Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS
& INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its Reply Comments in the above-captioned proceeding.[2]

INTRODUCTION

The FCC recognizes that its current Section 106 process is so protracted and cumbersome that it has created an untenable situation with respect to the siting of communications towers on or near historic properties.[3] CTIA commends the Commission in its efforts to rectify this situation by working with the Advisory Council

---

[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *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 NPRM").

[3] News Release, Statement by FCC Chairman Michael K. Powell, *Environmental and Historic Preservation Plan* (rel. May 1, 2003). *See also* Comments of Fordham University (describing its 9-year effort to construct a broadcast under the FCC's current Section 106 review process); Joint Comments of Western Wireless and T-Mobile USA, at 12-13 (noting its experience with FCC's current Section 106 review process as it relates to visual impact issues and the significant delays in deployment as result of the FCC's failure to clarify such issues.)

on Historic Preservation's Telecommunications Working Group ("TWG") in the development of a draft Nationwide Programmatic Agreement ("NPA"), which the Commission drew upon to initiate this proceeding. While the FCC's Draft NPA attempts to achieve many of the streamlining principles and goals established by the TWG, CTIA concurs with NAB and PCIA that several key provisions of the FCC's Draft NPA stray from those principles and goals.[4] If such provisions are not amended, the final NPA will result in a process that complicates rather than streamlines and expedites the Section 106 process for all stakeholders, not just the communications industry.

Such a result is the antithesis of what the TWG and the FCC sought to achieve in this proceeding. While CTIA supports adoption of the FCC's Draft NPA in accordance with the modifications and limitations set forth in CTIA's Comments, CTIA cannot overstate the gravity of the situation if the NPA should be adopted in its present form. If the NPA is to serve as a lawful, useful and practical Agreement, as it finalizes the NPA the FCC must be guided by certain core principles in evaluating the comments and recommendations of the Parties to this proceeding.[5]

Before the Commission adopts a final NPA, however, it must address the threshold issue of whether the antenna and tower siting activities contemplated under the Agreement lawfully constitute a Federal undertaking under the National Historic

---

[4] *See* Comments of the National Association of Broadcasters ("NAB Comments") at 2; Comments of PCIA at 8 (noting the FCC, among other things, must preserve the categorical exclusions and maintain the objective criteria for assessing visual effects). *Cf.* Comments of Nextel Communications, Inc. ("Nextel Comments") at 3 (recommending that the FCC reject the FCC's Draft NPA as a whole and start anew).

[5] *See* PCIA Comments at 9-10. While CTIA believes that jurisdiction and statutory authority should be fundamental guiding principles among other core principles, CTIA does not object to the key principles articulated in PCIA's Comments.

Preservation Act or a major federal action under the National Environmental Protection Act.[6]

I. The FCC Can No Longer Ignore the "Federal Undertaking" Issue Raised in This Proceeding.

While the Commission has expended considerable time, effort and resources in the TWG process and the formulation of the FCC's Draft NPA, the Commission has failed to address the threshold issue of whether private parties engaged in antenna and tower siting activities are engaged in a "Federal Undertaking" that triggers a Section 106 review.[7] In its comments, Sprint correctly states that the Commission has never explained its regulatory authority to impose NHPA obligations on "CMRS licensees, other licensees authorized to provide radio services in specified geographic areas and non-licensees that are in the business of building communications towers."[8] While Verizon Wireless and Sprint appropriately note that the NPRM fails to address which siting activities constitute Federal undertakings, other industry commenters point out that the FCC's "Draft NPA improperly categorizes tower modifications and associated excavations that are not related to a collocation and do not substantially increase the size of the tower as Undertakings."[9] While this fundamental issue has been raised in several proceedings,[10] the Commission has not made any policy statement, decision or provided

---

[6] *See* Sprint Comments at 3-6. *See also* Comments of Verizon Wireless at 3 –6; NAB Comments at 2-5; and Comments of American Tower Corporation ("ATC Comments") at 8-10.

[7] *Id.*

[8] Sprint Comments at 3

[9] Comments of Crown Castle USA, Inc. ("Crown Castle Comments") at 2. *See also* ATC Comments at 11.

[10] *See* Sprint Comments at 4-5, nn. 10-17.

any legal justification that explains its regulatory authority in this matter and whether certain siting activities constitute a Federal undertaking under the National Historic Preservation Act ("NHPA").[11] The Commission can no longer avoid addressing the fundamental legal issue of its jurisdiction over CMRS siting decisions.

The Commission must address the Federal undertaking issue in this proceeding. The Commission cannot determine what provisions should be included in a final NPA until it deals with the fundamental legal issue of whether the activities at issue constitute a Federal undertaking under the NHPA. If they do not, where does the FCC find authority to impose NHPA obligations on the Parties? Failure to address the Federal undertaking issues will threaten the legitimacy of the Agreement, and undermine the desired regulatory certainty and streamlining the Parties, including the FCC, hope to accomplish through the NPA.

