 104-458, 104th Cong., 2d Sess., at 207-08 (Jan. 31, 1996). During the Congressional deliberations, a proposal was made to require the FCC to establish a “national policy for the siting of [CMRS] facilities.” *See* H.R. REP. NO. 104-204, at 94 (1995). This proposal was deleted in the final legislation, further indicating that Congress did not want the FCC to have a role in the construction, design, and location of tower structures.

⁶⁸ Among other things, local governments may “not unreasonably discriminate among providers of functionally equivalent services” and may “not prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i). In addition, local governments may not regulate “the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” *Id.* at § 332(c)(7)(B)(iv).

⁶⁹ *See* 47 U.S.C. § 332(c)(7)(B)(v). In contrast, the FCC can entertain complaints that a state or local government impermissibly regulated the RF emissions from antennas. *See id.* *See also Anne Arundel County Order, infra*; [Federal Guidelines for Local and State Government Authority over the Siting of Personal Wireless Service Facilities] (“Allegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be resolved exclusively by the courts (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission).”), *available at* www.wireless.fcc.gov/siting/local-state-gov.html.

or safety concerns.”⁷⁰ In this regard, the Commission has recognized that “other than RF emissions cases, the Commission’s role in Section 332(c)(7) [siting] issues is primarily one of information and facilitation.”⁷¹

Sheridan Kalorama Historical Ass’n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995) – is again instructive. The Republic of Turkey was required to submit its proposal to replace its chancery building to the District of Columbia Foreign Missions Act-Board of Zoning Adjustment (“DCFMA-BZA”), a body established by federal law. Under this federal law, the DCFMA-BZA was given approval authority concerning the “location, replacement, or expansion” of a chancery.⁷² The court of appeals reversed the district court’s holding that the DCFMA-BZA was subject to NHPA:

The DCFMA-BZA, though established concurrently in federal and District of Columbia law, is a local, not a federal body. . . . The NHPA contemplates that the ACHP will review the “policies and programs of Federal agencies,” whereas no provision is made for the NHPA to review individual determinations of a local body.⁷³

Indeed, the ACHP itself acknowledges that NHPA does not apply to state and local governments, such as a local zoning board.⁷⁴

If the Commission does not regulate the placement, construction and modification of antenna structures – including aesthetic consideration – it necessarily follows that the

⁷⁰ See *Petition of Cingular Wireless for a Declaratory Ruling That the Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, WT Docket No. 02-100, DA 03-2196, at ¶ 19 n.88 (July 7, 2003)(“*Anne Arundel County Order*”).

⁷¹ Federal Guidelines for Local and State Government Authority over the Siting of Personal Wireless Service Facilities, available at www.wireless.fcc.gov/siting/local-state-gov.html.

⁷² *Sheridan Kalorama Historical Ass’n v. Christopher*, 49 F.3d 750, 758 (D.C. Cir. 1995).

⁷³ *Id.* at 759-60 (internal citations omitted). See also *McMillan Park Committee v. National Capital Planning Comm’n*, 968 F.2d 1283, 1290 (D.C. Cir. 1992)(J. Randolph, concurring)(NHPA “does not authorize the Council to inject itself into local affairs.”).

⁷⁴ See ACHP Legal Memorandum at § IV.A.

Commission may not determine what kind of historic review licensees must perform concerning their proposed facilities. The Communications Act thus confirms that antenna siting is not a “federal undertaking” under NHPA and that any historic impact analysis of a proposed antenna structure should be undertaken by local governments without federal intervention.

D. THE POLICIES UNDERLYING NHPA DO NOT APPLY TO ANTENNA SITING DECISIONS

The policies that Congress sought to achieve with NHPA would not be promoted by application of NHPA procedures to antenna siting. In fact, applying NHPA to siting matters undercuts the policy objectives Congress emphasized in passing the National Historic Preservation Act.

NHPA’s purpose, Congress declared, is for “the Federal Government to accelerate *its* historic preservation programs and activities . . . and to *assist* State and local governments . . . to expand and accelerate their historic preservation programs and activities.”⁷⁵ One of the core purposes of Section 106 of NHPA is to help ensure that the views of local communities are considered in federal agency decision-making. As the ACHP has advised Congress, the “strength of the Section 106 process is the opportunity that it provides for members of the public to express their views and to participate in the Federal decision-making process”:⁷⁶

Effective public participation is strongly encouraged, and specific direction is provided for agencies to seek and consider the view of the public through the process.⁷⁷

In short, NHPA is designed to influence *federal* officials implementing *federal* policies, not private or local activities with peripheral federal involvement.

⁷⁵ 16 U.S.C. § 470(b)(7)(emphasis added).

⁷⁶ ACHP, Report to Congress, *Alternatives for Implementing Section 106 of the National Historic Preservation Act: An Assessment* (May 1998).

