

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
NATIONWIDE PROGRAMMATIC)
AGREEMENT REGARDING THE) WT Docket No. 03-128
SECTION 106 NATIONAL HISTORIC)
PRESERVATION ACT REVIEW PROCESS)

To: The Commission

**COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE
ASSOCIATION**

Jay Kitchen
President and CEO
Julie Coons
Executive Vice President
Connie Durcsak
Senior Director,
Government and Industry Affairs
PCIA
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

John F. Clark
Zachary A. Zehner
Keith R. Murphy
Perkins Coie LLP
Counsel for PCIA
607 Fourteenth Street, NW Suite 800
Washington, DC 20005-2011
(202) 434-1637

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Summary

On behalf of its members, PCIA – The Wireless Infrastructure Association – presents these comments in general support of the Draft Nationwide Programmatic Agreement (“Draft NPA”) regarding Section 106 reviews of FCC Undertakings under the National Historic Preservation Act (“NHPA”). Although the Draft NPA achieves many of the streamlining goals set by the Telecommunications Working Group (“TWG”), the group responsible for the initial draft, PCIA cautions that the FCC's Draft NPA has veered from those goals in several crucial ways. Indeed, PCIA is concerned that, without careful correction, some of the changes to the Draft NPA could lead to a final agreement that complicates rather than streamlines the Section 106 process.

In these comments, PCIA identifies several key principles that should guide the Commission in finalizing the Draft NPA.

- The final NPA must streamline and clarify the Section 106 process;
- The final NPA should streamline tribal participation provisions;
- Many activities at tower sites are not Undertakings and therefore, are not subject to Section 106 review;
- Exclusions must be practicable;
- Consideration of visual effects must be defined, explained and limited, as provided in current law; and
- Section 106 applies only to listed and determined eligible properties.

PCIA is confident that these guidelines will result in an NPA that will continue to preserve historic properties while bringing invaluable efficiency and economy to the Section 106 review process.

In addition, PCIA suggests a number of specific changes to the Draft NPA that can improve the Section 106 process and more precisely tailor its requirements to the Commission's responsibilities and the commercial and regulatory realities of the telecommunications industry. These solutions implement the guiding principles, which PCIA views as critical to the success of the Draft NPA in streamlining the Section 106 process.

Finally, PCIA provides revised versions of the Draft NPA and the two Submission Packet forms (Forms NT and CO) with suggested provisions intended to correct and improve the documents, as well as implement PCIA's proposals.

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Introduction and Background

PCIA – The Wireless Infrastructure Association – submits these comments on behalf of its members in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("*NHPA Notice*") regarding the Nationwide Programmatic Agreement ("Draft NPA") for the Section 106 National Historic Preservation Review Process.¹

PCIA is the principal trade association representing the wireless telecommunications and broadcast infrastructure industry. PCIA's members own and manage telecommunications towers and antenna facilities, and own or manage more than 50,000 towers that support digital and broadband services across the country. In the digital wireless age, towers are the indispensable infrastructure supporting the

¹ See Notice of Proposed Rulemaking, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 03-125 (rel. June 9, 2003) ("*NHPA Notice*").

wireless networks on which much of our country's economy, public safety, and national security depend.

As the leading representative of infrastructure providers, PCIA monitors the regulatory obligations imposed on its members and others in the industry. In addition, PCIA's members interact daily with State Historic Preservation Officers ("SHPOs"), Indian tribes and other consulting parties to implement the Section 106 process. These experiences provide PCIA's members with a unique perspective and a keen understanding of how this process works in practice, what changes are needed, and what will and will not improve or streamline the process.

No stakeholder in the streamlining process has invested more in this proposed programmatic agreement, is more sympathetic to its goals, or is more hopeful for its success than is PCIA. For three years, PCIA worked in the Telecommunications Working Group ("TWG") with the Commission, and with many other groups in the development of the nationwide agreements that are the subject of the *NHPA Notice*.²

² See *Public Notice*, "Wireless Telecommunications Bureau and Mass Media Bureau Invite Indian Tribes, Alaskan Native Villages and Native Hawaiian Organizations to Participate in Developing State Prototype Programmatic Agreement Regarding Historic Properties, Listed or Eligible for Listing in the National Register of Historic Places," DA 02-312 (rel. June 11, 2002).

The TWG was originally formed by the Advisory Council on Historic Preservation ("ACHP") in August of 2000 and was made up of, or had input from, the following groups: (1) representatives from government, including the FCC, the ACHP, the National Conference of State Historic Preservation Officers ("NCSHPO"), and individual State Historic Preservation Officers ("SHPOs") notably those from Delaware, Ohio, Vermont, Arkansas, Arizona, Massachusetts, Georgia, Washington, and North Carolina; (2) tribal representatives, including the National Association of Tribal Historic Preservation Officers ("NATHPO") the National Council of American Indians, United South and Eastern Tribes ("USET"), and representatives from individual tribes, including the Navajo Nation and others; (3) the wireless telecommunications, telecommunications infrastructure and broadcast industries, including representatives from the trade associations Cellular Telecommunications and Internet Association ("CTIA"), PCIA, and the National Association of Broadcasters ("NAB"), and individual companies including Nextel, AT&T Wireless, Verizon Wireless, Sprint PCS, American Tower Corporation, Crown Castle, SBA, T. Mobile, and Alltel; (4) National Historic Trust; and (5) representatives of the cultural resources consulting industry, including the trade association American Cultural Resources Association ("ACRA") and individual companies such as EBI and URS Dames and Moore.

PCIA played a key role in the drafting of the Nationwide Collocation Programmatic Agreement ("Collocation Agreement" or "NCPA")³ and PCIA helped draft much of what has now become the Draft NPA.

It is, therefore, from a position of support, and with the wisdom of its long experience, that PCIA must caution the Commission that this Draft NPA has veered in some crucial ways from its original course and from the streamlining goals adopted by the Commission. PCIA is concerned that without careful correction, some of the proposed changes to the Draft NPA could lead to a final NPA that complicates, rather than streamlines the Section 106 process. Some of these changes could add considerable unnecessary burden and expense to the already costly and time-consuming process that PCIA's members and others FCC regulatees must undertake on behalf of the Commission. PCIA urges the Commission to avoid that unfortunate and unnecessary regulatory result.

PCIA reaffirms its belief that adoption of this agreement remains an important goal. PCIA's members have long been frustrated by the "regulatory muddle and delay that has beset . . . tower-construc[tion]" described by Chairman Powell.⁴ PCIA agrees with the Chairman that the NPA must "improve our ability to protect valuable historic and environmental resources, while at the same time accelerating the process of deploying necessary communications infrastructure."⁵ It is important to note that PCIA's members are some of the key field participants that must effectuate the Commission's policies and both elements of this laudable goal. As such, PCIA

³ *NHPA Notice* at Attachment 1.

⁴ *Id.*, Separate Statement of Chairman Michael K. Powell.

⁵ *Id.*

believes that its members' hands-on experience and perspective should lend particular weight to these comments.

In these comments, PCIA identifies several of the principles that guided the deliberations of the TWG and which should continue to guide the Commission in finalizing the NPA. PCIA also suggests a number of specific changes that can improve the Section 106 process and more precisely tailor its requirements to the Commission's responsibilities and the commercial and regulatory realities of the telecommunications industry. Finally, PCIA provides a revised version of the Draft NPA (Attachment A) and the two Submission Packet forms (Attachments B and C) with suggested modifications intended to correct and improve the documents as well as implement PCIA's proposals.

As discussed herein, PCIA urges the Commission to adopt the guiding principles and concepts developed by the TWG, to establish new principles that advance those same goals, and to correct and clarify certain portions of the Draft NPA that are inconsistent with current preservation law. PCIA believes that it will be important for the Commission to preserve only the portions of the Draft NPA that adhere to these principles and to incorporate only those revisions that do the same. PCIA is confident that these guidelines will result in a final NPA that will continue to preserve historic properties while bringing invaluable efficiency and economy to the Section 106 review process.

I. Key Principles That Should Guide the Finalization of the NPA

The TWG crafted much of the Draft NPA over more than a year, involving hundreds of person-hours of serious debate and compromise. This important work was guided by an unwritten set of principles and goals. The Commission's Section 106 policy should continue to seek to achieve these core principles and to harmonize the remaining portions of the Draft NPA with prevailing law and the NHPA.

Accordingly, PCIA urges the Commission to adopt and apply the following tenets in finalizing the Draft NPA and in evaluating the comments and suggestions of parties in this proceeding:

- The NPA must streamline and clarify the Section 106 process;
- The NPA should streamline tribal participation provisions;
- Many activities at tower sites are not Undertakings and therefore, are not subject to Section 106 review;
- Exclusions must be workable;
- Consideration of visual effects must be defined, explained and limited as provided in current law; and
- Section 106 applies only to listed and determined eligible properties.

A. Streamlining and Clarifying Section 106 Procedures

After many years of effort and public input, the Advisory Council on Historic Preservation (“ACHP” or “Council”) developed a detailed set of procedures and rules to implement Section 106 for all federal agencies.⁶ By law, any National Historic Preservation Act (“NHPA”) programmatic agreement must be consistent with the ACHP’s regulations and prevailing law.⁷ To meet the Commission’s streamlining goals, however, the Draft NPA must also clarify, simplify, focus and tailor the process to meet the realities of the telecommunications industry and the Commission’s regulatory responsibilities. Where possible, the new NPA should provide the same level of protection to historic properties as the ACHP rules, while also employing greater flexibility and incurring less cost and delay. The Commission’s streamlining

⁶ See 36 C.F.R. Part 800.

⁷ See *id.* § 800.14(a).

efforts should improve existing processes without imposing additional requirements upon regulators, applicants or licensees.

PCIA approves and supports the adoption of a number of specific proposals set forth in the Draft NPA provisions. These proposals advance the key principles identified above.

First, PCIA agrees that all replacement towers should be excluded from the consultation and review process. Allowing tower owners to extend the existing compound and excavation by "30 feet in any direction" appropriately provides a reasonable and realistic degree of flexibility.⁸

Second, in the section of the Draft NPA concerning the assessment of effects, the proposed text stipulates that "[n]o archeological survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites."⁹ PCIA strongly supports this language and believes this exclusion is a worthy example of a practical and low-risk streamlining measure.

Third, PCIA supports the adoption of the presumption that no archeological resources exist within an area of potential effect ("APE") where all areas to be excavated involve "previously disturbed" ground to the specified depths. PCIA also approves of the exception for the footings and similar limited areas of deep excavation." Because construction of towers and collocation antennas and associated equipment typically involves only limited deeper excavation, this definition poses little risk to archeological resources. Moreover, this exclusion would be impractical and unusable without this footing exemption. Again, PCIA commends this

⁸ Draft NPA at Section III.A.2., A-8.

⁹ *Id.* at Section VI.C.3., A-18.

recognition of the realities of the telecommunications industry and supports inclusion of this provision.

Fourth, the Commission should continue and improve upon the efforts of the TWG in developing standard, understandable and user-friendly submission packets for Section 106 reviews. PCIA does not believe, however, that the proposed draft forms yet achieve this streamlining goal. PCIA accordingly suggests significant revisions to the submission packet forms (Form NT and Form CO) as shown in Attachments B and C.

Finally, bringing uniformly applied and fairly enforced time limits to the historic preservation review process is extremely important to PCIA. The time limits in the final NPA should streamline the process, properly speed conclusion of Section 106 review, and require action within specific, reasonable review and comment periods. Prolonged review of proposed facilities wastes valuable and limited compliance resources and injects debilitating uncertainty into the progress of the deployment of networks. As such, PCIA strongly supports the proposal in the Draft NPA that if the SHPO fails to respond to an Applicant's Submission Packet within thirty days, the proposed facility will be deemed to have "no effect on [h]istoric [p]roperties," and the Section 106 review will be complete. This thirty-day period provides SHPOs adequate time to review proposed facilities and generates the proper incentives for SHPOs to conduct Section 106 reviews efficiently.¹⁰

B. Scope and Nature of Tribal Participation

In every facet of the Section 106 process, Indian tribes must be treated with the utmost respect that they deserve as domestic dependent sovereign nations. This is true both in their relations with the federal and state governments and with private

¹⁰ PCIA addresses improvements to other timing issues related to the Section 106 process elsewhere throughout these comments.

industry. Tribes are entitled to special consideration in certain areas, particularly in their right to government-to-government consultation,¹¹ the effort needed to identify potentially interested tribes,¹² and in the effort needed to identify historic properties to which a tribe may attach religious and cultural significance.¹³ Notwithstanding these special considerations, in other areas, the Draft NPA need not and should not confer greater rights on tribes than those imposed on other Section 106 consulting parties. To the extent that the Navajo Nation and the United South and Eastern Tribes ("USET") have proposed greater rights for tribes, these proposals should be rejected.

1. The Navajo Nation Proposal

The Draft NPA includes in Section III.B. a proposal by the Navajo Nation that would require applicants to notify Indian tribes prior to commencement of construction of every Undertaking otherwise excluded from the Section 106 process under the NPA except temporary structures. In support of this position, the Navajo Nation argues that Indian tribes have special rights of consultation under the NHPA that may not be excluded in a programmatic agreement, and that because they have not been consulted heretofore by industry or the FCC in connection with many completed towers, they should not have their rights of notification or consultation further limited in this agreement.

There are three fundamental flaws in the Navajo Nation's proposal. First, under the ACHP rules, the legal effect of excluding classes of Undertakings is an unqualified exemption from Section 106 review. The ACHP rules do not contemplate or allow exemptions to categories of exclusion, except when the Commission

¹¹ See 36 C.F.R. § 800.14(f).

¹² See *id.* § 800.3(f)(2).

¹³ See *id.* § 800.4(b).

determines special circumstances warrant review.¹⁴ PCIA believes that any attempt to force such an awkward process into the NPA would be ill-advised. Second, tribes have no independent right to consultation outside the context of the Section 106 process. And, third, no legally sustainable reason has been advanced to justify this unnecessary and burdensome proposal. For these reasons, PCIA encourages the Commission to reject the Navajo Nation's proposed language and adopt the alternative Section III.A. proposes in the Draft NPA.

a. The Legal Effect of Excluding Classes of Undertakings as an Unqualified Exemption From Section 106 Review

Under Section 214 of the NHPA and ACHP Rule 800.14, the FCC is authorized to develop alternate procedures,¹⁵ including programmatic agreements,¹⁶ as a complete substitute for the Council's Section 106 rules.¹⁷ The Commission's authority to exclude certain Undertakings from Section 106 review¹⁸ is rooted in

¹⁴ See *id.* § 800.14(e).

¹⁵ Section 800.14(a) provides that "[a]n agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E)." 36 C.F.R. § 800.14(a).

¹⁶ Subsection b states that "[t]he Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." *Id.* § 800.14(b).

¹⁷ See *id.* § 800.14(b)(2)(iii) ("Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council.").

¹⁸ The Council's regulations make clear that excluded Undertakings are exempted from any and all consultation and review under Section 106. ACHP Rule 800.14(c)(6) specifies:

Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to [the Council's Regulations in] subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

section 214 of the NHPA, which grants the Council broad authority to "promulgate regulations, as appropriate, under which Federal programs or Undertakings may be exempted from any or all of the requirements of [the NHPA]." ¹⁹ Consistent with this authority, the Draft NPA states that "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." ²⁰

Accordingly, the legal effect of excluding classes of Undertakings is an unqualified exemption from Section 106 review.