Sprint, Verizon Wireless and other industry commenters, including CTIA, have provided the FCC with extensive legal analyses on the issue of what constitutes a Federal undertaking under NHPA or a major federal action under NEPA.[12] NAB has included in the record a copy of the Joint Intervenors Brief filed by CTIA and other interested parties in the U.S. Court of Appeals for the D.C. Circuit.[13] While the Joint Intervenors Brief addresses the question of the Commission's authority over tower siting decisions in a

---

[11] 16 U.S.C. § 470w(7).

[12] *See* Sprint Comments at 6-20; Verizon Wireless at 4-5 (incorporating by reference comments it filed on May 14, 2001, in support of the Sprint PCS Petition for Reconsideration and Clarification of the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas); NAB Comments at 2-5; PCIA Comments at 31-32; and ATC Comments at 8-10.

related matter, the analysis is also relevant to this proceeding. Rather than recount the legal analysis provided to the Court, CTIA incorporates by reference the Joint Intervenors Brief and its analysis concerning a "major federal action." The Intervenors' analysis of the "major federal action" issue supports Sprint's analysis of the Federal undertaking issue. Accordingly, CTIA strongly recommends that the Commission give considerable weight to these analyses.

II. Section 106 Tribal Consultation Process Is Not the Appropriate Statutory or Regulatory Vehicle to Address Reasonable and Appropriate Fees for Tribal Expertise.

In its Comments, USET notes that tribes incur substantial costs in responding to applicants' requests for information concerning properties of cultural and religious significance to a tribe.[14] While applicants seek such information for purposes of Section 106 review, the information is not readily available to the general public. USET claims that such information can only be obtained from the tribe, because only the tribe has the unique expertise in its cultural and religious history.[15] It recommends that the FCC require applicants to pay fees to cover tribal costs under Section 106. USET infers that the unique services provided by tribes are similar to services the FCC provides to licensees, and stretches the point to analogize the tribes' position to that of the Commission when the FCC charges reasonable fees for its services.[16]

---

[13] *See* NAB Comments, Appendix A, Response of Intervenors Cellular Telecommunications & Internet Association, *et al.* filed April 30, 2003 in *In re Forest Conservation Council, Inc.*, *2003 U.S. App. Lexis 13517 (D.C. Cir., July 2, 2003).*

[14] *See* Comments of the United South and Eastern Tribes, Inc. and its Member Tribes ("USET Comments") at 3.

[15] *Id.*

[16] *See* USET Comments at 3-4..

CTIA respectfully disagrees with USET's analysis. USET incorrectly assumes that the FCC, on its own motion, has discretion to charge regulatory fees for its services, and overlooks the fact that Congress granted the FCC authority to assess and collect regulatory fees to recover their costs for performing certain regulatory activities.[17] Furthermore, Congress has mandated that any adjustments in the FCC's regulatory fee schedule must be based on the statutory-imposed formula set forth in 47 U.S.C. § 159(b). Neither the Communications Act nor the NHPA grants any statutory authority that allows the FCC to impose fee obligations upon applicants to cover tribal costs under Section 106. Accordingly, CTIA respectfully recommends that the Commission reject USET's proposal regarding mandatory regulatory fees to cover the costs of tribal services, and that each party to the process should be expected to bear its own costs.

While CTIA recognizes that tribal expertise is important in identifying properties of cultural and religious significance to tribes, a regulatory mandate created with no statutory authority is not the appropriate vehicle to address reasonable and appropriate fees for tribal expertise. There is no legal basis for the FCC to insert itself into an applicant's or tribe's private business arrangements. However, CTIA does agree with USET that it is possible for applicants and tribes to mutually agree on reasonable and appropriate fees for tribal expertise. USET provides several examples of successful private business arrangements between an applicant and tribe.[18] While such success stories may be the exception, they provide a useful model for others to follow. In contrast, USET's proposed alternative is legally unsustainable.

---

[17] 47 U.S.C. 159(a);

[18] *See* USET Comments at 3-4.

CTIA urges the FCC to play a valuable role by highlighting these successful business models and encouraging both applicants and tribes to consider them as viable models in developing successful private business relationships with one another.

CONCLUSION

For the reasons stated above, the Commission must address the Federal undertaking issue before it finalizes the NPA, and give careful consideration to the comprehensive legal analysis submitted in the record of this proceeding. The analysis provides a sound legal basis for determining that antenna siting does not constitute a Federal undertaking under the NHPA.

The FCC also must reject the proposal to impose mandatory regulatory fees to cover the costs of tribal consultations. Congress has not granted the FCC the authority to assess such fees. There is also no need to impose a regulatory fee regime since private business negotiations between an applicant and tribe are the most appropriate vehicle to address reasonable and appropriate fees for the use of tribal expertise. Finally, CTIA encourages the Commission to provide an appropriate forum highlighting the successful private business relationships already established by several applicants and tribes as viable models.

Respectfully submitted,

/s/ _____

Andrea D. Williams
Assistant General Counsel

Michael F. Altschul
Senior Vice President & General Counsel

CELLULAR TELECOMMUNICATIONS
& INTERNET ASSOCIATION

1250 Connecticut Ave., N.W., Suite 800
Washington, D.C. 20036
(202) 785-0081

Dated: September 8, 2003