⁷⁷ *Id.*

But there is no “federal decision-making” involved in antenna siting. In addition, a local public participation and approval process already exists with regard to tower location and design: the local zoning board, which reviews the location, height and design of proposed towers, including the effects a particular tower might have on historic properties in the area, before approving the proposal.⁷⁸

Given this established local participation and approval procedure, the addition of the Section 106 process adds an unnecessary and redundant layer of bureaucracy. Indeed, to apply the Section 106 process to the local zoning process is to stand NHPA on its head: Section 106 is designed to facilitate local community participation in the federal agency decision-making process. As applied to antenna siting, however, the Section 106 process is instead used to interject federal government procedures into local government decisions. Experience confirms what one would expect from such a duplicative arrangement – namely, the NHPA process can prevent local communities from meeting their needs, including preserving the historical character of their neighborhoods and structures.⁷⁹

In summary, the construction of an antenna facility, whether by a carrier licensee or a non-licensee tower company does not constitute “a proposed Federal or federally assisted undertaking” under NHPA. As courts have held, “if the relevant federal agency retains no

⁷⁸ Local zoning board meetings are open to the public, and meetings addressing tower siting issues tend to be well publicized. Of course, local zoning boards are free to consult with SHPOs, and SHPOs may always submit their comments to zoning boards. Indeed, NHPA not only encourages SHPOs to “advise and assist . . . local governments in carrying out their historic preservation responsibilities,” but also requires them to “cooperate with local governments.” 16 U.S.C. 470a(b)(3).

⁷⁹ There are numerous instances where SHPOs have usurped the authority of local communities and landowners to determine how best to preserve local historic properties. Sprint provided several examples of such in the ACHP’s Section 106 rulemaking. *See e.g.*, Comments of Sprint PCS, *In the Matter of Amendment of Rules Implementing Section 106 of the National Historic Preservation Act* at 32-38 (August 31, 2000).

authority to terminate or significantly impact a project, a NHPA remedy . . . makes no sense."⁸⁰ And, as the ACHP has itself acknowledged, "when the Federal agency has minimal control over or involvement in the project, courts have increasingly found that Section 106 does not apply . . . even if a Federal agency approves of a project or issues a permit."⁸¹

This is precisely the situation with the siting of wireless facilities. In the end, antenna siting cannot be considered a "federal undertaking" when the federal government is not even aware of the tower and its location.

III. THE COMMISSION DOES NOT POSSESS AUTHORITY TO EXERCISE JURISDICTION CONGRESS HAS NOT DELEGATED TO IT

It is an elementary principle of administrative law that a regulatory agency has no power to act without a delegation of authority by Congress.⁸² The Commission is "a creature of statute" and "any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress."⁸³ In addition, an administrative agency cannot adopt rules simply because it perceives there is a problem that needs to be addressed. As the Supreme Court has declared:

⁸⁰ *Gettysburg Battlefield Preservation Ass'n v. Gettysburg College*, 799 F. Supp. 1571, 1580-81 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993).

⁸¹ ACHP Legal Memorandum at § IV.A.2.

⁸² See, e.g., *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 125-26 (2000); *Louisiana Public Service Comm'n v. FCC*, 486 U.S. 355, 374 (1986); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944).

⁸³ *Killip v. OPM*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) ("Though an agency may promulgate rules or regulations pursuant to authority granted by Congress, no such rule or regulation can confer on the agency any greater authority than that conferred under the governing statute."). See also *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) (Agency "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."); *Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("[W]hen congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."); *Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("An agency's power is no greater than that delegated to it by Congress.")

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority “in a manner that is inconsistent with the administrative structure that Congress has enacted into law.”⁸⁴

In other words, an agency cannot adopt rules simply because Congress did not expressly preclude such action, especially where Congress left no “gap for the agency to fill.”⁸⁵

As demonstrated above, the Commission does not have the authority under NHPA to impose historical review obligations on owners of wireless telecommunications facilities – whether they are common carrier radio licensees or non-licensee tower companies not regulated by the Commission. In fact, Congress made abundantly clear in the Communications Act that the Commission does not have regulatory jurisdiction over traditional zoning functions such as “the placement, construction, and modification of personal wireless service facilities.”⁸⁶

IV. CONCLUSION

For the foregoing reasons, Sprint respectfully requests that the Commission declare that decisions pertaining to the location, construction and/or modification of wireless telecommunica-

⁸⁴ *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 125 (2000), quoting *ETSI Pipeline v. Missouri*, 484 U.S. 495, 517 (1988).

⁸⁵ *Railway Labor Exec Ass’n v. National Mediation Board*, 29 F.3d 665, 671 (D.C. Cir. 1994). See also *Brown & Williamson Tobacco v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) (“[A]gency power is ‘not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.’”), *aff’d*, 529 U.S. 120 (2000).

⁸⁶ 47 U.S.C. § 332(c)(7)(A).

tions facilities do not constitute “federal undertakings,” and that, as a result, the Commission may not impose NHPA obligations applicable to federal agencies to antenna siting activities by telecommunications carriers (or other non-governmental entities).

Respectfully submitted,

SPRINT CORPORATION

A handwritten signature in black ink, appearing to read 'Luisa L. Lancetti', written over a horizontal line.

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August 8, 2003