The rules neither allow for nor contemplate any exception to the exclusion for particular classes of consulting parties. ²¹ Obviously any such exception would not only be extremely awkward, but would also defeat much of the benefit for which the exclusions are developed in the first place, ultimately defeating the goals of the NPA.

Id. § 800.14(c)(6) (emphasis added).

¹⁹ NHPA Section 214 provides in full

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 Act when such exemption is determined to be consistent with the purposes of this Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.

16 U.S.C. § 470v.

²⁰ Draft NPA at A-2.

²¹ The provisions of 36 C.F.R. § 800.14(c) allow for exception to exclusions in "circumstances" involving an undertaking, not for classes of consulting parties.

b. Indian Tribes Have No Independent Right to Consultation Outside the Section 106 Process

Upon execution, the final NPA will constitute a complete substitute for the Section 106 process, including an applicant's tribal consultation obligations.²² Despite the Navajo Nation's claims that Section 101(d)(6) of the NHPA imposes separate consultation obligations, no independent right to consult exists outside the Section 106 process.

Section 101(d)(6) of the NHPA provides, in relevant part:

- (A) Properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
- (B) In carrying out its responsibilities under section 106 of the Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A). * * *²³

The consultation obligation in Section 101(d)(6)(B), however, extends no further than the Section 106 process, as the phrase “[i]n carrying out its responsibilities under section 106 of the Act” makes clear. Where Section 106 responsibilities are lawfully excluded and require no further review, there is clearly nothing left of the consultation requirement provided in Section 101(d)(6). Moreover, the numerous references and explanations regarding tribal consultation in the Council's rules implementing both Section 101(d)(6) and Section 106 firmly establish

²² See 36 C.F.R. § 800.14(b)(iii).

²³ 16 U.S.C. §470a(d)(6).

that the Commission's tribal consultation obligations are based on Section 106 and extend no further than the Section 106 process.²⁴

No other federal laws contain any independent tribal consultation requirements in connection with effects to historic properties or for Undertakings excluded from consultation and further review under the Draft NPA or the NCPA. Neither the American Indian Religious Freedom Act,²⁵ the Native American Graves Protection and Repatriation Act,²⁶ nor the Archeological Resources Protection Act²⁷ provide any justification for the Navajo Nation's position.

²⁴ See, e.g., 36 C.F.R. § 800.2(c)(2)(ii)(A) ("The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process."); *id.* § 800.2(c)(2)(ii)(D) ("When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part."); *id.* § 800.3(f) ("Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate in the section 106 process."); *id.* § 800.3(f)(2) ("Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.").

²⁵ 42 U.S.C. § 1996.

²⁶ 25 U.S.C. §§ 3001-13.

²⁷ 16 U.S.C. §§ 470aa-70mm.

In addition, Section 101(d)(6) expressly limits the description of properties to which the consultation duty extends to only those properties determined eligible for the National Register.²⁸

c. The Navajo Nation Has Failed to Adequately Justify This Unnecessary and Burdensome Proposal

The Navajo Nation has been unable to articulate a sufficient justification for why the carefully crafted exclusions should not apply to tribes or why these excluded projects would have higher potential for effects on historic properties of significance to tribes than to other historic properties. The proposal creates an awkward "exceptions-to-the-exclusions" provision, thereby obviating much of the benefit to be gained from adopting exclusions in the first place. The proposal would result in unnecessary delay and expense as applicants would be required to submit thousands of notifications for Undertakings unlikely to cause effects to Indian historic properties.

The ACHP's regulations do provide that an "exempted program or category *shall require no further review*," unless the agency official "determined that there are circumstances under which *the normally excluded undertaking* should be review under subpart B of this part."²⁹ Such kick-out provisions are common in environmental law. They are used to address exceptional circumstances in the individual case that indicate that application of the exclusion is inappropriate.³⁰ Use of a kick-out provision is

²⁸ *Id.* § 470a(d)(6)(A), (B); *see* discussion *infra* Section I.F.

²⁹ 36 C.F.R. § 800.14(c)(6) (emphasis supplied).

³⁰ *See, e.g.*, 40 C.F.R. § 1508.4. This provision of the National Environmental Policy Act regulations defines activities categorically excluded from further environmental review, which is akin to the exclusions listed in the Section III.A. of the Draft NPA. The provision provides,

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in

appropriate when the agency determines that a particular excluded activity will produce significant effects of the sort the act was designed to address.³¹

Given the significant burden and complication its proposal would add to the Section 106 process, convincing justification for the special notification the Navajo Nation is requesting should be required. It has provided none. The Navajo Nation has made no attempt to justify what must be its implicit claim that impacts on historical properties from actions that the FCC has otherwise deemed likely to be minimal or not adverse in all other cases somehow generates more acute impacts on certain lands of cultural or religious importance to tribes thereby warranting consultation. Moreover, the Navajo Nation unreasonably proposes that it will be the Indian tribe that shall determine, after notification, whether an adverse effect may occur and whether further review is necessary. The ACHP's regulations clearly state that it is the agency or the ACHP that is responsible for determining whether its is appropriate to use a kick-out provision, not interested parties.³²

The TWG developed the proposed exclusions in Section III.A. precisely because they have little or no ability to cause adverse effects to historic properties,

procedures adopted by a Federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in Sec. 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Id. § 1508.4 (emphasis supplied).

³¹ *See id.*

³² *See* 36 C.F.R. § 800.14(c)(6) ("Any undertaking that falls within an approved exempted program or category shall require no further review . . . unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part."). (Emphasis added).

including properties of significance to Indian tribes or native Hawaiian organizations (“NHOs”).³³ In contrast to the Navajo Nation's unwieldy proposal, straight application of those exclusions, with of course attention to extraordinary individual cases requiring review, achieves the purposes of the NPA. For these reasons, PCIA encourages the Commission to reject the Navajo Nation's proposed language.

2. The USET Proposals

USET has proposed an alternative – Alternative B – to Section IV. of the Draft NPA.³⁴ Among other things, Alternative B would require the Commission to consult directly with every tribe, for every Undertaking, except where a given tribe expressly waives in writing its right to direct consultation. USET argues that Alternative A constitutes an unlawful delegation to non-governmental entities of the Commission's obligations under both Section 101(d)(6) and the federal trust responsibility to consult with tribes. USET offers Alternative B as a "practical solution" to this asserted problem.³⁵

PCIA believes that Alternative B, far from being a practical solution, would be a logistical and regulatory nightmare for all parties involved, including Indian tribes. More importantly, the heavy-handed, inflexible and overly-restrictive requirements of Alternative B are legally unnecessary. Excessively rigid regulatory solutions that implausibly rely on requiring the Commission staff to participate personally in thousands of consultations all over the country will not facilitate better, more efficient review.

³³ To the extent the excluded Undertakings do not have the potential to cause effects on historic properties, ACHP Rule 800.3(a)(1) dictates "the agency official has no further obligation under section 106 or this part." *Id.* § 800.3(a)(1).

³⁴ *See* Draft NPA at Section IV. (Alternative B), A-14 – A-15.

³⁵ *Id.* at Section IV. n.9 (Alternative B), A-14.

As long as the Commission is accessible and able to engage in full consultation with any tribe on any Undertaking at any time, the tribes' rights of government-to-government consultation are fully protected. By assigning the initial responsibility of providing information to and soliciting information from Indian tribes to industry representatives possessing the greatest knowledge of the proposed action, the overall goal of protecting historic properties of religious and cultural significance to these tribes will be enhanced.

Moreover, the procedures specified in Alternative A of the Draft NPA are a lawful delegation, as discussed below, and are vastly preferable to the truncated procedures in Alternative B. Alternative A will better protect both the rights of tribes and their history, while encouraging greater, more flexible and more efficient participation in the Section 106 process by all Indian tribes and NHOs.

a. The FCC Can Lawfully Authorize Applicants to Facilitate Tribal Participation in the Section 106 Process

The ACHP has interpreted the NHPA to allow agencies to permit applicants to initiate Section 106 consultation.³⁶ According to the ACHP, the FCC can authorize representatives to act on its behalf in initiating the Section 106-review process, identifying and evaluating historic properties, and assessing effects.³⁷ Such authorization is consistent with 36 C.F.R. Part 800.³⁸ The ACHP, however, also

³⁶ See Memorandum, *The Delegation of Authority for the Section 106 Review of Telecommunications Projects*, from John M. Fowler, Executive Director, ACHP, to Federal Preservation Officers, SHPOs, THPOs (September 21, 2000) ("*Delegation Memorandum*"). The ACHP's interpretation of NHPA is entitled to deference. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

³⁷ See *Delegation Memorandum*.

³⁸ See *id.*

determined that the FCC remains responsible for participating in the consultation process when:

- 1) it is determined that the *Criteria of Adverse Effect* apply to an undertaking;
- 2) there is a disagreement between the licensee, applicant, tower construction company, or their authorized representatives and the SHPO/THPO regarding identification and evaluation, and/or assessment of effects;
- 3) there is an objection from consulting parties or the public regarding findings and determinations, the implementation of agreed upon provisions, or their involvement in a Section 106 review; or
- 4) there is the potential for a foreclosure situation or anticipatory demolition as specified in Section 110(k) of the [NHPA].³⁹

Similarly, when it substantially revised its own regulations in 2000, the ACHP rewrote section 800.2(c)(5) to resolve a major problem regarding participation of applicants in the Section 106 process. The ACHP clearly stated that "an agency may authorize a group of applicants to initiate the Section 106 process, rather than being required to grant individual authorizations. Language was also added to clarify that such authorizations do not relieve the federal agency of its obligations to conduct government-to-government consultation with Indian tribes."⁴⁰ This language distinguishes between the initiation of the process and the process of consultation itself.

³⁹ *See id.*

⁴⁰ Protection of Historic Properties, 65 Fed. Reg. 77698, 77700 (Dec. 12, 2000) (later codified at 36 C.F.R. Part 800).

Alternative A strictly follows the ACHP's memorandum and regulations by allowing applicants and tribes to work together to reach a consensus concerning specific Undertakings while still requiring the applicant to refer all objections and disagreements to the FCC for a determination.⁴¹ The FCC has not delegated to the applicant any power to resolve disputes or make determinations without the consent of the tribe. PCIA agrees that applicants cannot perform such government-to-government consultation duties on behalf of the FCC.⁴²

Instead, as described above, Alternative A allows Indian tribes to waive direct government-to-government consultation under Section 106 by simply electing to deal with the applicant directly. At the outset of the process, the applicant must provide potentially affected tribes with written notice of the location and description of the proposed facility and information (including name, address, and telephone number) regarding how to submit comments regarding potential effects on historic properties.⁴³ If, after the information is supplied, the tribe determines that consultation is either unnecessary or undesirable, it can waive its right to government-to-government consultation simply by not requesting it.⁴⁴ If, however, the tribal authority involved

⁴¹ Alternative A states that in cases of disagreement, "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." Draft NPA at Section IV.I. (Alternative A) A-13.

⁴² See 65 Fed. Reg. at 77703 ("Federal agencies are required to consult with Indian tribes on a government-to-government basis pursuant to Executive Orders, Presidential memoranda, and other authorities. The proposed rule was amended to acknowledge this responsibility. The authorization to applicants to initiate consultation does not include consultation with Tribes.")

⁴³ See Draft NPA at Sections IV.E. (Alternative A), A-12 and V.C., A-15 – A-16.

⁴⁴ See *id.* at Section IV.A. (Alternative A), A-11.

determines that consultation is either appropriate or necessary, it may request direct consultation with the Commission at any time.⁴⁵

In addition to being consistent with ACHP's regulations and memoranda, Alternative A is similarly in line with federal law addressing the involvement of private applicants in the agency decision making process. Again, Alternative A does not actually delegate any rulemaking or decision-making authority over Indian tribes to applicants. Rather, it only allows the applicant to assume a role in the process, as do many other environmental regulations.⁴⁶

b. Alternative A's Procedures Are Fully Consistent with the FCC's Tribal Consultation Responsibilities

Federal statutes and policies require consultation with Indian tribes on a wide variety of matters.⁴⁷ As domestic dependent nations with the powers of self-government,⁴⁸ Indian tribes consult with the federal government (or federal agencies)

⁴⁵ See *id.* at Section IV.B. (Alternative A), A-11. See also 65 Fed. Reg. at 77702 (explaining that "[i]t is the duty of the relevant federal agency (and not the Council) to specify how they meet their government-to-government responsibilities").

⁴⁶ The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, for example, allows applicants to play a substantial role in the environmental review process. Under the regulations, an applicant can be permitted to conduct an environmental assessment. See 40 C.F.R. 1506.5(b). This document is integral to an agency's determination on whether further environmental review is needed. See *id.* § 1501.3. As long as the action agency retains responsibility for determining whether additional review is needed, this delegation is entirely permissible. See *id.* § 1506.5(b).

⁴⁷ See Derek C. Haskew, Federal Consultation with Indian Tribes: Foundation of Enlightened Policy Decisions, Or Another Badge of Shame? 24 Am. Indian L. Rev. 21, 74 n.3 (2000) for a list of authorities requiring federal consultation with Indian tribes.

⁴⁸ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (explaining that Indian tribes may "be denominated domestic dependent nations. . . . Their relationship to the United States resembles that of a ward to his guardian.").

on a government-to-government basis.⁴⁹ Further, the United States must adhere to certain fiduciary standards in their dealings with federally recognized Indian tribes.⁵⁰ The purpose of the consultation requirement is to ensure that tribal views are taken into account in the federal decision making process. To meet this goal, tribal consultation is to occur "in advance with the decision maker or with intermediaries with clear authority to present tribal views to the [agency] decision-maker."⁵¹

Alternative A of the Draft NPA fully meets the tribal consultation duties imposed under Section 106, the Council's rules, and section 101(d)(6)(B), by providing for extensive consultation opportunities while still creating a streamlined and efficient process for all parties. Specifically, Alternative A establishes a process that enables tribal governments to "request Commission consultation on any and 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."⁵²

Moreover, as required in the Council's rules and federal case law, Alternative A provides that a "good faith effort" should be made, meaning more than a "mere

⁴⁹ See e.g., Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (November 9, 2000). Although there are numerous Presidential documents and Executive Orders that create tribal consultation procedures, those procedures govern the internal management of the executive agencies. See Haskew, 24 Am. Indian L. Rev. at 26. For the purposes of the draft NPA, the only relevant consultation provisions are those included in the NHPA and the Council's rules. See *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1099 (9th Cir. 1986) (finding that unpublished, internal policies are non-binding); cf. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (explaining that the failure of an agency to comply with internal policies declared by the agency to be binding, including the policy of consultation when it has created a justified expectation on the part of Indian tribes, violates general administrative decision making principles and the federal trust obligation to Indian tribes).

⁵⁰ See *United States v. White Mt. Apache Tribe*, 537 U.S. 465 (2003).

⁵¹ *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995).

