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March 26, 2004

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VIA ELECTRONIC FILING

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

RE: Ex Parte Presentation in the Proceeding Entitled
"Nationwide Programmatic Agreement Regarding
Section 106 National Historic Preservation Act
Review Process"
WT Docket No. 03-128

Dear Ms. Dortch:

On behalf of United States Cellular Corporation ("USCC"), this will request that adoption by the FCC of the Best Practices Agreement, in connection with the above-referenced Nationwide Programmatic Agreement ("NPA") be sufficiently delayed to permit industry input and adequate consideration of a crucial issue, namely that of "tribal notification," which has emerged in the last few weeks.

USCC is a wireless carrier operating numerous cellular and PCS systems nationwide. It owns most of its own towers and thus has an important stake in any action that the FCC may take either to facilitate or hamper the construction of such towers. In recent weeks, USCC has grown concerned that the adoption of both the NPA and the related agreement entitled "Best Practices for Expediting The Process of Communications Tower and Antenna Siting Review by Member Tribes of the United South and Eastern Tribes ("USET") and licensees and Applicants of the Federal Communications Commission" (the "BPA"), which has been available to interested parties in draft form, may have the unintended affect of blocking the

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construction of many wireless towers needed to provide the improved wireless service which all desire.

USCC wishes to associate itself with the March 10, 2004 and other ex parte filings of the "Wireless Coalition to Reform Section 106," ("Wireless Coalition") in which it has participated. We write separately to emphasize the following points.

We believe that the Commission must urgently focus on the effect which the draft BPA, and by extension possibly the "tribal consultation" portion of the NPA, may have on wireless tower construction. Whether intended or not, the combined effect of these two documents may result in tower construction being unduly burdened or even blocked in much of the country.

USCC acknowledges, as is noted in the June 2003 version of the NPA, that there may be "Historic properties of religious and cultural significance to Indian tribes and [Native Hawaiian Organizations] ... located on ancestral, aboriginal, or ceded lands of such tribes and organizations." USCC further acknowledges that the Commission has obligations to consult with such tribes and NHOs concerning such historic properties pursuant to Section 106 of the National Historic Preservation Act ("NHPA") (16 U.S.C. § 470f), and that the NPA will delegate some of those obligations to wireless applicants. We also understand the larger obligations which the FCC and its licensees have to deal with Indian tribes and NHOs fairly and honorably in light of their unique legal status.

However, it is absolutely essential to the future of wireless communications in the United States that the FCC arrive at an appropriate and balanced means of implementing those obligations. And, in our view, the draft BPA falls short of this objective.¹

First, neither document provides criteria for confirming the area in which an Indian tribe asserts a historic interest sufficient to trigger its review of a particular wireless project. Section II(C) of the BPA refers to the FCC's new "Tower Notification System" and "encourage[s]" tribes to "input into the Tower Notification System the geographic areas for which they would like to receive notice of a proposed tower facilities construction." Such early "notice" is crucial, for it begins the process of tribal participation in a tower review contemplated under Section 106 of the NHPA, as well as the NPA and the BPA. However, as currently proposed in the BPA, the "areas" for which a tribe may choose to receive notices may or may not

¹ USCC acknowledges with gratitude the willingness of FCC staff members to meet with industry representatives and consider modifications to the BPA in response to industry concerns. However, upon reflection, we have concluded that the basic approach taken in the BPA may have the effect of preventing the construction of lawful and necessary towers and that no modification of it, in its present form, can mitigate this problem.

be congruent with the areas that contain known historic properties of religious and cultural significance to the tribe.

Second, the BPA does not restrict the Section 106 review process to "impacts" on properties already listed or previously deemed "eligible for listing" in the National Register of Historic Places by the Department of the Interior. Instead, in Section V(A) of the BPA, it provides that a tribe may determine that a "property" is eligible for the National Register, and that it has "religious or cultural significance" to that tribe, thus triggering the Section 106 review process. Disputes over eligibility are to be resolved by the FCC and ultimately by the keeper of the National Register, a process which will inevitably be protracted and complex.

Lastly, as has been noted by the Wireless Coalition, the NPA and BPA will together create a Section 106 process which may prove to be unnecessarily complex and unworkable overall. Attachment 1 to the Wireless Coalition's March 10, 2004 filing refers, for example, to the "six redundant contacts" with tribes and the five mandatory waiting periods which are mandated by the BPA. We do not believe the FCC has given adequate consideration to how such an intricate (and sequential) system will inevitably create misunderstandings, delays, and procedural roadblocks to tower approval. The BPA also imposes other onerous and time consuming requirements which are more extensive than present Section 106 requirements, including that of preparing a detailed site survey, including a professional archaeological study, if a tribe claims that a tower will affect a "property" of interest to it within the proposed tower's area of potential effect, the definition of which, under the BPA, is also uncertain.

The BPA is ostensibly voluntary, but it is difficult to see how it will not become a de facto standard for tribal and NHO notification under Section 106, since it would seem impossible to argue that other tribes and NHOs are entitled to fewer procedural protections than USET members. If that proves to be the case, the burdens it will impose on all FCC licensees will be unreasonable and contrary to the public interest.

USCC has not formulated its views concerning what rights of notification and approval Indian tribes and NHOs should have regarding proposed towers under Section 106 and other arguably relevant statutes.² USCC does submit that these issues are very important and can only be resolved after all interested parties, including wireless carriers and other FCC licensees and their trade associations,

² USCC believes that the FCC should review how other federal agencies view their responsibilities concerning tribal consultation under NHPA, the Native American Graves Protection and Repatriation Act and other statutes. It is USCC's understanding that the relevant agency practices differ substantially from those prescribed by the BPA for FCC licensees.

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have had an opportunity to be heard concerning them through the comment process. The FCC has never provided an explanation of why procedures as complex as those in the BPA are required under the NHPA or any other statute.

It is not, we submit, an appropriate way to resolve these issues for the FCC simply to negotiate with one interested party, namely USET, and reach an agreement, evidently satisfactory to both of those parties, but which wrongly assumes that all tribal notification and consent issues have already been resolved. The proper way to proceed would be first to determine what rights the tribes and NHOs have as consulting parties under Section 106 and then frame the NPA and BPA in light of those conclusions.

We understand that this proceeding is very far advanced and that it would be difficult for the FCC not to adopt the NPA and BPA soon. However, if the adoption of those documents brings the construction of wireless and other towers to a halt, that will also result in political difficulties for all stakeholders, as well as profoundly diserving the public interest.

In conclusion, we ask that the FCC seek public comment on the issues discussed above and resolve them before acting on either the NPA or BPA.

Sincerely,


Peter M. Connolly
Counsel to United States Cellular Corporation

cc: By Hand Delivery:
The Honorable Michael K. Powell
The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
The Honorable Jonathan S. Adelstein
K. Dane Snowdon, Chief, Consumer and Governmental Affairs Bureau
Kris A. Monteith, Deputy Chief, Consumer and Governmental Affairs Bureau
John Muleta, Chief, Wireless Telecommunications Bureau
Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division,
Wireless Telecommunications Bureau