

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

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

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking seeking comment on the draft Nationwide Programmatic Agreement (“NPA”).¹

I. SUMMARY.

Wireless carriers, such as Nextel, have “rapidly evolved into an indispensable, crucially important network of services upon which more and more of our country’s citizens depend, and without which our commerce, public safety and homeland security would be impaired.”² A streamlined and efficient mechanism for tower and antenna siting – even for historical and environmentally sensitive areas – is essential to the ability of all wireless carriers to provide ubiquitous voice and data services.

The comments from virtually all interested parties, *e.g.*, trade associations, tower companies, telecommunications carriers, Indian tribes, state historic preservation officers, demonstrate that the proposed NPA, as put forward by the Commission, fails to tailor and streamline the procedures for

¹ NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS, *Notice of Proposed Rulemaking*, WT Docket No. 03-128, FCC 03-125, ¶ 1 (rel. June 9, 2003) (“NPRM”).

² AT&T Wireless Comments at 2.

review of communications facilities under the National Historic Preservation Act (“NHPA”).³

Indeed, as is, this draft agreement “has veered in some crucial ways from its original course and from the streamlining goals adopted by the Commission.”⁴ Further, some of the proposed changes “could add considerable unnecessary burden and expense to the already costly and time-consuming process” CMRS carriers must undertake.⁵

Nextel, like other interested parties, thus urges the Commission to avoid unfortunate and unnecessary regulatory results. In particular, Nextel urges the Commission to reject the draft NPA – and the overly burdensome and unrestricted review processes contained therein – in its entirety. If, in the interest of time, the Commission wishes to continue to work with the proposed agreement, then its most egregious elements should be modified. Specifically, the Commission must add a *definitive and short-term time frame for the review of all non-exempt tower and antenna siting projects*. As Nextel and others have demonstrated, the more specific and predictable procedures that are in place for building on or near historic properties, the better it is for all concerned participants.

II. AN APPROPRIATE BALANCE BETWEEN PRESERVING HISTORIC AND ENVIRONMENTAL RESOURCES AND ACCELERATING THE PROCESS OF DEPLOYING WIRELESS INFRASTRUCTURE MUST BE STRUCK.

Nextel recognizes the importance of Congress’ and the Commission’s efforts to protect valuable historic and environmental resources. Equally important, however, are the Commission’s efforts to accelerate the process of deploying necessary communications infrastructure. Indeed,

³ 16 U.S.C. § 470 (2003).

⁴ PCIA Comments at 8.

⁵ *Id.*

“[m]obile telecommunications . . . is not possible without the towers and other structures that support antennas for the line-of-site radio coverage necessary for each cell in a mobile network.”⁶

A. Streamlined and Readily Understandable Tower and Antenna Siting Procedures Advance the Public Interest.

The selection of sites for towers and antenna structures is a matter of great importance for efficient wireless network design and effective coverage. “Unless a sufficient number of towers are constructed in appropriate locations, wireless systems will not be effective and the public interest will not be served.”⁷ *Thus, CMRS carriers’ ability to expand their network and coverage areas directly effects their ability to deliver ubiquitous wireless service to subscribers and advance the overall public interest and welfare.*⁸

Efficient cell site planning, construction and implementation of a fully functional wireless network for voice and data service *depends* upon a predictable reasonable streamlined tower siting process.⁹ Carefully drafted and well-reasoned procedures for tower and antenna siting are beneficial to all parties involved in the Section 106 process. And, “a carefully drafted and well-reasoned Nationwide Programmatic Agreement . . . will be of considerable value to all participants. . . .”¹⁰ Moreover, streamlined procedures advance the public welfare because they assure that wireless services will be available to consumers ubiquitously. As Nextel demonstrated in its initial comments, one of the Commission’s most crucial missions under the Communications Act is to

⁶ CTIA Comments at 3.

⁷ *Id.*

⁸ See PCIA Comments at 6-7 (“[i]n the digital wireless age, towers are the indispensable infrastructure supporting the wireless networks on which much of our country's economy, public safety, and national security depend.”)

⁹ See SBC Comments at 1 (“[b]ringing greater certainty to determinations under the NHPA by creating objective criteria for evaluation . . . will assist telecommunications providers in bringing advanced services to the public in a timely and cost effective fashion.”).

¹⁰ Crown Castle Comments at 2.

make communications services available to all in order to “promote public safety of life and property.”¹¹

The *added* layers of review of CMRS providers’ placement of towers and cell sites contained in the draft NPA will undoubtedly *delay* full-scale wireless build-out and, in turn, delay service to consumers in rural and other high-cost areas, delay or prevent the completion of 911 calls, create dead zones and adversely affect the overall quality of available wireless service. Plainly, this is a bad policy result.