⁵² Draft NPA at Section IV.B. (Alternative A), A-11.

request for information," to identify both interested tribes and relevant historic properties.⁵³ Alternative A addresses such concerns in several instances. For example, section D provides, in part:

Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to 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 [C]ontacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes⁵⁴

Under Alternative A, it is insufficient to rely on a single, potentially inadequate source of information. Furthermore, the process recommends efforts to encourage the participation of the potentially affected Indian tribes. For example, Section F states:

[A]n 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

⁵³ Section 106 regulations require the agency to make a "reasonable and good faith effort to carry out appropriate efforts, which may include background research, consultation, oral history, interviews, sample field investigations, and field survey." 36 C.F.R. § 800.4(b). *See also Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995) (explaining that because tribal customs "restrict the ready disclosure of specific information," a "mere request for information alone is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires.") and *Attakai v. United States*, 746 F. Supp. 1395, 1407 (D. Ariz. 1990) (finding that surveys alone are insufficient to satisfy the consultation requirements of the NHPA and that "without consultation with the SHPO or reference to other available information, the Agency Official has no reasonable basis under the regulations to determine what additional investigation aside from a survey may be warranted or the reasonable scope of the survey . . .").

⁵⁴ Draft NPA at Section IV.D. (Alternative A), A-11 – A-12.

Submission Packet at the time it is submitted to the SHPO/THPO, and/or where practical, contact by telephone.⁵⁵

This provision is designed to ensure that tribal authorities are given ample opportunity to reply to initial contacts made by applicants, as directed by federal case law.⁵⁶

Likewise, to account for cases in which the properties involved are "highly confidential, private, and sensitive," Alternative A mandates that an applicant must honor a tribal request for confidentiality and "shall, in turn, request confidential treatment of such materials. . . ." ⁵⁷ Incorporation of this provision addresses concerns that "knowledge of traditional cultural values may not be shared readily with outsiders" as such information is "regarded as powerful, even dangerous" in some societies.⁵⁸

Alternative A provides: (1) a flexible and efficient method of gathering and exchanging important information with the relevant Indian tribes and NHOs regarding proposed Undertakings and the existence of, and the Undertaking's potential impacts to, historic properties located off tribal lands that are of significance to tribes; (2) FCC oversight and responsibility for providing continuous agency availability to tribes and real opportunity for meaningful consultation before a decision is made regarding a federal Undertaking; (3) guidance for applicants to make a good faith effort to identify

⁵⁵ *Id.* at Section IV.F. (Alternative A), A-12.

⁵⁶ Of course, 36 C.F.R. Part 800 includes specific deadlines that should be followed within the draft NPA. Alternative A should be drafted in a manner consistent with those deadlines, while still providing an adequate opportunity for tribal authorities to respond. Without such deadlines, PCIA believes that it will be difficult to apply section F of Alternative A because the timing of the notice period will be indefinite.

⁵⁷ Draft NPA at Section IV.J. (Alternative A), A-13.

⁵⁸ *See Pueblo of Sandia*, 50 F.3d at 861 (citing National Register Bulletin 38).

properties of traditional religious and cultural importance and to elicit response from Indian tribes in a manner sensitive to the confidential nature of such information.

c. Requests for Confidentiality

USET proposes certain revisions to Section IV.J. of the Draft NPA, which relates to requests by tribes and NHOs for confidential treatment of information and materials. Both proposals should be rejected as they will unnecessarily complicate the Section 106 process and lead to no greater protection for confidential materials than the Draft NPA currently affords.

USET requests that confidentiality requirements be applied to all consultations with Indian tribes and NHOs under Section 106 whether or not confidentiality has been requested.⁵⁹ If accepted, this proposal will encumber and complicate the Section 106 process for all parties by requiring confidential handling of non-confidential material. Moreover, the proposal is unnecessary in light of the confidentiality obligations already in place in the NHPA and the ACHP rules. At a minimum, given the costs and burdens associated with the handling of confidential material, Indian tribes and NHOs should be required to indicate whether confidential treatment is necessary. As currently drafted, Section IV.J. of the Draft NPA complies with the NHPA and the Council's rules and should be adopted.⁶⁰

⁵⁹ Draft NPA at Section IV.J. n.8 (Alternative A), A-13.

⁶⁰ Section 304 of the NHPA sets forth the FCC's confidentiality obligations with respect to "the location, character, or ownership of a historic resource" and obligates the Commission to withhold such information *only* in certain well-defined circumstances. As currently drafted, Section IV.J. (Alternative A) of the Draft NPA expressly references the right of all Indian tribes to request confidential treatment under Section 304 of the NHPA and guarantees that the "Applicant shall honor this request." Draft NPA at Section IV.J. (Alternative A), A-13. If the Applicant forwards confidential materials to the Commission, pursuant to this provision of the Draft NPA, "[t]he Commission shall provide such confidential treatment consistent with applicable federal laws." *Id.* Neither Section 304 nor the Council's rules require that confidentiality requirements be applied to all consultations with Indian tribes under Section 106.

In addition, adopting USET's proposed requirement would certainly complicate or contradict other streamlining measures proposed in the Draft NPA. Accordingly, the USET proposal should be rejected as inconsistent with the NHPA, and the ACHP rules. Section IV.J. of the Draft NPA should be retained.

In summary, Alternative A meets all of the requirements of the Section 106 process while at the same time properly addressing all of the Commission's obligations to tribes under federal law, internal procedures and treaties, and at the same time allowing for the efficient resolution of the Section 106 review process. USET's unwieldy and unnecessary Alternative B should be rejected.

C. Clarifying Undertakings

1. The Applicability and Scope of the NPA Must Be Clear

Under Section I, entitled "Applicability and Scope of this Nationwide Agreement," the Draft NPA ambiguously states it is applicable to "certain" Undertakings. The FCC lists examples of Undertakings in Attachment 2, which includes most, if not all, of the permits provided by the Wireless Telecommunication and Media Bureaus. Neither the Draft NPA nor Attachment 2, however, clearly identifies which of those Undertakings come under the jurisdiction of the Draft NPA. If the intent of this document is to apply to the construction of new towers and to Collocations that are not covered by the Collocation Agreement, this should be clearly stated under Section I. For the purposes of the NPA, the term "Undertaking" should be defined to mean only those Undertakings subject to the NPA to avoid the current confusion created by the inartful use of that term throughout the draft NPA.

2. The NPA Is Only Applicable to Undertakings

The Draft NPA rightfully recognizes that maintenance and servicing of towers, antennas and associated equipment are not deemed to be Undertakings subject to Section 106 review.⁶¹ However, as discussed in more detail below, Section III of the Draft NPA expressly excludes from Section 106 review "modifications of Towers and associated excavation that do not involve a Collocation and does not substantially increase the size of the existing Tower, as defined in the Collocation Agreement," hereinafter referred to as "Exclusion 1." This exclusion wrongfully implies that modifications involving collocations are Undertakings. The final NPA must be drafted to recognize that, just as in the case of maintenance and service, such activities are not subject to Section 106 review *ab initio*.

The term "Undertaking" is defined by the NHPA as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency."⁶² For the purposes of the Draft NPA, the only activities that subject the Commission to Section 106 are those "requiring a Federal permit, license or approval." Modifications to towers that do not involve collocations are not subject to the "permit, license or approval" of the Commission, and therefore, are not Undertakings.

As currently drafted, given the broad definition of "tower" and Exclusion 1, the construction of a new fence, the installation of an air conditioner, the extension of an

⁶¹ Draft NPA at Section I.B.

⁶² 36 C.F.R. § 800.16(y).

access road, the planting of new shrubs or the installation of a generator, among other things, might be considered to be Undertakings under the Draft NPA. Certainly, these routine tower activities, unrelated to collocations, are not subject to the Commission's license, permit or approval authority and should not be considered Undertakings. Moreover, the Commission has no statutory authority to regulate these activities. As currently drafted, Exclusion 1 is *ultra vires* and ripe for judicial review. PCIA requests that the Commission delete Exclusion 1 and clarify under Section 1.B. that modifications to towers that do not involve collocations are not within the scope of the NPA.

3. Tower Construction Per Se Is Not an Undertaking

Nor does tower construction and registration by a non-licensee qualify as an Undertaking. Such action is not subject to Section 106 review. Noted in the previous section, an "Undertaking" by a private party requires federal financial assistance or a federal permit, license or approval.⁶³ Clearly, this definition does not embrace tower construction that does not require registration. With respect to unregistered towers, there is no action carried out by the agency, no federal financial assistance, no permit or approval required, and no federally delegated state or local regulations.

Nor does the mere act of registration qualify tower construction as an "Undertaking." Although tower registration requires some action on the part of the FCC, that action is purely ministerial. FCC regulations set forth registration criteria, which if met, automatically result in registration.⁶⁴ Because no agency discretion is

⁶³ *See id.*

⁶⁴ *See generally* 47 C.F.R. Part 17.

required, NHPA is not triggered.⁶⁵ Section I. of the Draft NPA must be clarified on these issues.

D. Application of Defined Exclusions

Where the TWG has identified classes of Undertakings that present little or no ability to cause adverse effects to historic properties, the final NPA should clearly exclude those Undertakings from the Section 106 review process. Each such exclusion must be clear, workable and easy to understand and apply. Each exclusion should also be objective, and self-executing. No exclusions should require consultation or the application of a secondary or subjective test. Section III.A. should be revised as proposed in Attachment A to more accurately describe the legal effect of an excluded undertaking under the NHPA and the ACHP's rules.

As noted previously, the exclusion from Section 106 review of certain Undertakings is expressly permitted under the rules of the ACHP and advances the important streamlining goal of regulating only when needed to protect historic resources.⁶⁶ Moreover, because the vast majority of Section 106 tower reviews produce findings of no effect or no adverse effect,⁶⁷ excluded Undertakings ensure that the limited compliance-related resources available to both federal and state regulators are available for the small number of communications projects that truly have a significant effect on historic properties.

⁶⁵ See, e.g., *Sugarloaf Citizen Ass'n v. FERC*, 959 F.2d 508, 513-15 (4th Cir. 1992) (finding that where the Federal Energy Regulatory Commission did not have the authority to reject an application for small power production facility certification, if all the prerequisites were met, environmental and NHPA review requirements were not triggered).

⁶⁶ See Section (I)(B)(1)(a).

⁶⁷ In a 2002 meeting of the TWG, the Ohio SHPO reported on a survey their office had performed showing that more than 97% of Section 106 reviews of communications towers in that state resulted in findings of no effect. Other SHPO staff reported similar findings in their states.

Six proposed excluded “Undertakings” are set out in Section III.A. of the Draft NPA:

1. Modifications that do not involve collocations and do not substantially increase the size of an existing tower;
2. Construction of a replacement tower that does not substantially increase the size of the existing tower or expand the property boundary;
3. Construction of temporary wireless facilities;
4. Construction of facilities less than 400 feet in height on land used for industrial, commercial or government office purposes;
5. Construction of facilities less than 400 feet in height located near government rights-of-way, highways or railroad corridors; and
6. Construction of facilities in an area previously designated as an exclusion zone by the SHPO/THPO.⁶⁸

As noted above, modifications of towers and associated excavations are not Undertakings under the ACHP rules and this exclusion should be removed from the Draft NPA. PCIA strongly supports the exclusion of replacement towers from all consultation and review requirements, and agrees that this exclusion should include extensions of the compound and excavation by "30 feet in any direction" with the qualifier that the such extension applies to “leased or owned property.” PCIA urges the Commission to adopt this provision without revision.

PCIA also supports the exclusion of any "temporary communications Tower, Antenna Structure or related facility[,]" where "temporary" is defined as not more than 24 months.⁶⁹ The consequences of exceeding this authorized tenure, however, should be clearly set forth in the final NPA. The industrial area exclusion is overly

⁶⁸ Draft NPA at Section III.A., A-8 – A-9.

⁶⁹ *Id.* at Section III.A.3., A-8.

complicated. PCIA urges the Commission to simplify the scope of this exclusion so that it can more easily be applied in a manner that would encourage meaningful streamlining.

The transportation corridor exclusion has been greatly improved, but still requires the tower to be on "previously disturbed ground."⁷⁰ This exclusion was always designed to address visual effects only and should continue to do so. PCIA's proposed revision of the visual effects definition in Section VI of the Draft NPA would virtually eliminate the need for this exclusion. Despite the drawbacks to the right-of-way/transportation corridor exclusion, PCIA disagrees with the suggestion by the National Trust and NCSHPO that states should selectively be able to "opt out" of the exclusion. Such a right would greatly erode the effectiveness of this valid exclusion. The transportation corridor exclusion should apply to all trains, not just passenger trains, as they share the same characteristics.

Finally, the SHPO-designated exclusion area provision fails to create any incentive for its use; thus, its likelihood of producing any beneficial effect is minimal. Accordingly, the NPA should require SHPOs to make a good faith effort to identify areas near population centers and highways where they would prefer towers to be developed.

E. Clarifying the Assessment of Visual Effects

The problem of assessing and quantifying visual effects caused by construction of towers has long been the most contentious and time-consuming aspect of Section 106 tower review. PCIA believes that much of the problem is the product of

⁷⁰ *Id.* at Section III.A.5., A-9.

misunderstanding about the nature of visual effects under Section 106.⁷¹ Below, PCIA proposes an approach towards visual effects, which may seem novel at first blush, but is grounded in the ACHP's rules and the authoritative guidance of the National Register and provides a clear and objective solution for this unique and important part of the Section 106 process.

1. Understanding Visual Effects from Tower Projects

As the definition of the term "effect" in the Draft NPA implies, in order to be considered under Section 106, visual effects, like all other effects, must change or alter a historic property itself.⁷² The ACHP's rules define "effect" as an "alteration to the characteristics of a historic property qualifying it for inclusion in, or eligibility for, the National Register."⁷³ The two necessary qualities for eligibility, therefore, are significance and integrity. That is, for a property to qualify for the National Register,

⁷¹ Two potential sources of misunderstanding can be found in the ACHP's Section 106 rules, which explain that an "adverse effect" can include the "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features[]" and "may include reasonably foreseeable effects that may occur later in time, be farther removed in distance or be cumulative." 36 C.F.R. § 800.5(a)(1), (2). Some involved in the Section 106 review process read these two definitions together to apply to the "introduction of visual elements farther removed in distance[]" As described herein, however, these definitions should not be applied to remove the requirement that an adverse effect must alter a physical feature of the historic property itself.

⁷² Thus, the mere visibility of a tower from an historic property might be described as having an aesthetic effect. Aesthetic effects can impact one's perception of beauty or good taste and can alter the mood or perception of a viewer. Unless they also alter a physical feature of a historic property's eligibility, however, they are not Section 106 effects. This is not to say that aesthetic effects are unimportant or completely irrelevant to Section 106. Aesthetic effects can be significant and are properly considered by land-use and zoning authorities. Moreover, where an Undertaking physically affects a historic property, Section 106 properly requires assessment and perhaps mitigation of any associated aesthetic effects, for example to the property's integrity of feeling.

⁷³ *Id.* § 800.16(i). This definition has been proposed verbatim in the Draft NPA.

it must: (1) be associated with an important historic context; and (2) it must retain the historic integrity of those features necessary to convey the property's significance.⁷⁴

The National Register's four criteria of significance define the association that must exist between a historic property and historically significant persons, events, characteristics or information.⁷⁵ A property's integrity is measured in one or more of seven aspects of its physical features, including its: (1) location; (2) design; (3) setting; (4) materials; (5) workmanship; (6) feeling; and (7) association.

Because effects from a federal Undertaking typically cannot alter a historic property's significance, Section 106 review focuses exclusively on characteristics of integrity. In this regard, the National Register guidance states that "[t]he evaluation of integrity is sometimes a subjective judgment, but it *must always be grounded in an understanding of a property's physical features* and how they relate to its significance."⁷⁶

⁷⁴ United States Department of the Interior, National Park Service, National Register Bulletin 15, "How to Apply the National Register Criteria for Evaluation," (Revised 1997) <http://www.cr.nps.gov/nr/publications/bulletins/nrb15/>, (Revised for the Internet, 1995) ("*National Register Bulletin 15*") at 3.

⁷⁵ The National Register defines the four criteria for evaluation as follows:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- A. That are associated with events that have made a significant contribution to the broad patterns of our history; or
- B. That are associated with the lives of persons significant in our past; or
- C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- D. That have yielded, or may be likely to yield, information important in prehistory or history.

National Register Bulletin 15, at 2.

⁷⁶ *Id.* at 44 (emphasis supplied).

Thus, because all aspects of a historic property's integrity are manifest in its physical features of that property, in order to alter an aspect of integrity, an effect under Section 106 must alter one or more of the physical features of the property itself.⁷⁷

In most cases, visual effects from a tower would not affect an historic property's location, design, workmanship, materials, or association.⁷⁸ For this reason, the two remaining aspects of integrity involving "setting" and "feeling" are most often implicated in the analyses of visual effects.

The National Register defines feeling as "a property's expression of the aesthetic or historic sense of a particular period of time. It results from the presence of physical features that, taken together, convey the property's historic character."⁷⁹ Thus, a tower project would affect a property's feeling only if it inhibited a property's ability to express its own historic character.

The National Register defines setting as "the physical environment of a historic property."⁸⁰ Where integrity of setting is an element of National Register eligibility,

⁷⁷ The same is true for adverse effects. The Council's regulations define "adverse effect" as an "effect" that diminishes one of the seven aspects of a property's integrity. Because the aspects of integrity are at the same time characteristics that must be altered to find an effect, in practice adverse effects differ little, if at all, from mere effects. *Compare* 36 C.F.R. § 800.16(I) ("Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.") *with* 36 C.F.R. § 800.5(a)(1) ("An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."). The Draft NPA instructs applicants to evaluate effects and use the definition provided by Rule 800.5(a)(1) as guidance. Draft NPA at Section VI.E.1., A-19.

⁷⁸ A property's integrity of association is defined as "the direct link between an important historic event or person and a historic property." *National Register Bulletin 15*, at 45.

⁷⁹ *Id.*

⁸⁰ *Id.* Furthermore, "[w]hereas location refers to the specific place where a property was built or an event occurred, setting refers to the *character* of the place in which the property played its

however, the relevant physical environment is not the same as the "viewscape" from the property. The evaluation of setting for eligibility purposes is limited to a specific geographic area, generally defined by the description of the property's boundary of historic significance in its nomination.⁸¹ Boundaries should encompass all the resources that contribute to the property's historic significance.⁸² Therefore, it is clear that the protected setting of any historic property is the setting within the property's boundary of historic significance.

historic role. It involves *how* not just where, the property is situated and its relationship to surrounding features and open space." *Id.* (Emphasis supplied).

⁸¹ United States Department of the Interior, National Park Service, Form 10-300, "National Register of Historic Places Inventory – Nomination Form," Section 10 – "Geographical Data" (providing requests for an acreage and both the coordinates and a verbal boundary description); *see also* United States Department of Interior, National Park Service, National Register Bulletin "Defining Boundaries for National Register Properties," at 1 ("*Defining Boundaries Bulletin*") ("Among the decisions a preparer must make is the selection of the property's boundaries: in addition to establishing the significance and integrity of a property, the physical location and extent of the property are defined as part of the documentation."); United States Department of Interior, National Park Service, National Register Bulletin 16(a), "How to Complete the National Register Registration Form" at § III ("*Completing NR Form Bulletin*") ("Carefully select boundaries to encompass, but not to exceed, the full extent of the significant resources and land areas making up the property. The area to be registered should be large enough to include all historic features of the property, but should not include 'buffer zones' or acreage not directly contributing to the significance of the property. Leave out peripheral areas of the property that no longer retain integrity, due to subdivision, development, or other changes.").

⁸² *See Defining Boundaries Bulletin*, at 1. The guidance also provides that "appropriate correspondence [should exist] between the factors that contribute to the property's significance and the physical extent of the property." *Id.* at 2. Furthermore, the National Park Service's rules list several justifications for altering a historic property's boundary, including recognition of additional areas with historic significance. Regarding the expansion of boundaries, these rules explain: "No enlargement of a boundary should be recommended unless the additional area possesses previously unrecognized significance in American history, architecture, archeology, engineering or culture." 36 C.F.R. § 60.14(a)(2). Thus, the NPS rules suggest that historically significant areas should be contained within the historic property's *listed* boundary.

Under the ACHP's Section 106 rules, the boundary specified in a National Register nomination is not necessarily to be considered definitive if the nomination is older or if the assessment of the boundaries was originally uninformed by modern standards or is otherwise incomplete. *See* 36 C.F.R. § 800.4(c)(1) ("The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible.").

Applying the National Register's guidance, therefore, in order to find an effect or an adverse effect to the setting or feeling of a property from a tower, one would have to find an alteration or diminishment of the physical environment or physical features of that particular property, or an inhibition from the tower that prevents those features from conveying the property's significance, thus causing an alteration of those features.

2. Appropriate Consideration of Visual Effects Under Section 106

As described above, in a Section 106 review, the alteration or diminishment of integrity of physical features of a historic property is the relevant focus of a proper analysis of all effects, including visual effects. Therefore, the most logical primary APE for any communications Undertaking would typically be the area of ground disturbance and other potential physical changes that might be expected to be caused by the project. Only if an Undertaking sits on or within the boundary of a historic property would it ordinarily alter the physical characteristics of such property.

Where an Undertaking is located outside of the boundary of a historic property, its ability to visually effect or alter that property in such a way as to inhibit its ability to convey its own historic significance would be very limited. The possible ways of creating this kind of effect are difficult to predict, but might involve, for example, casting a shadow that alters the physical view of the property. For properties whose integrity of feeling is a qualifying characteristic (the property's ability to evoke a feeling of a particular time and place), a tower blocking the view of such property from the only, or most important, vantage point might create such an effect.

It is clear, however, that for most tower Undertakings, the most logical presumed APE would consist of only the footprint of the tower and its supporting facilities, together with any associated new excavation for utility trench(es) or access road(s). This APE would take into account almost all possibilities of physical

alteration to an historic property. To account for the rare case of an historic property not physically impacted by construction, but near enough that the tower might prevent the property from conveying its historic significance, the APE might also include the immediate (i.e., radius of a hundred yards) area around the tower site. Such an APE should be adequate to identify those rare cases of properties outside the boundary that nevertheless might be said to cause an alteration of the property's physical features.

PCIA acknowledges that this approach is very different from that typically used by most SHPOs today and would result in vastly smaller presumed APEs than those proposed in the *NHPA Notice*.⁸³ Nevertheless, this approach appropriately considers the nature and limits of visual effects under Section 106 and remains grounded in the ACHP's rules and the prevailing authoritative legal guidance from the National Register. As such, PCIA submits that its approach should likewise guide the Commission and the analysis of visual effects in the NPA.

3. Practical Application of a Boundary-Centric Visual Effects Approach

Once a tower site is located, the initial step in the Section 106 process is to first determine the APE and then determine if any historic property falls within that APE. For towers assessed under the above-described approach to visual effects, this would involve noting the probable extent of ground disturbance and any historic properties in the immediate area of the project. Contrary to current assumptions, except in extreme cases, the presumed APE should not vary with the height of the tower; nor should the potential visibility of the tower at a distance, where no physical alteration of a historic property is involved, be considered relevant to the Section 106 review.

In most cases, determining whether a tower's physical footprint falls within the boundary of a historic property should be relatively straightforward. Where historic

⁸³ See Draft NPA at A-17.

properties are located nearby, however, or when such property might encompass larger areas, such as districts or landscape-based properties like designed or rural landscapes, it will be necessary to confirm the boundary of historic significance for such properties to determine whether or not the project lies physically inside of that boundary.⁸⁴

This approach provides practical guidance for the Commission, its applicants, consulting parties, SHPOs/THPOs, and Indian tribes in the assessment of visual effects, and ensures that the Section 106 review process is not used improperly to impose general land-use or aesthetic preferences, but as originally intended – to preserve historic properties. Without such guidance, the scope of the Section 106 review for towers will continue to be so broad that it unreasonably and unproductively scatters and dilutes the resources available for historic preservation and unnecessarily hinders the expansion of the crucially needed wireless telecommunications network.

F. Limiting Section 106 to Listed and Determined Eligible Properties Only

PCIA does not concede that Section 106 review applies to properties that meet National Register eligibility criteria, but that have not been determined eligible for, or actually listed in, the National Register. Section 106 review is limited to listed and determined eligible properties only.

Under the regulations of the National Park Service ("NPS") – the bureau of the Department of Interior that is responsible for administering the National Register – it is the role of the Keeper of the National Register to determine the eligibility of a

⁸⁴ PCIA does not concede that properties not determined eligible for national registration are to be considered under Section 106.

property for inclusion on the National Register.⁸⁵ As the Commission notes in its proposed Rule 1.1307(a)(4), the National Register is regularly updated and re-published each year. In addition, every February, the National Register publishes in the Federal Register an updated list of properties "determined eligible."⁸⁶

The legislative history of the 1976 amendments to Section 106 suggests that in using the phrase "determined eligible," Congress intended to further the principle that consultation under the NHPA was required for (1) properties already listed on the National Register or (2) properties determined eligible for listing by the Secretary of Interior.⁸⁷ Thus, the meaning of the term "eligible for inclusion in" as used in the

⁸⁵ See 36 C.F.R. § 60.3(c) (defining "determination of eligibility" as "a decision by the Department of Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register"); 36 C.F.R. § 60.3(f) (defining "Keeper of the National Register" as "the individual who has been delegated the authority by the NPS to list properties and determine their eligibility for the National Register"); 36 C.F.R. § 60.9 (requiring federal agencies to establish programs "to locate, inventory, and *nominate to the Secretary* all properties under the agency's ownership or control that appear to qualify for inclusion on the National Register") (emphasis supplied). See also 36 C.F.R. § 60.3(h) (defining National Park Service as bureau of DOI to which the Secretary of Interior has delegated the authority and responsibility for administering the Nation Register program); 36 C.F.R. § 63.2 (setting forth process for how a federal agency can request a formal determination of eligibility from the Department of Interior); 36 C.F.R. § 63.3 (stating that even when the federal agency and SHPO agree on the eligibility of a property, the Keeper may inform them that the property has not been "accurately defined and evaluated" therefore they may only consider the property "eligible" for purposes of obtaining comments from the Advisory Council).

⁸⁶ See 36 C.F.R. § 63.5 ("[P]ublic notice of properties determined eligible for the National Register will be published in the FEDERAL REGISTER at regular intervals and in a cumulative annual edition usually issued in February.").

⁸⁷ In adding the "eligible for inclusion" language to the NHPA in 1976, Congress made clear that the language was a "housekeeping amendment" and covered only properties "determined to be eligible for inclusion in the National Register." See S. Rep. No. 94-367, at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2442, 2450. Furthermore, the NPS' rules explain that "[t]he National Register is an *authoritative* guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and *to indicate what properties should be considered for protection from destruction or impairment.*" 36 C.F.R. § 60.2 (emphasis supplied). Thus, under the Secretary's rules, the National Register presents the universe of those properties to be protected under the preservation laws.

NHPA,⁸⁸ and specifically "determined eligible" in 101(d)(6)(A), make clear that the NHPA requires consultation for properties of traditional religious and cultural importance that have been determined eligible by the DOI. Indeed, the ACHP, itself, has clarified that its rules do not grant tribes the de facto ability to designate any property to which they attach religious or cultural significance.⁸⁹

Federal courts too have recognized that when Congress' 1976 amendments to the NHPA extended coverage to "eligible" properties, the intent of the Act was to "afford some measure of protection to properties on which there has been some determination of eligibility for inclusion on the National Register."⁹⁰ A number of federal decisions rely on the meaning of the ACHP's regulations in finding that Section 106 applies to properties that meet the criteria without an official determination; however, these courts do not address the meaning of the term "eligible for inclusion in" pursuant to its legislative history.⁹¹

⁸⁸ The FCC should be aware of the apparent contradictory approaches for defining "eligible" properties in the legislative history of the NHPA and the NPS's rules on the one hand, and the ACHP's rules on the other.

⁸⁹ See 65 Fed. Reg. at 77,706 ("The fact that a Tribe attaches religious and cultural significance to [properties] does not make them 'historic,' but neither does it preclude them from meeting the National Register criteria. The Federal Agency makes the determination of eligibility, and disputes are ultimately resolved by the Keeper based on the secular National Register criteria.").

⁹⁰ *Birmingham v. General Services Realty Co.*, 497 F. Supp. 1377, 1388 (N.D. Ala. 1980) ("A literal construction of the phrase 'eligible for inclusion in the National Register' would, under broadly stated criteria for eligibility . . . lead almost inescapably to the conclusion that every building over fifty years old in this country is eligible for inclusion on the Register."). See also *Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta*, 497 F. Supp. 504, 512 (N.D. Ala. 1980) (finding property eligible under National Register criteria, but concluding that no agency had determined that the building was eligible).

⁹¹ See *Boyd v. Roland*, 789 F.2d 347, 349 (5th Cir. 1986); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985).

Accordingly, the consideration of any historic properties that have not been determined eligible by the Keeper of the National Register, is beyond the scope of the NHPA.

II. Other Issues Raised in the NPRM

A. Applicants Should Handle Confidentiality Requests

In addition to the guiding principles discussed above, which PCIA urges the Commission to adopt and apply in finalizing the Draft NPA, PCIA provides the following comments regarding other issues raised in the NPRM.

The Council has proposed revisions to the second and third sentences of Section IV. J 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." This proposal unnecessarily complicates the process as applicants are capable of maintaining the confidentiality of specified materials without Commission intervention. The only role for the Commission in this context should be to resolve disputes arising from confidentiality requests.

PCIA encourages the Commission to reject the Council's proposal and retain Section IV.J as drafted because it complies with Section 304 of the NHPA and applicable federal laws.

B. Pending Section 106 Reviews

The Commission requests commenters to provide responses regarding how it should treat Section 106 reviews pending before Indian tribes, SHPOs, or the Commission on the date the NPA becomes effective.⁹² PCIA urges the Commission

⁹² *NHPA Notice*, at ¶ 4.

to apply the NPA, including its exclusions and the timing provisions, only to future historic preservation reviews initiated after the adoption of the NPA. PCIA believes that it would not be fair to apply the terms of this NPA retroactively to Undertakings initiated when neither regulators nor industry knew exactly what the NPA might provide.