The Commission must balance the two goals at issue, *i.e.*, the preservation of historic properties and the streamlining of tower siting procedures. Nextel and others recognize that this is not an easy task. The objective of Section 106, however, is not to have an open-ended tower siting process. Nowhere does Section 106 mandate vague or ambiguous processes that would require the Commission to renounce its CMRS deployment goals. The Commission must not, therefore, compromise the buildout of wireless networks by implementing unnecessary and convoluted tower siting procedures that are not required by statute and do not promote the public interest in broad availability of wireless services.

B. The Proposed Programmatic Agreement Contains Complex and Burdensome Construction Review Processes.

Nextel, like other commenters, “wholly support[s] the stated goal of the Draft NPA to ‘tailor and streamline procedures for review’ under Section 106, but believe[s] that this ‘streamlining’ effort should remove and improve, not add to or complicate, the regulatory burdens on the wireless industry.”¹² Nextel recognizes the importance of environmental and historic preservation issues

¹¹ Nextel Comments at 3-4 (citing 47 U.S.C. § 151). *See also* AT&T Wireless Comments at 3 (“[e]liminating unnecessary regulation promotes the health of the entire industry and therefore homeland security by enabling robust wireless services to be made available to consumers and public safety entities alike.”).

¹² *See* Joint Comments of Western Wireless and T-Mobile at 3.

associated with tower siting in sensitive areas. Like other wireless carriers, Nextel devotes considerable resources to fulfilling its compliance obligations under the NHPA. The efforts of the wireless telecommunications community have resulted in a “record that the industry is proud of, and a national wireless infrastructure that has been developed as rapidly as possible in a manner that meets environmental, historic preservation, land use, and other requirements.”¹³ Despite these continuing efforts of the wireless industry, the proposed rules seemingly continue to create unnecessary obstacles for wireless carriers and tower siting companies. As it now stands, the proposed NPA contains a complicated series of rules and processes that not only allow for an entirely separate and additional Indian tribe consultation and approval process¹⁴ but also permit unrestricted state and local government participation and process entirely outside of the traditional zoning process.¹⁵

Indeed, as Sprint recognizes, the “Commission’s application of Section 106 to antenna siting activities has resulted in an extremely burdensome process that negatively impacts [the] industry’s ability to deploy facilities in a timely manner without countervailing benefit. The FCC’s Section 106 requirements not only delays deployment of voice and data services, but increases the costs of network deployment.”¹⁶ These burdens would be an unwelcome addition to an already long list of government mandates. A difficult and time-consuming antenna siting process would deliver no real benefits to consumers and would also deter the Commission’s goal in preserving historic properties.

Wireless carriers operate in an extremely competitive environment and face constant pressure to improve upon their service quality and offerings. Wireless carriers have already come

¹³ CTIA Comments at 3. *See also id.* at 3-4 (“[i]n building out their network, CTIA members have gone to great lengths to comply with the Commission’s environmental rules, Section 106 requirements, and the implementing regulations promulgated by the Advisory Council on Historic Preservation.”).

¹⁴ *See Programmatic Agreement* at IV.B (NPRM Appendix A-11, A-15).

¹⁵ *See id.* at V.A-C (NPRM Appendix A-15-16).

¹⁶ Sprint Comments at 1-2.

modified from their original form and, in some cases, have been either substantially limited or made quite complex.”²⁰

Nextel agrees with the modifications to the “Exclusions List” proposed by Western Wireless and T-Mobile. For one, the Commission must clarify that excluded undertakings never require Commission or SHPO consultation or the application of subjective tests. Second, the Commission should recognize that modifications to towers do not constitute undertakings under the NHPA. The relevant provision of the NHPA, for purposes of the Draft NPA, states that only activities that “requir[e] a Federal permit, license or approval” are undertakings.²¹ As such, this should be made plain in the draft Programmatic Agreement and removed from the exclusions section (Section III.A.1).²² Third, the industrial area (Section III.A.4) and corridor (Section III.A.5) exclusions should be revised and simplified. As Western Wireless, T-Mobile and CTIA correctly note, the wording of the industrial area exclusion must be simplified to increase its utility for applicants. As currently drafted, the industrial area exclusion “is verbose and confusing.”²³ In addition, the corridor exclusion should be clarified to apply to all high-speed, controlled access highways, not just Interstate highways, and to all rail lines in active use, not just passenger lines. Nextel also agrees with CTIA that the proposed opt-out provision, which would involve state-by-state determinations of what areas are and are not excluded, must be rejected. Indeed, “[a]n opt-out

They must be clear, easy to understand and apply, objective, and above all, self-executing.”); CTIA Comments at 33 (“[e]xclusions are crucial and effective streamlining measures, provided they are clear, concise, objective and self-executing.”).

²⁰ AT&T Wireless Comments at 3-4.

²¹ 16 U.S.C.S. § 470w(7)(C) (2003).

²² Joint Comments of Western Wireless and T-Mobile at 11. *See also* CTIA Comments at 34 (“[t]here is substantial question whether the ‘modification of a tower and any associated excavation’ . . . is an undertaking at all.”).