C. Proposed Changes to Section 1.1307(a)(4)

PCIA supports the Commission's proposed amendments to the wording of its environmental rules involving revision to the text of Section 1.1307(a)(4) deletion of the Note to that provision.⁹³ The current text of Section 1.1307(a)(4) and its Note fail to delegate any of the Commission's Section 106 obligations to applicants, stating only an applicant "*may*" contact the appropriate SHPO when assessing whether a proposal affects a historic property.⁹⁴ Although PCIA generally believes additional requirements are not in the public interest (as indicated by the key principles discussed above), PCIA agrees that an applicant's obligations under the NHPA must be clearly defined. As such, it supports the proposed revisions to Section 1.1307(a)(4).

D. Miscellaneous Provisions

PCIA provides the following general comments regarding various provisions of the Draft NPA not discussed above. These suggestions and others are continued in redline format in the copy of the Draft NPA attached hereto as Attachment A.

1. Whereas Clauses and Section I

The 4th Whereas clause should be revised to replace "may affect" with "adversely affects." Current FCC policy is that an EA is only required if the

⁹³ See Errata, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, DA 03-2116 (rel. July 1, 2003).

⁹⁴ 47 C.F.R. 1.1307(a)(4) Note.

undertaking would adversely affect Historic Properties, not if it simply “may affect.” In addition, the term “properties” should be changed to “Historic Properties” and the phrase “that meet the National Register criteria” should be eliminated as “Historic Properties” can include more than just those that meet the National Register criteria.

The 6th Whereas clause should be revised to replace the phrase “their facilities” with “Undertakings” as the Section 106 review process applies only to undertakings. The 13th Whereas clause should be revised to reflect the full scope of the Commission’s efforts to consult with Indian tribes and NHOs throughout the development of the Draft NPA. In the 17th Whereas clause, the FCC fails adequately to explain how, if it is not delegating "consultation responsibilities," what authorization is being given to allow applicants, even with an express or implied waiver from an Indian tribe, to participate in and legally conclude the Section 106 process. PCIA recommends revising this Whereas clause as indicated in Attachment A to make the delegation of authority express. A new 21st Whereas clause is required to make clear that the proposed excluded undertakings have been approved by the ACHP as required under Section 214 of the NHPA.

PCIA approves of the fact that the final Whereas clause encourages but does not require the use of qualified professionals. PCIA members always strive to utilize consultants that are well qualified to render the opinions they are asked to provide, but the necessary qualifications standards are not always universally accepted or agreed upon, and some standards differ from state to state.⁹⁵

The status of the facilities on the list of FCC Undertakings (Attachment 2) is made unclear by the use of the phrase "Undertakings . . . may occur" in Section I.A. As the list should clearly designate which activities constitute "Undertakings," PCIA

⁹⁵ Draft NPA, Final Whereas Clause, A-3.

urges the Commission to either revise or remove this language.⁹⁶ PCIA supports Section I.B. which stipulates that the maintenance and servicing of towers, antennas, and associated equipment is not an "Undertaking" and is therefore excluded from these historic preservation requirements.⁹⁷ PCIA urges the Commission to acknowledge in Section I.B. that modification of or associated excavation at a facility that does not involve a collocation is not an undertaking.

PCIA also supports the statement in Section I.D. that the NPA does not apply on tribal lands, unless otherwise adopted by a tribe to apply to its lands.⁹⁸ While PCIA agrees as stated in Section I.D. that a tribe may elect to perform the duties of a SHPO/THPO for Undertakings on tribal lands, with or without assuming SHPO function, the tribe, in either case, should be required to abide by the limitations and guidelines for SHPO functions under the Department of the Interior Grants Manual and the NPA.⁹⁹ In other words, the NPA should clarify that if the tribe assumes the role of a SHPO, it must also assume the responsibilities applicable to the SHPO.

Section I.E., which addresses the scope of the NPA, requires further revisions, as the precise meaning of the language is unclear.¹⁰⁰ First, the section fails to recognize that the NPA excludes certain Undertakings and thus no EA will be required when an exclusion under the NPA applies. Second, the section should clarify that findings or corrected findings of "conditional no adverse effect" do not require an environmental assessment. PCIA urges the Commission to revise Section I.F. to

⁹⁶ *Id.* at Section I.A., A-4.

⁹⁷ *Id.* at Section I.B., A-4.

⁹⁸ *Id.* at Section I.D., A-4.

⁹⁹ *Id.* at Section I.D., A-5.

¹⁰⁰ *Id.* at Section I.E., A-5.

exclude explicitly the Commission *and* the ACHP, and should allow this agreement to control where the FCC is working in concert with other agencies and all concur as to the effect of the proposed project.¹⁰¹

2. Section II

PCIA supports the proposed definition of "Antenna" in Section II.A.1., which includes associated equipment and structures. This definition should be adopted without revision.¹⁰² The definition of "Adverse Effect" based on the one in the ACHP rules should be added to the NPA.¹⁰³ The definition of the term "Applicant" should be revised to reflect the fact that the FCC's rules place different responsibilities on different parties in the Section 106 process.

The word "existing" should be removed from the definition of "Collocation" because even the first antenna on a tower is a collocation subject to the Nationwide Collocation Programmatic Agreement, not the Draft NPA. The definition of "Historic Properties" should be revised as suggested above.

PCIA supports the proposed definition of "tower" at Section II.A.12., which includes associated equipment and structures not installed as part of an antenna, but recommends removing the qualifier "Commission licensed or authorized" as this is unnecessary, given the definition of tower.

3. Sections III and IV

Throughout Section III, the FCC uses the terms "tower," "communications tower" and other variations on defined terms. The Commission should conform references in the Draft NPA so that it uses consistent, defined terms only.

¹⁰¹ *Id.* at Section I.F., A-5.

¹⁰² *Id.* at Section II.A.1, A-5.

¹⁰³ *Id.* at Section II.A.2 (new), A-6.

The procedures for an Applicant notifying tribes that have been identified as potentially interested in an undertaking which are set forth in Sections IV.E. and F. of the Draft NPA are unclear and fail to provide clear-cut time limits. As substitute, PCIA suggests notifying such tribes at least 21 days (not 30) prior to the applicant's submission of the Submission Packet. While PCIA supports the minimum tribal communication requirements contained in Section IV.F., it suggests that the Commission further refine the potential timeframes, as too much flexibility or too many alternatives may cause confusion and delay and prove counterproductive.¹⁰⁴ PCIA also suggests clarifying that timely provision to a tribe or NHO of a Submission Packet following an appropriate initial communication is *prima facie* evidence of a reasonable effort to follow up.

PCIA asserts that Section IV.G. should be revised to ensure that tribes provide an explanation and justification of its allegations of adverse effect with any objection regarding Historic Properties.¹⁰⁵ If a tribe fails to provide this explanation (and provides only a terse negative response), or otherwise indicates it has no objections, further consultation should not be required.

PCIA opposes the Commission's suggestion in Section IV.H. that applicants must provide Submission Packets to every identified tribe, apparently whether or not the tribe has indicated any interest; such a requirement would be very wasteful and difficult to implement.¹⁰⁶ Rather, the Agreement should only require submission of materials to those Indian tribes that have indicated an interest to receive such

¹⁰⁴ *Id.* at Section IV.F., A-12.

¹⁰⁵ *Id.* at Section IV.G., A-13.

¹⁰⁶ *Id.* at Section IV.H., A-13.

materials, or where the applicant decides to use the Submission Packet as its follow-up to the initial communication.

4. Section V

PCIA agrees with the requirement in Section V.A. that Applicants must notify the local government, as it tracks and clarifies current law.¹⁰⁷ PCIA also agrees with the Commission's proposal in Section V.B. for requirements regarding notifying the public, as it clarifies and makes more flexible the current applicable requirements.¹⁰⁸ Section V.D., which permits SHPOs to provide lists of groups that "should be provided notice" is broader than the requirements of current law.¹⁰⁹ As such, if the NPA includes this provision, it must also clarify that notice to those on the list shall be suggested, but not required. Section V.E. should be revised to clarify that the Submission Packet is the operative document and that commenting parties are limited to a 30 day review period, as suggested above.

PCIA strongly supports the Verizon, Ohio SHPO and NCSHPO suggestion for the setting of a specified period – *e.g.*, 30 days from submission of the Submission Packet to the SHPO/THPO – for public response. PCIA also concurs with CTIA's suggestion that proprietary information submitted by industry be protected as confidential.¹¹⁰

¹⁰⁷ *Id.* at Section V.A., A-15.

¹⁰⁸ *Id.* at Section V.B., A-15.

¹⁰⁹ *Id.* at Section V.D., A-16.

¹¹⁰ *Id.* at Section V.F., A-16. Note 11.

5. Section VI

In addition to those issues regarding this section discussed above, PCIA agrees that for a non-excluded collocation, the assessment of effect should consider only those effects from the collocation, not from the existing supporting tower.¹¹¹

6. Section VII

PCIA supports the clear procedures set forth in Section VII.A.1. for: (1) initial determination of effects; and (2) submission of packets to SHPO and all consulting parties.¹¹² PCIA believes the Draft NPA must include language in Section VII.A.2. providing a clear 30-day objection period for consulting parties, including Indian tribes and NHOs, as currently provided under existing law pursuant to 36 C.F.R. § 800.5(c)(2)(i).¹¹³

PCIA disagrees with the 26- to 30-day extended comment period in Section VII.A.3, which provided the SHPO/THPO up to five extra calendar days to consider the comment, because it goes beyond the notice requirements of current law.¹¹⁴ PCIA also disagrees with the 60-day resubmission period proposed in Section VII.A.4.¹¹⁵ It is in the Applicant's best interest to provide all materials to the SHPO/THPO as soon as possible in order to expedite review. A specific re-submission period as a result of a SHPO/THPO's Submission Packet adequacy determination is unnecessary. The Commission should revise this section to simply allow re-submittal or supplemental submittals whenever desired or needed.

¹¹¹ *Id.* at Section VI.E.4., A-20.

¹¹² *Id.* at Section VII.A.1., A-20.

¹¹³ *Id.* at Section VII.A.1., A-20 Note 14.

¹¹⁴ *Id.* at Section VII.A.3., A-20.

¹¹⁵ *Id.* at Section VII.A.4., A-20 Note 15.

Except as noted above, and in the redlined comments to the Draft NPA in Attachment A, PCIA agrees with procedural framework proposed in Section VII.C.2. but believes that a default approval of a "no adverse effect" finding should apply if the Commission fails to respond within fifteen days.¹¹⁶ Such a proposal will significantly streamline the process. PCIA also believes the SHPO/THPO "must" (rather than "should") provide an explanation when it disagrees with an applicant's no effect or no adverse effect finding, and Sections VII.B.3. and VII.C.3. in the final NPA should be revised accordingly. Such an explanation is necessary to safeguard Applicants against arbitrary decision making.

PCIA also supports Section VII.C.5., which expressly encourages SHPOs to seek measures to change an "adverse effect" to a "conditional no adverse effect."¹¹⁷ PCIA, however, urges the Commission to revise Section VII.C.6. to expressly permit the Commission to make its own determination of "conditional no adverse effect" when a SHPO and Applicant cannot agree.¹¹⁸

Sections VII.D.1-5 should contain time limits for resolving adverse effects disputes between Applicants and consulting parties.¹¹⁹ For instance, if the parties are unable to resolve the disagreement and enter a MOA within three months, the dispute should be forwarded to the Commission for resolution. The final NPA should explicitly recognize the Commission's power to design a mitigation plan through a

¹¹⁶ *Id.* at Section VII.C.2., A-22.

¹¹⁷ *Id.* at Section VII.C.5., 6, A-22, 23.

¹¹⁸ *Id.* at Section VII.C.6., A-23.

¹¹⁹ *Id.* at Section VII.D.1 – 5., A-23 Note 18.

MOA or otherwise. Finally, Section VII.D.5. should be revised to read the "terms of the MOA" not "mitigation measures."¹²⁰

7. Sections VIII and IX

The meaning of Section VIII is unclear; if emergency authorizations are excluded from the historic preservation review process, the agreement should say so explicitly.¹²¹ PCIA urges the Commission to exempt all temporary authorizations, including emergency authorizations.

The procedures concerning undiscovered historic sites set out in Section IX.A. should be limited to pre-completion of construction.¹²² After Section 106 review is completed, no further review is provided or should be permitted post-construction. PCIA urges the Commission to further refine the definition of "implementation of an Undertaking" in Section IX.D.¹²³ In its current context, it is unclear whether the phrase "implementation of an Undertaking" means before completion of construction; or, during the beginning phases of construction.

8. Sections X, XI, XIII and XV

PCIA agrees with the statement in Section X that Section 110(k) of the NHPA requires a showing of intent to avoid Section 106 requirements and intentionally adversely affecting a historic property.¹²⁴ PCIA agrees with the statement in Section X.D. that violations of Section 110(k) should be resolvable with an MOA.¹²⁵ PCIA

¹²⁰ *Id.* at Section VII.D.5., A-23.

¹²¹ *Id.* at Section VIII., A-23.

¹²² *Id.* at Section IX.A., A-24.

¹²³ *Id.* at Section IX.D., A-24.

¹²⁴ *Id.* at Section X.D., A-25.

¹²⁵ *Id.* at Section X.D., A-26.

also agrees with the statement in Section X.G. that Undertakings excluded from review under NCPA or the NPA are not subject to Section 110(k) review.¹²⁶

PCIA believes Section XI should make clear that complaints regarding constructed towers must comply with Section X.¹²⁷ PCIA believes that Section XIII must clarify that should consultation over termination fail to produce a resolution, the agreement shall be terminated 60 days after notice of termination is served by a signatory upon all other parties and published in the Federal Register. Finally, PCIA supports the statement in Section XV that neither signatories nor entities complying with this agreement waive the right to sue to overturn, or to otherwise assert the invalidity of any provision of the NHPA, or the ACHP's Section 106 rules.¹²⁸

¹²⁶ *Id.* at Section X.G., A-26.

¹²⁷ *Id.* at Section X.I., A-26.

¹²⁸ *Id.* at Section X.V., A-27.

Conclusion

For the reasons stated above, PCIA urges the Commission to adopt the proposals discussed herein, including the revisions to the Draft NPA proposed in Attachment A and the revisions to Forms NT and CO in Attachments B and C.

/s/

Jay Kitchen
President and CEO
Julie Coons
Executive Vice President
Connie Durcsak
Senior Director, Government
and Industry Affairs
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

John F. Clark
Zachary A. Zehner
Keith R. Murphy
Perkins Coie, LLP
Counsel for PCIA
607 Fourteenth Street, NW Suite 800
Washington, DC 20005-2011
(202) 434-1637

Attachment A – Revised Draft NPA

**Proposed Redline Edits to Accompany
PCIA's Comments
WT Docket No. 03-128
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[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 adversely affects Historic Properties that are either listed in or eligible for listing in the National Register, including Historic Properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization ("NHO"); 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" or "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 Undertakings; 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 sought comment and input from all federally recognized Indian tribes and NHOs with regard to the Nationwide Agreement, has invited all such tribes and organizations to consult with the Commission in connection with its terms and development, and has consulted with Indian tribes and tribal organizations 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 authorizes its Applicants to initiate contact, exchange information, coordinate determinations and findings, and conclude discussions with Indian tribes and NHOs in connection with each Section 106 review under this Nationwide Agreement, while at the same time the Commission does not delegate under this Nationwide Agreement any portion of its responsibilities to Indian tribes and NHOs, including its consultation obligations 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 adverse 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 exclusion of actions from Section 106 review pursuant to this Nationwide Agreement have been approved by the Council, with the concurrence of the Secretary of the Interior, consistent with Section 214 of the NHPA (16 U.S.C. § 470v), as meeting the criteria for exclusions at 36 C.F.R. § 800.14)(c)(i)-(iii); 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 defined as Undertakings covered by this Agreement 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 a Facility, and modification of or associated excavation at a Facility that does not involve a Collocation 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 such 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 initiating the Section 106 review process under the terms of this Nationwide Agreement may not begin construction without completing any environmental review that is otherwise required for environmental effects other than those to historic properties under the Commission's rules (*See* 47 C.F.R. §§ 1.1301-1.1319). Initiation and completion of the Section 106 review process after the effective date of this Nationwide Agreement satisfies an Applicant's obligations under the Commission's rules with respect to Historic Properties, except for Undertakings that have been finally determined to have an adverse effect on one or more Historic Properties and that therefore require preparation of an EA (*See* 47 C.F.R. § 1.1307(a)(4)). A preliminary or tentative finding of adverse effect that is changed to a "conditional no adverse effect" finding, due to mitigation or conditions that will adequately mitigate or avoid the adverse effect, does not require the filing of an EA.
- F. This Nationwide Agreement does not govern any Section 106 responsibilities that agencies other than the Commission and the Advisory Council may have with respect to those other 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. Adverse Effect. An effect that alters, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that diminishes the integrity of the property's location, design, setting, materials, workmanship or association. An adverse effect from an undertaking may be found where the Undertaking will cause or is likely to cause an adverse effect.

3. Applicant. A Commission licensee, permittee, or registration holder, or an applicant for a license, permit, or registration, and the duly authorized agents, employees, and contractors of any such person or entity.

4. 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.

5. Collocation. The mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals.

6. Effect. An alteration to the characteristics of a Historic Property qualifying it for inclusion in or eligibility for inclusion in the National Register.

7. 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.

8. Facility. A Tower or an Antenna. The term Facility may also refer to a Tower and its associated Antenna(s).

9. Historic Property. Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes historic properties of traditional religious and cultural importance to an Indian tribe or NHO.

10. National Register. The National Register of Historic Places, maintained by the Secretary of the Interior's office of the Keeper of the National Register.

11. Special Temporary Authority ("STA"). 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.

12. Submission Packet. The form and documents 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 Facility Submission Packet (Form NF) (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.

13. Tower. Any structure built for the sole or primary purpose of supporting 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. Because the Parties find that potential effects upon historic properties from Undertakings that fall within the provisions listed in the following sections III.A.1. through III.A.6 are foreseeable and likely to be minimal or not adverse, these Undertakings are therefore excluded from Section 106 review, including review by the SHPO/THPO, the Commission, Indian tribes and NHOs, other consulting parties and the Council. Submission Packets for such Undertakings shall not be submitted to the SHPO/THPO for review.² The Parties further find that exemption of these categories of Undertakings from the Section 106 process is consistent with the purposes of the NHPA. 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. Construction of a replacement for an existing Tower and any associated excavation that does not substantially increase the size of the existing tower under elements 1-3 of the definition of that phrase in the Collocation Agreement (See Attachment 1 to this Agreement, Stipulation I.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 leased or owned property.

2. Construction of any temporary Tower, Antenna or 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 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;

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.

- e. Any Facility authorized by a Commission grant of an experimental authorization.³

For purposes of this subsection 3, the term "temporary" means "authorized for a continuous period of 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 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. The right of way of an existing limited access Interstate Highway with a speed limit of 55 MPH or higher; or
- c. The right of way of a railway corridor in active use for railway traffic.;

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 including the excluded area or other visual element including such area 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

³ The Commission requests comment on whether experimental authorizations should be limited to 24 months. PCIA believes that they should be so limited.

⁴ The Ohio SHPO suggests a distance of 400 feet or, alternatively, a distance equal to the height of the proposed Facility. PCIA believes that 200 feet is sufficient for this exclusion, particularly considering the definition of visual effects as outlined in the language proposed for Section VI.B.2.

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. PCIA opposes any provision to allow individual states to opt out of these exclusions. The possible presence of historic properties in such corridors is taken into account by the limitations in the exclusions. CTIA objects to an opt-out provision because it reverts back to addressing key exclusions on a state-by-state basis with no

6. Construction of a Facility in any area previously designated by the SHPO/THPO at its discretion, following consultation with appropriate 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 111.13 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).] PCIA opposes proposed section III.B. See discussion in narrative comments.

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

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.

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.

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 or NHO 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 Historic Properties that may be affected by an Undertaking. Such reasonable 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, and at least 21 days prior to submission of a Submission Packet to the SHPO/THPO, 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 V.A. and B above.

F. The Applicant must ensure that each identified Indian tribe or NHO has a reasonable opportunity to respond to its initial communication. 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 at least one more reasonable effort 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 Timely provision to a tribe or NHO of a Submission Packet following an appropriate initial communication is *prima facie* evidence of a reasonable effort to follow up. The Applicant should describe in its Submission Packet its efforts and planned efforts to invite the participation of identified tribes.

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. Objections from Indian tribes and NHOs to Towers and Collocations should specify and describe the nature of the alleged adverse effect and how it alters and diminishes a characteristic of integrity that is part of a Historic Property's eligibility for the National Register.

H. The Applicant shall submit to each Indian tribe and NHO that it has identified pursuant to Section IV.D., above, and that has indicated a desire to participate, 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 the initial attempt 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 Commission. The Commission shall provide such confidential treatment consistent with applicable federal laws.⁸

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

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." PCIA agrees with the Conference. The Council proposes that this provision be revised to read as follows: "If a Tribe or Native Hawaiian Organization

K. Nothing in this Section shall be construed to prohibit or limit Applicants and Indian tribes from entering into arrangements or agreements, 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 B⁹

PCIA opposes Alternative IV.B. *See* discussion in narrative comments.

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*).

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

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." PCIA opposes the Council's language and believes that the procedures in Alternative A provide very adequately for appropriate confidential treatment supervised by the Commission. 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. PCIA opposes USET's suggestion as impractical, unnecessary and harmful to the interests of all parties interested in historic preservation, including tribes and NHOs. Except where confidentiality is demonstrably required to protect sensitive properties from possible damage, destruction or unauthorized access, Section 106 consultations should be open and transparent to the public and to consulting parties in order to engender confidence in the fairness of the process for all,

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. PCIA opposes Alternative B as explained in PCIA's narrative comments.

Advisory Council on Historic Preservation implementing Section 106 of the NHPA (codified at 36 C.F.R. Part 800). Notwithstanding the foregoing, 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 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. Applicants are encouraged to invite such groups to be consulting parties for their Undertakings.

E. If the Applicant receives a comment regarding potentially affected Historic Properties, the Applicant shall consider the comment and either include it in the Submission Packet to the

SHPO/THPO, or, if the Submission Packet has already been submitted, immediately forward the comment to the SHPO/THPO for review. An Applicant need not submit to the SHPO/THPO any comment submitted after the 30-day comment period or 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}

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.

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. PCIA believes that the period for response for all consulting and interested parties should be, and is under current law, the 30-day period of SHPO/THPO review. This should be made clear in Section VII.A.2., as provided in the suggested language in that section.

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 confidentiality clause binding upon all Parties. PCIA agrees that the protection of confidential and proprietary information in this process is important. 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. PCIA reminds that typically alternative site evaluations have not been treated as proprietary information in NEPA or Section 106 reviews.

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. To be considered under Section 106 and this Agreement, a visual effect from a Tower must alter one or more physical characteristics of a Historic Property that qualify that property for the National Register. Mere visibility of a Tower or Antenna from a Historic Property, without alteration of a qualifying characteristic of a Historic Property, cannot be either an effect or an adverse effect under Section 106. As an example, in order to be able to alter a Historic Property's integrity of setting, a Tower or Antenna would usually have to be physically located on or within a property's boundary of historic significance, such that the setting is physically altered.¹² As another example, to be able to alter a Historic Property's integrity of feeling, a Tower or Antenna would have to prevent or inhibit the physical features of that property from being able to express or convey a sense of a particular period of time.¹³ Accordingly, visual effects from a Tower or Antenna will only be considered under Section 106: (1) when the physical footprint or area of ground disturbance of a project lies on or within the boundary of a Historic Property, thereby altering its setting; or (2) where the Facility is so situated within or next to the boundary of a Historic Property that it substantially prevents or inhibits that property from conveying a sense or feeling of a particular time and place, when such feeling is a characteristic of the property's eligibility for the National Register.

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.

¹² According to the National Register, setting is one of seven aspects of integrity that must be present to qualify a property for the National Register. Setting is defined as the "physical environment of a historic property." National Register Bulletin 15 – "How to Apply the National Register Criteria for Evaluation" (National Register Bulletin 15), at 45.

¹³ Feeling is defined as "a property's expression of the aesthetic or historic sense of a particular time or period." National Register Bulletin 15, at 45.

¹⁴ 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. Consistent with the suggested language on the nature of visual effects in the section above, PCIA believes that different procedures for towers of different heights are unnecessary.*

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 any 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, the nature and extent of potential effects on historic properties, 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 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 or records of the SHPO/THPO or identified by 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)) and the definitions in this agreement.

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 Undertaking will alter and noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register.¹⁵

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.¹⁶

2. The SHPO/THPO shall have 30 days from receipt of the requisite documentation to review the Submission Packet. Any consulting or interested party, including Indian tribes and NHOs and any member of the public may, within the 30-day review period, submit to the Applicant or SHPO/THPO a description of its reasons for disagreement with any proposed finding. The Applicant may consult with the party to resolve the disagreement or ask the Commission to review the finding to which objection is made.

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.

¹⁵ 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." PCIA believes that the language suggested in section VI.B.2. a., above would better address these concepts.

¹⁶ 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." A version of this language is provided in Section VII.A.2., above.

4. If the SHPO/THPO determines the Applicant's Submission Packet is inadequate, the SHPO/THPO will immediately return it to the Applicant with a description of any deficiencies. The Applicant may resubmit an amended Submission Packet to the SHPO/THPO any time following its receipt of the returned Submission Packet.¹⁷ Disputes regarding the adequacy of submission may be submitted to the Commission for prompt resolution.

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 Undertaking, 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 Submission Packet, it is deemed that the Undertaking will have no effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the Undertaking, 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, the SHPO/THPO must 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

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 Undertaking, 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

¹⁷ 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. See the suggested language in section VII.A.4., above.

correspondence with the SHPO/THPO and any timely 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 15 days of submission.]¹⁸

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, the SHPO/THPO must 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 Undertaking 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.¹⁹

6. If the Applicant and SHPO/THPO mutually agree upon conditions that will result in no adverse effect, the Applicant shall advise the 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 Undertaking subject to those conditions. Where the Commission has previously been involved in the matter, the Applicant shall notify the Commission of this resolution.²⁰ When the parties cannot agree on conditions that will result in a finding of Conditional No Adverse Effect, the matter may be submitted to the Commission for prompt resolution.

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 ("MOA") by notifying both the Applicant and the Commission.

¹⁸ As noted in its narrative comments, PCIA believes that the procedure for findings of "no adverse effect" should be the same as findings of "no historic properties affected."

¹⁹ The Council would like to change "encourage" to "shall" and USET agrees. Verizon Wireless disagrees with the Council and USET. PCIA is in favor of any provision that will better assist in identifying methods and conditions that will change findings of adverse effect to findings of conditional no adverse effect.

²⁰ PCIA suggests permitting the Commission to make its own determinations with respect to conditional no adverse effect when the SHPO and Applicant cannot agree. Language provided above.

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 and SHPO/THPO (and the Council if it is participating) shall negotiate a MOA that shall be sent to the Commission for review and execution. The Applicant, Commission and the SHPO/THPO (and the Council if it is participating) shall be the signatories to an MOA. The signatories may invite consulting parties or others to concur in the MOA. The refusal of any party invited to concur in the MOA does not invalidate the MOA.

5. If the Applicant and the SHPO/THPO (and the Council, if it is participating) are unable to agree upon the terms of an MOA, within three months, 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 800.7.²¹

VIII. EMERGENCY SITUATIONS

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 during construction a previously unidentified cultural or archeological resource or property within the APE that may be a Historic Property, 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.

²¹ CTIA requests specific time estimates for completing activities in VII.D.1-5.

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 Facility 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 suggest possible measures that might 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")²², 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 an 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 compliance with this Agreement of individual Undertakings covered or excluded under the terms of this Agreement. Comments related to telecommunications activities or Towers 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 any consultation it deems appropriate with the SHPO/THPO, potentially affected Indian tribes and NHOs, and/or the Council, take appropriate action. The Commission shall notify the objector of the outcome of its decision and any action. Complaints against constructed facilities on Section 106 grounds must comply with the provisions of Section X.

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.

²² PCIA suggests that a complete statement of Section 110(k) is preferable to a synopsis or incomplete statement.

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. Should the consultation fail to produce agreement or a reasonable alternative to termination, this Agreement shall be terminated 60 days after notice of termination is served by a signatory on all other Parties and published in the Federal Register.

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.

Attachment B – Revised Form NT

ATTACHMENT 3

[Note: The following pages contain suggested changes, deletions and additions to the New Tower Submission Packet (Form NT) released as Attachment 3 to the FCC NPRM dated July 1, 2003. The suggested changes are in narrative form, not arranged or laid out in final, useable questionnaire format.

The final instructions, cover sheet and Form CO should be formatted and designed with appropriate check-boxes and information lines for maximum clarity, readability, logical progression and ease of use]

Instructions

**For a
NEW TOWER SUBMISSION PACKET
(Consisting of Instructions, Cover Sheet and Form NT)**

**For Historic Preservation Review of FCC Undertakings
Under Section 106 of the National Historic Preservation Act**

This New Tower Submission Form is designed to assist carriers, broadcast companies, tower companies, cultural resource professionals and others involved with the historic preservation review of Federal Communications Commission (“FCC”) Undertakings under Section 106 of the National Historic Preservation Act (“NHPA”) and the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Undertakings Approved by the Federal Communications Commission (“Nationwide Agreement”). Applicants may compare this New Tower Submission Packet (Form NT) with the Collocation Submission Packet (Form CO) (Attachment 4 to the Nationwide Agreement) to understand the similarities and differences.

A New Tower Submission Packet should be used in cases where:

1. An Applicant proposes to construct a new Tower, and
2. The new Tower is not exempt from Section 106 review under the terms of the Nationwide Agreement.

Prior to the construction of any new FCC Undertaking not excluded from Section 106 review by the Nationwide Agreement, Form NT should be completed and submitted to the relevant State Historic Preservation Officer ("SHPO"), (and/or for undertakings on or affecting tribal lands, the Tribal Historic Preservation Officer ("THPO")), to any participating Indian tribe or Native Hawaiian Organization ("NHO"), and to other consulting parties, as required by the terms of the Nationwide Agreement. The information requested in this Form NT, and all supporting documentation must contain, sufficient detail to enable the SHPO/THPO to complete their independent review of the Applicant's findings and determinations regarding potential effects to historic properties from the proposed Undertaking, pursuant to Section VII of the Nationwide Agreement.