²³ *See* Joint Comments of Western Wireless and T-Mobile at 11; CTIA Comments at 34.

procedure will spawn unfair, illogical and confusing results, as it would likely involve the development of different policies in adjoining states.”²⁴

Nextel also opposes the Navajo Nation’s proposed language which provides additional notice requirements and does nothing to help streamline excluded Undertakings from review. Indeed, “tribes have no independent right to consultation outside the context of the Section 106 process. And, no legally sustainable reason has been advanced to justify this unnecessary and burdensome proposal.”²⁵

As drafted, the proposed exclusion list does not accurately reflect the list that was originally negotiated among *all* interested parties, which contained a more extensive list of “Undertaking exclusions.” The current list must be modified to make it easier for wireless carriers and tower siting entities to determine which undertakings are in fact excluded from the Section 106 process.

B. The Alternative Indian Tribe Consultation Proposals for Undertakings Off Tribal Lands must Be Rejected.

Nextel agrees with Cingular Wireless that the two alternative proposals for participation and consultation of Indian tribes and Native Hawaiian Organizations in the Undertaking review process are flawed and must be rejected. Indeed, “[b]oth alternatives of this section impose obligations on carriers that far surpass the requirements of Section 106(d)(6).” Alternative A -- Section IV.B. provides that “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

²⁴ CTIA Comments at 35.

²⁵ PCIA Comments at 13-14. *See also* Comments of the Central Station Alarm Association at 2 (“if the final Nationwide Agreement includes [the proposed III.B] language . . . licensees could be required to notify and seek approval from tribal authorities before engaging in any construction projects that take place merely in the vicinity of (but not on) tribal lands *even where such Undertakings are otherwise exempt from Section 106 review*. Because including Section III.B . . . would impose *additional* notice requirements on tower projects that would otherwise be excluded from review, CSAA must oppose this approach.”).

are of religious and cultural significance to that Indian tribe or NHO.”²⁶ This provision “is replete with open-ended obligations on carriers, with virtually no corresponding obligations imposed on tribes.”²⁷ For instance, under such an obligations, carriers will be required to contact tribes directly, and “would have to continually follow-up with tribes who fail to respond to communications, or do not respond in a timely manner.”²⁸

Alternative B, on the other hand, requires that the Commission and not carriers “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.”²⁹ Alternative B is even more flawed “because it requires the Commission to consult directly with the tribe, *but imposes no time restrictions either on tribal or Commission action.*”³⁰ Indeed, as Nextel stated in its comments, under Alternative B, *no dates whatsoever are specified.*³¹

In addition, Alternative B is vague and ambiguous because it does not describe the process necessary for “meaningful consultation” and it does not explain how the Commission will actually address disputes.³² In fact, no guidance is given as to how the Commission would conduct the consultation with the Indian tribe. Wireless carriers’ expansion of service should not be placed at the mercy of third-party Indian tribes that are under no obligation to complete the review process in any specified timeframe. Should the draft NPA be adopted “as is,” the result will be a decrease in

²⁶ See *Programmatic Agreement* at IV.B (NPRM Appendix A-11).

²⁷ Cingular Wireless Comments at 6.

²⁸ *Id.*

²⁹ See *Programmatic Agreement* at IV.B (NPRM Appendix A-15).

³⁰ Cingular Wireless Comments at 6.

³¹ Nextel Comments at 17.

³² See CTIA Comments at 30.

wireless service expansion to underserved areas rural or tribal – a bad policy result from any parties’ perspective.

C. Commission and State Review Processes Must Contain Fixed Timeframes.

“The timeframes for review under Section 106 are of vital importance to the wireless industry.”³³

The Commission must ensure that *all entities* involved in the review process are subject to limited and definite periods for such review. *A 30 day timeframe for review of any proposed Undertaking is critical for all parties, including the Commission, SHPO/THPO, state and local governments involved in the review process.*³⁴ As both Western Wireless and T-Mobile correctly observe, “the lack of enforcement of the 30-day review period undermines industry’s reasonable reliance on this provision and, in turn, its confidence in the Commission’s regulatory processes relating to wireless communications facilities.”³⁵

IV. CONCLUSION.

The Commission must reject as a whole, or at the very least modify substantially, the proposed NPA, which creates open-ended, convoluted tower siting review procedures that, if implemented, will severely curtail CMRS service expansion both in existing an new service areas.

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³³ See Joint Comments of Western Wireless and T-Mobile at 4.

³⁴ See SBC Comments at 8 (“the FCC should specify firmly defined time periods for each stage of consultation and review.”); CTIA Comments at 39 (30 day timeframes are necessary “to provide certainty and ensure that open-ended review periods not continue to plague Section 106 reviews. . . .”).

³⁵ Joint Comments of Western Wireless and T-Mobile at 5.