For this Form NT, determinations will include:

- 1) The relevant SHPO(s) and/or, for Undertakings on tribal lands, the relevant THPO;
- (2) The area of potential effects ("APE") for the Undertaking;
- (3) The identification of known and possible historic properties in the APE;
- (4) The eligibility for the National Register of Historic Places ("National Register") for potentially affected, unlisted properties;
- (5) The relevant local government to be notified; and
- (6) The Indian tribes or Native Hawaiian Organizations ("NHOs") that may attach religious and cultural significance to historic properties in the APE.

The findings for this review will describe the potential effects from the Undertaking to each historic property in the APE. Findings can be either: (1) no historic properties affected; (2) no adverse effect; or (3) adverse effect.

The information provided in the New Tower Submission Packet must be provided and explained in sufficient detail to allow the reviewer, without visiting the site, to

understand, evaluate and reach its own independent conclusions regarding the strength and validity of the following:

- (1) Each of the applicant's findings and determinations;
- (2) The applicant's determination of the appropriate level of effort for the identification of historic properties and Indian tribes and NHOs;
- (3) All of the relevant and material information on which each finding and determination is based;
- (4) The process by which the relevant information was gathered;
- (5) The process by which each finding and determination was made, including the evaluation of the relevant evidence, and the logical process leading to each material conclusion; and
- (6) The relevant education, expertise and experience of the person(s) gathering the evidence and making or contributing to the ultimate determinations and findings.

These Instructions and the attached Form NT are intended to provide authoritative guidance with regard to the Section 106 process for FCC Undertakings. In the event of any inconsistency or other conflict between the provisions of these instructions or Form NT and the Nationwide Agreement, and any other applicable relevant federal law shall control.

Exclusions

Form NT should not be prepared or submitted for any new Undertaking where Section 106 review is not required or is excluded under the Nationwide Agreement, or any future programmatic agreement that excludes Undertakings from such review.

Where Section 106 review of an Undertaking is excluded or not required, the Applicant should retain in its files a record of the justification and basis for each determination that Section 106 review is not required.

Time Period for Review and Comments

Upon submission to the SHPO/THPO of a New Tower Submission Packet (Form NT), the Applicant is deemed to have made a request for review of a finding(s), determination(s), or both for purposes of Sections VI and VII of this Nationwide Agreement and the review period specified in Section VII of this Nationwide Agreement will begin.

COVER SHEET

**For a
NEW TOWER SUBMISSION PACKET**

**For Historic Preservation Review of FCC Undertakings
Under Section 106 of the National Historic Preservation Act**

PROJECT IDENTIFICATION

Primary name and identification number of project.

Project location – city and state.

Nature of Undertaking, either: FCC licensed project (describe license), antenna structure to be registered, or voluntary submission.

Proposed tower height:

Tower type: guyed tower monopole self-supporting other

Project Status:

- a. Construction planned but not yet commenced;
- b. Construction commenced on [date] but not yet completed;
- c. Other (Explain)

PRIMARY CONTACT FOR THIS REVIEW

Company name

Contact person, title, address, phone, mobile, fax and e-mail

APPLICANT

Company name

TOWER MANAGER, BUILDER OR OWNER (if different from Applicant)

Company name

OUTSIDE CONSULTANT OR OTHER SOURCE OF RELEVANT EXPERTISE

Company name

Name(s) of persons making or contributing to findings for this submission

KEY DETERMINATIONS FOR THIS PROJECT:

1. Listed Historic Properties in APE? yes, no
2. Determined eligible historic properties in APE? yes, no
3. Properties in the APE determined not to be NR eligible? yes, no
4. Will this project be located on, or have a physical effect on, tribal lands? yes, no. If yes, provide name and contact information of the THPO or tribal contact.
5. Has the relevant local government entity been notified? If yes, provide name of entity.
6. Are there Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the APE? If yes, list the tribes and whether or not each is a consulting party to this review. For those identified that are not consulting parties, state dates and types of contacts with each tribe.

KEY FINDINGS FOR THIS PROJECT

Check applicable finding:

1. No effect on Historic Properties in APE
2. No adverse effect on Historic Properties in APE
3. Adverse effect on Historic Properties in APE

Form NT

For a NEW TOWER SUBMISSION PACKET

For Historic Preservation Review of FCC Undertakings Under Section 106 of the National Historic Preservation Act

Elements of New Tower Submission Packet (Form NT) [separate page]

1. Project Identification

Primary name and identification number of project. Where applicable, provide all other names and identification numbers assigned by related entities. Identify source and where useful for the purposes of this review, provide an explanation for each.

Project location. Provide street address where available and city, county, and state. Provide both Lat/Long coordinates or Universal Transverse Mercator "UTM" coordinates.

Nature of Undertaking, either: FCC licensed project (describe license), antenna structure to be registered, or voluntary submission.

Proposed tower height:

Tower type: guyed tower monopole self-supporting other

Type of tower lighting, if any:

Describe surrounding land use of leased or owned property and any access roads, utility lines, or other easements related to the site.

Project Status:

- a. Construction planned but not yet commenced;
- b. Construction commenced on [date] but not yet completed;
- c. Other (Explain)

2. Primary Contact For this Project

Date: _____

Name of Company: _____

Address: _____

Phone: _____ Fax: _____

Email Address: _____

Applicant will be:

3. Applicant

Company name and address

Contact person, title, address, phone, mobile, fax and e-mail (optional)

4. Tower Manager, Builder Or Owner (If Different From Applicant)

Company name and address

Contact person, title, address, phone, mobile, fax and e-mail (optional)

5. Outside Consultant Or Other Source Of Relevant Expertise

Company name and address

Contact person, title, address, phone, mobile, fax and e-mail (optional)

Name(s), companies and titles (or area of relevant expertise) of persons making or contributing to findings for this submission

6. Initiating Section 106 Consultation

- a. State and/or Tribal Historic Preservation - List SHPO/THPO with jurisdiction over this project.

- i. Will this project be located on, or have a physical effect on, tribal lands? If so, identify THPO or tribal representative contacted.
 - ii. Are there Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the APE? If yes, list the tribes and whether or not each is a consulting party to this review. For those identified that are not consulting parties, state dates and types of contacts with each tribe.
- b. Public Involvement - Because applicable rules require notice to the public of Undertakings and an opportunity to comment that reflects the nature and complexity of the Undertaking, describe measures taken to notify the public of their opportunity to comment on potential effects from the project on historic properties.
- c. Local Government - Has local government been contacted and invited to become a consulting party pursuant to Section V.A. of the Nationwide Agreement? If so, list local government agencies contacted and their response. If not, explain why this has not occurred.
- d. Additional Consulting Parties - List any additional potentially interested consulting parties (individuals or organizations with demonstrated interest in the project, or in historic preservation) that have been identified and any that have been contacted, and identify those that have been made consulting parties.

7. Identification of Historic Properties¹

Attach continuation sheets as necessary; include key locations of all Historic Properties to maps and key descriptions of Historic Properties to photos.

- a. Area of Potential Effects (APE) - Describe the APE for the proposed project and how this APE was determined, see VI.B of the Nationwide Agreement.
- b. Previously Identified Historic Properties
 - i. Are there any National Historic Landmarks located within the APE? If so, list the name and address of each property.
 - ii. Are there any properties or historic districts located within the APE that are listed in the National Register of Historic Places? If so, list the name and address of each property and the source of survey information.
 - iii. Are there any historic properties or historic districts located within the APE that have been determined eligible for listing in the National Register of Historic Places? If so, list the name and address of each property and the source of survey information.
 - iv. If Applicant surveyed any previously evaluated historical sites whose prior evaluation may have been incorrect or incomplete due to the passage of time, changing perceptions of significance, or incomplete prior evaluations, identify and describe these properties. List the name and address/vicinity of each property, the site inventory number, and the source of survey information. Contact SHPO/THPO regarding previously surveyed archeological sites.
- c. Field Survey Results

¹ PCIA believes that the Section 106 Process applies to properties determined eligible for national registration only and does not concede that identification of other properties is necessary.

- i. Evaluate the eligibility for the National Register of Historic Places ("National Register") of any potentially eligible historic districts, sites, buildings, structures, or objects that have not previously been identified that are located within the APE and provide your eligibility assessment. For each property assessed, please reference Photos and a Site Location Map. For identified properties, list the name and address of each property, the site inventory number, and the name of the consultant(s) or other qualified person(s) who performed or contributed to the evaluation.
 - ii. Are there any newly identified archaeological sites located within the APE? If so, evaluate their potential eligibility for the National Register of Historic Places and provide Applicant's assessment of whether additional survey work is necessary. If Applicant has already completed an archaeological survey, please include the survey report with this checklist. For each site assessed, please reference Photos and Site Location Map. For identified properties, list the name and address of each property, the site inventory number, and the name of the consultant who performed the evaluation.
 - iii. Describe surrounding topography including modern intrusions, existing buffering, and vegetation. Describe any previous ground disturbance.
- d. Determination
- Historic Properties Exist Within the APE.** Applicant should continue to Section 5, Determination of Effect.
 - No Historic Properties Exist Within the APE.** Applicant need not complete Section 5.

8. Determination of Effect

Use the Criteria of Adverse Effect and the guidelines found at Sections VI. A and VI. B. of the Nationwide Agreement as the basis for Applicant's assessment. Check one box below and attach narrative that explains the basis for your determination. The documentation compiled through the use of this checklist should be sufficient for reviewing parties to clearly understand the basis for determinations made about potential project effects on Historic Properties.

"No Historic Properties Affected" means that there are Historic Properties present within the APE, but the undertaking will have no effect on them.

"No Adverse Effect" means that there are Historic Properties within the Area of Potential Effects, but that the effects from the undertaking do not constitute adverse effects under the Criteria of Adverse Effects. Where an adverse effect may have been appropriate, but conditions on the Undertaking have been proposed, implemented or agreed to that sufficiently mitigate or otherwise avoid the adverse effect, describe such conditions and how the Adverse Effect is being avoided.

"Adverse Effect" means that there are Historic Properties within the Area of Potential Effects, the Applicant has applied the Criteria of Adverse Effect, and found that the undertaking will have an adverse effect on one or more Historic Properties that are eligible for or listed in the National Register of Historic Places. The following questions should be answered in the narrative:

1. Which Historic Properties will be adversely affected? Explain how.
2. Has the SHPO/THPO addressed Adverse Effects in previous communications?
3. What alternatives were considered that might avoid, minimize, or mitigate adverse effects? What conclusion was reached regarding the feasibility of each alternative?

4. How will the public be informed of developments regarding the Section 106 consultation process?
5. What mitigation options are proposed by the Applicant to resolve the adverse effect of the project?

9. Exhibits

- a. Photos (Number all photos and key the photos to Photo Map)
 - i. Color photos showing view from proposed tower site in all compass directions, labeled with N/S/E/W view from the tower. Photo coverage of 360 degrees is recommended. If surveyed properties are visible from the proposed tower site, include additional views from site towards Historic Properties and indicate distance between the site and each property. For all photos, label compass direction and date photos were taken.
 - ii. Color photos of existing site conditions. Key photos to description of topography and previous ground disturbances in Field Survey section.
 - iii. Color photos of potentially eligible Historic Properties that are reasonably available within the Area of Potential Effects. Include photos of all buildings greater than 45 years old. In urban areas where there are large numbers of buildings greater than 45 years old that do not appear to meet the National Register Criteria, Applicant may include a limited number of representative streetscape photos. However, in all cases Applicant must provide sufficient photos in urban areas to support its eligibility assessment and effect determination.²

² See *supra*, footnote 4.

b. Maps

- i. Topographic Map - 7.5-minute quad map showing location of proposed tower site. Show Area of Potential Effects. If map is copied from original, include key with name of quad and date.
- ii. Site Location Map - Mark location of proposed tower site and any new access roads required. Show Area of Potential Effects. Applicant must also show the location of any surveyed Historic Properties. Provide key for any symbols, colors, identifiers used.
- iii. Photo Perspectives Map - Applicant may duplicate the Site Location Map (with or without the Historic Properties shown). Mark clearly the locations from which photos were taken and indicate direction of view.

Attachment C – Revised Form CO

ATTACHMENT 4

[Note: The following pages contain suggested changes, deletions and additions to the Collocation Submission Packet (Form CO) released as Attachment 4 to the FCC NPRM dated July 1, 2003. The suggested changes are in narrative form, not arranged or laid out in final, useable questionnaire format.]

The final instructions, cover sheet and Form CO should be formatted and designed with appropriate check-boxes and information lines for maximum clarity, readability, logical progression and ease of use]

Instructions

**For a
COLLOCATION SUBMISSION PACKET
(Consisting of Instructions, Cover Sheet and Form CO)**

**For Historic Preservation Review of FCC Undertakings
under Section 106 of the National Historic Preservation Act**

This Collocation Submission Packet is designed to assist carriers, broadcast companies, tower companies, cultural resource professionals and others involved with the historic preservation review of Federal Communications Commission (“FCC”) Undertakings under Section 106 of the National Historic Preservation Act (“NHPA”)¹ and the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Undertakings Approved by the Federal Communications Commission (“Nationwide Agreement”).²

Applicants may compare this Collocation Submission Packet (Form CO) with the New Tower Submission Packet (Form NT) (Attachment 3 to the Nationwide Agreement) to understand the similarities and differences.

¹ 16 U.S.C. § 470 *et seq.*

² Other related federal laws that may be applicable include the FCC’s environmental rules (47 C.F.R. Sections 1.1301-1.1319), the regulations of the ACHP (36 C.F.R. Part 800), the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, or any other programmatic agreement that may be applicable.

The Collocation Submission Packet (Form CO) should be used in cases where:

1. An Applicant proposes to collocate one or more Antennas on an existing Tower³ or a non-Tower structure; and
2. The proposed collocation is not exempt from Section 106 review under the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Agreement").

Prior to the collocation of any antenna(s) not excluded from Section 106 review by the Collocation Agreement, Form CO should be completed and submitted to the relevant State Historic Preservation Officer ("SHPO"), (and/or for undertakings on or affecting tribal lands, the Tribal Historic Preservation Officer ("THPO")), to any participating Indian tribe or Native Hawaiian Organization ("NHO"), and to other consulting parties, as required by the terms of the Nationwide Agreement. The information requested in this Form CO and all supporting documentation must contain sufficient detail to enable the SHPO/THPO and the FCC to complete their independent review of the Applicant's findings and determinations regarding potential effects to historic properties from the proposed Undertaking, pursuant to Section VII of the Nationwide Agreement.

For this Form CO, determinations will include:

- 1) The relevant SHPO(s) and/or, for Undertakings on tribal lands, the relevant THPO;
- (2) The area of potential effects ("APE") for the Undertaking;
- (3) The identification of known and possible historic properties in the APE;
- (4) The eligibility for the National Register of Historic Places ("National Register") for potentially affected, unlisted properties;
- (5) The relevant local government to be notified; and
- (6) The Indian tribes or NHOs that may attach religious and cultural significance to historic properties in the APE.

³ A "Tower" is any structure built for the sole or primary purpose of supporting Commission-licensed antennas and their associated facilities.

The findings for this review will describe the potential effects from the Undertaking to each historic property in the APE. Findings can be either: (1) no effect to historic properties; (2) no adverse effect; or (3) adverse effect.

The information provided in the Collocation Submission Packet must be provided and explained in sufficient detail to allow the reviewer, without visiting the site, to understand, evaluate and reach its own independent conclusions regarding the following:

- (1) Each of the applicant's findings and determinations;
- (2) The applicant's determination of the appropriate level of effort for the identification of historic properties and Indian tribes and NHOs;
- (3) All of the relevant and material information on which each finding and determination is based;
- (4) The process by which the relevant information was gathered;
- (5) The process by which each finding and determination was made, including the evaluation of the relevant evidence, and the logical process leading to each material conclusion; and
- (6) The relevant education, expertise and experience of the person(s) gathering the evidence and making or contributing to the ultimate determinations and findings.

These Instructions and the attached Form CO are intended to provide authoritative guidance with regard to the Section 106 process for FCC Undertakings. In the event of any inconsistency or other conflict between the provisions of these instructions or Form CO and either the Collocation Agreement, the Nationwide Agreement, or other applicable federal law, the Collocation Agreement, the Nationwide Agreement, and any other applicable federal law, shall control.

Exclusions from Review under the Collocation Agreement

This Form CO should not be submitted for any proposed collocation where Section 106 review is not required under the Collocation Agreement, the Nationwide Agreement, or any future programmatic agreement that excludes undertakings from such review.

Where Section 106 review of an Undertaking is excluded or not required, the Applicant should retain in its files a record of the justification and basis for each determination that Section 106 review is not required.

How to Determine if a Collocation is Excluded from Review

Many collocations may be excluded from the review and consultation requirements of Section 106, depending on factors such as: (1) the age of the tower, building or non-tower structure on which the collocation will occur; (2) whether the collocation will result in a substantial increase in the size of the tower; or (3) whether the collocation will be on a historic building or structure.

The following guidelines may be used to determine whether or not a collocation may be excluded.

A. For Collocations on Towers built on or before March 16, 2001, the Applicant must answer the following questions. A "yes" answer to any question means the collocation is not excluded from review, and a Collocation Submission Packet for this Undertaking must be submitted to the SHPO/THPO.

1. Will the proposed collocation result in a "substantial increase" in the size of the tower? A "substantial increase" in the size of a tower generally occurs when a collocation would involve:

- 1) An increase in the existing height of the tower by more than 10%, more than 20 feet from the nearest antenna array, or more than necessary to avoid RF interference;
- 2) The installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter;
- 3) The adding of an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, or more than is necessary to shelter the antenna or to connect the Antenna to the Tower via cable; or
- 4) Excavation outside the current tower site (meaning the leased or owned area and any access or utility easements).

(For a more complete definition of "substantial increase" in the size of the tower, see the Collocation Agreement, Section I.C. and the January 10, 2002, Commission Fact Sheet, "Antenna Collocation Programmatic Agreement Collocation Fact Sheet" ("Collocation Fact Sheet").

2. Is the tower subject to a pending environmental review or proceeding before the FCC involving NHPA compliance?

3. Has the tower been determined by the FCC to have an adverse effect that has not been resolved through a Memorandum of Agreement, Programmatic Agreement, the Nationwide Agreement, or other form of agreement?

4. Has the proposed collocation licensee or tower owner received notification from the FCC that the FCC has received a complaint that the collocation will have an adverse effect on one or more Historic Properties?

B. For Collocations on Towers built after March 16, 2001, the Applicant must answer the following questions. A "no" answer to question 1, or a "yes" answer to any of questions 2 through 4, means the collocation is not excluded from review, and a Collocation Submission Packet for this Undertaking must be submitted to the SHPO/THPO:

1. Has this Tower undergone a completed Section 106 review and any associated environmental assessment ("EA") required by the FCC?

2. Will the proposed collocation result in a "substantial increase" in the size of the tower?

3. Has the tower been determined by the FCC to have an adverse effect that has not been resolved through a Memorandum of Agreement, Programmatic Agreement, the Nationwide Agreement, or other form of agreement?

4. Has the proposed collocation licensee or tower owner received notification from the FCC that the FCC has received a complaint that the collocation will have an adverse effect on one or more Historic Properties?

C. For Collocations of Antennas on Buildings and Non-Tower Structures, the Applicant must answer the following questions. A "yes" answer to any question means the collocation is not excluded from review, and a Collocation Submission Packet for this Undertaking must be submitted to the SHPO/THPO.

1. Is the building or structure over 45 years old?
2. Is the building or structure inside the boundary of a historic district, or within 250 feet of the boundary of, and visible from, the historic district?
3. Is the building or structure a National Historic Landmark, or listed in or eligible for listing in the National Register of Historic Places?
4. Has the collocation licensee or the owner of the tower received notification that the FCC is in receipt of a complaint that the collocation has an adverse effect on a historic property?

Time Period for Review and Comments

Upon submission to the SHPO/THPO of a Collocation Submission Packet, the Applicant is deemed to have made a request for review of a finding(s), determination(s), or, both for purposes of Sections VI and VII of this Nationwide Agreement and the review period specified in Section VII of this Nationwide Agreement will begin.

Record Keeping

Where an undertaking is to be completed but no submission is made to the local SHPO/THPO because of the availability of one or more exclusions, the Applicant should retain in its files documentation of the basis for each exclusion should a question arise as to the Applicant's compliance with Section 106.

COVER SHEET

**For a
COLLOCATION SUBMISSION PACKET
For Historic Preservation Review of FCC Undertakings
under Section 106 of the National Historic Preservation Act**

PROJECT IDENTIFICATION

Primary name and identification number of Collocation.

Project location - city, county, and state.

Nature of Collocation, either: (1) On a Tower built before March 16, 2001; (2) On a tower built after March 16, 2001; or (3) On a building or non-tower structure.

(For Towers) Existing tower height.

(For Towers) Height of collocation mount.

Tower type: guyed tower monopole self-supporting other

For Towers:

1. Date of Construction of the Tower.

2. Section 106 Review. Has Tower completed Section 106 review? If so, list the date completed and SHPO/THPO reference number. If Tower was exempted from Section 106 review through a programmatic agreement, describe the basis for the exemption.

Collocation Project Status:

- a. Collocation planned but not yet commenced;
- b. Collocation commenced on [date] but not yet completed;
- c. Other (Explain).

PRIMARY CONTACT FOR THIS REVIEW

Company name and address.

Contact person, title, address, phone, mobile, fax and e-mail.

APPLICANT

Company name.

**TOWER, BUILDING OR STRUCTURE OWNER OR MANAGER (if
different from Applicant)**

Company name.

**OUTSIDE CONSULTANT OR OTHER SOURCE OF RELEVANT
EXPERTISE**

Company name.

Name(s) of persons making or contributing to findings for this submission.

KEY DETERMINATIONS FOR THIS PROJECT:

1. Listed Historic Properties in APE? Yes/No
2. Potentially eligible historic properties in APE? Yes/No
3. Properties in the APE determined not to be NR eligible? Yes/No
4. Will this project be located on, or have a physical effect on, tribal lands? Yes/No If yes, provide name and contact information of the THPO or tribal contact.
5. Has the relevant local government entity been notified? Yes/No If yes, provide name of entity.
6. Are there Indian tribes or Native Hawaiian Organizations ("NHOs") that might attach religious and cultural significance to historic properties in the APE? Yes/No If yes, list the tribes or NHOs and whether or not each is a consulting party to this review. For those identified that are not consulting parties, state dates and types of contacts with each tribe or NHO.

KEY FINDINGS FOR THIS PROJECT

Check all that apply.

1. No effect on Historic Properties in APE. []
2. No adverse effect on Historic Properties in APE. []
3. Adverse effect on Historic Properties in APE. []

Form CO

For a COLLOCATION SUBMISSION PACKET

For Historic Preservation Review of FCC Undertakings under Section 106 of the National Historic Preservation Act

1. Project Identification

Primary name and identification number of project. Where applicable, provide all other names and identification numbers assigned by related entities. Identify source and, where useful for the purposes of this review, provide an explanation for each.

Project location. Provide street address where available and city, county, and state. Provide both Lat/Long coordinates and Universal Transverse Mercator ("UTM") coordinates.

Structure. This Form CO pertains to collocation of antenna(s) on a: Tower or Non-Tower Structure (check one).

For Towers:

Type of tower lighting, if any.

Proposed height of Tower or non-Tower structure after collocation (if height is increased) (provide heights above ground and above sea level).

Describe surrounding land use of leased or owned property and any access roads, utility lines, or other easements related to the site.

Current area of compound.

Proposed increased area of compound.

Describe any new excavation outside the current leased or owned property including compound, access road or utility easement. If none, so state.

How many new equipment cabinets will be added?

How many new equipment shelters will be added?

2. Applicant

Company name and address.

Contact person, title, address, phone, mobile, fax and e-mail (optional).

3. Tower, Building or Structure Owner or Manager (if different from Applicant)

Company name and address.

Contact person, title, address, phone, mobile, fax and e-mail (optional).

4. Outside Consultant or Other Source of Relevant Expertise

Company name and address.

Contact person, title, address, phone, mobile, fax and e-mail (optional).

Name(s), companies and titles (or area of relevant expertise) of persons making or contributing to findings for this submission

5. Initiating Section 106 Consultation

a. State and/or Tribal Historic Preservation Officers - List SHPO/THPO with jurisdiction over this project.

i. Is this Collocation on tribal lands? If so, identify tribe and tribal contact(s).

For collocation projects located off tribal lands, explain efforts made to identify Indian tribes or Native Hawaiian Organizations ("NHOs") that may attach religious and cultural significance to Historic Properties that may be affected by this Collocation. List tribes and NHOs identified and describe date, nature of contact(s) and responses. If no tribes or NHOs were identified, explain how this determination was made.

b. Public Involvement - Describe measures taken to notify and seek comment from the public.

c. Local Government - Has local government been contacted and invited to be a consulting party pursuant to Section V.A. of the Nationwide Agreement? List

local government agency contacted and name, address, phone, fax and email address of contact person.

d. Additional Consulting Parties- List any additional consulting parties (individuals or organizations with demonstrated interest in the project) that have been identified and contacted, and, if made consulting parties, the contact information for any contact person(s).

6. Identification of Historic Properties

Attach continuation sheets as necessary; include key locations of all Historic Properties to maps and key descriptions of Historic Properties to photos.

a. Area of Potential Effects (APE) - Describe the APE for the proposed project and how this APE was determined, see Section VI B. of the Nationwide Agreement.

b. Previously Identified Historic Properties

i. Are there any National Historic Landmarks located within the APE? If so, list the name and address of each property.

ii. Are there any properties or historic districts located within the APE that are listed in the National Register of Historic Places? If so, list the name and address of each property and the source of survey information.

iii. Are there any properties or historic districts located within the APE that have been determined eligible for listing in the National Register of Historic Places? If so, list the name and address of each property and the source of survey information.

iv. If Applicant surveyed any previously evaluated historical sites due to the passage of time, changing perceptions of significance, or incomplete prior evaluations, identify and describe these properties. List the name and address/vicinity of each property, the site inventory number, and the source of survey information. Contact SHPO/THPO regarding previously surveyed archeological sites.

c. Field Survey Results

i. Evaluate the eligibility of any potentially eligible historic districts, sites, buildings, structures, or objects that have not previously been identified that are located within the APE for the National Register of Historic Places, and provide your eligibility assessment. For each property assessed, please reference Photos and Site Location Map. For identified properties, list the name and address of each property,

the site inventory number, and the name of the consultant who performed the evaluation.

ii. Are there any newly identified archaeological sites located within the APE? If so, evaluate their potential eligibility for the National Register of Historic Places, and provide Applicant's assessment of whether additional survey work is necessary. If Applicant has already completed an archaeological survey, please include survey report with this checklist. For each site assessed, please reference Photos and Site Location Map. For identified properties, list the name and address of each property, the site inventory number, and the name of the consultant who performed the evaluation.

iii. Describe surrounding topography including modern intrusions, existing buffering, and vegetation. Describe any previous ground disturbance.

d. Determination

Historic Properties Exist Within the APE. Applicant should continue to Section 5, Determination of Effect.

No Historic Properties Exist Within the APE. Applicant need not complete Section 5.

7. Determination of Effect

Use the Criteria of Adverse Effect and the guidelines found at Sections VI.A. and VI. B of the Nationwide Agreement as the basis for Applicant's assessment. **Check one box below and attach narrative** that explains the basis for your determination. The documentation compiled through the use of this checklist should be sufficient for reviewing parties to clearly understand the basis for determinations made about potential project effects on Historic Properties.

"No Historic Properties Affected" means that there are Historic Properties present in the APE, but the undertaking will have no effect on them.

"No Adverse Effect" means that there are Historic Properties within the Area of Potential Effects, but that the undertaking does not meet the Criteria of Adverse Effect. Explain how each criterion of Adverse Effect does not apply or how the Adverse Effect is being avoided.

"Adverse Effect" means that there are Historic Properties within the Area of Potential Effects, that the Applicant has applied the Criteria of Adverse Effect, and

found that the undertaking will have an adverse effect on one or more Historic Properties that are eligible for or listed in the National Register of Historic Places. The following questions should be answered in the narrative:

1. Which Historic Properties will be adversely affected? Explain how.
2. Has the SHPO/THPO addressed Adverse Effects in previous communications?
3. What alternatives were considered that might avoid, minimize, or mitigate adverse effects? What conclusion was reached regarding the feasibility of each alternative?
4. How will the public be informed of the developments regarding the Section 106 consultation process?
5. What mitigation options are proposed by the applicant to resolve the adverse effect of the project?

8. Exhibits

a. Photos (Number all photos and key the photos to Photo Map)

i. Color photos showing view from proposed site in all compass directions, labeled with N/S/E/W view from the tower. Photo coverage of 360 degrees is recommended. If surveyed properties are visible from the proposed site, include additional views from site towards Historic Properties and indicate distance between the site and each property. For all photos, label compass direction and date photos were taken.

ii. Color photos of existing site conditions. Key photos to description of topography and previous ground disturbances in Field Survey section.

iii. Color photos of potentially eligible Historic Properties that are reasonably available within Area of Potential Effects. Include photos of all buildings greater than 45 years old. In urban areas where there are large numbers of buildings greater than 45 years old that do not appear to meet the National Register Criteria, Applicant may include a limited number of representative streetscape photos. However, in all cases Applicant must provide sufficient photos in urban areas to support its eligibility assessment and effect determination.

b. Maps

i. Topographic Map - 7.5-minute quad map showing location of proposed tower site. Show Area of Potential Effects. If map is copied from original, include key with name of quad and date.

ii. Site Location Map - Mark location of proposed tower site and any new access roads required. Show Area of Potential Effects. Applicant must also show the location of any surveyed Historic Properties. Provide key for any symbols, colors, identifiers used.

iii. Photo Map - Applicant may duplicate the Site Location Map (without the Historic Properties). Mark where all photos were taken and indicate direction of view.