

**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)

To: The Commission

REPLY TO THE USET OPPOSITION

The Tower Siting Policy Alliance

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Pursuant to Section 1.429(g) of the Commission's rules (47 C.F.R. § 1.429(g)), the Tower Siting Policy Alliance ("TSPA"), submits this reply to the opposition¹ filed by the United South and Eastern Tribes ("USET") to the TSPA petition for reconsideration of the order in this proceeding.²

INTRODUCTION

In the petition, the TSPA asked the Commission to reconsider several provisions of the programmatic agreement adopted in this proceeding (the "NPA") that diverge substantially and unexpectedly from current rule and practice. These provisions are arbitrary and capricious as they unfairly burden the Section 106 process, and fail to achieve the NPA's dual goals of eliminating unnecessarily wasteful procedures while fully protecting historic properties. The

¹ USET filed an opposition to the petition on March 23, 2005 (the "opposition").

² On February 3, 2005, the TSPA filed a petition for reconsideration (the "petition") of the Commission's Report and Order in the proceeding entitled Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, FCC 04-222, Report

petition singled out six provisions in the NPA involving: (1) unnecessary archeological field-survey requirements; (2) inequitable tribal exemptions from exclusions; (3) unjustified disparate treatment of tribal properties only visually affected; (4) unreasonably broad confidentiality provisions; (5) unwise inclusion of consulting parties in the negotiation of memoranda of agreement ("MOAs"); and (6) failure to provide for designating lead agencies for undertakings with multiple federal involvement.

The USET opposition addresses only three of the substantive requests in the petition: (1) archeological field surveys; (2) tribal exemptions from two exclusions; and (3) confidentiality. No other party submitted an opposition, and USET does not object in its opposition to the other requests in the petition. As described in this reply, although USET opposes the petition, it does not refute the bases for any of the TSPA's reconsideration requests.

I. Unnecessary Archeological Field Surveys Should Not be Required

The petition established that nothing in the record of this proceeding, or in reported field experiences of its members, supports or justifies the introduction in the NPA of the arbitrary and capricious requirement of archeological field surveys for virtually every new tower. In most states, over 95% of new tower projects proceed without State Historic Preservation Officers ("SHPOs") requiring such surveys, and only in extremely rare cases have any kind of archeological properties ever been inadvertently discovered during construction.

The opposition rightly acknowledges that there are "some situations where an archeological field survey is not sensible." Opposition at 5. The opposition is incorrect, however, when it asserts that the burden imposed by requiring unnecessary field surveys may be

and Order (rel. Oct. 5, 2004), *Erratum* (rel. Dec. 2, 2004); 70 Fed. Reg. 556 (Jan. 4, 2005) ("Report and Order").

avoided by following the Best Practices Agreement (“BPA”), or by establishing a relationship with interested tribes. Id. at 5, 6. The NPA requires an archeological field survey for every new tower, unless the tower can qualify under one of the two narrow exceptions involving “depth of previous disturbance” or “geomorphological evidence.” Report and Order, Appendix B at B-18 (NPA §§ VI.D.2.c.i. and ii.). Even in these cases, tribes may force the initiation of a field survey by supplying evidence of a “high probability of the presence of intact archeological properties,” (Id. at B-19-20 (NPA § VI.D.2.d.)), but neither compliance with the BPA, nor the consent of a tribe, can overcome the requirement for an archeological field survey for virtually every new tower. Only the report of a Secretary-qualified professional archeologist invoking one of the two exceptions can do that. See Id. at B-20 (NPA §§ VI.D.2.f.).

It is also incorrect to argue, as the opposition does, that adding less than one percent to the cost of a tower project is a minor matter when measured against the destruction of a tribal sacred site. Opposition at 6. This is incorrect because, first, as noted in the petition, archeological surveys can add significantly more than 1% to the cost of a tower project, and the loss of time is equally expensive.³ But more importantly, adding several thousands of dollars of cost to every project is unjustified and wasteful where there is no reason to believe that fewer archeological surveys automatically correlates with an increased chance of destruction of archeological sites. Experience supports the opposite conclusion - that archeological surveys are unnecessary in the vast majority of cases, and that reasonable standards for avoiding many unnecessary surveys can be developed.

³ The costs of constructing a wireless tower can vary considerably with size, location design and other factors. Typical costs for a simple site might run between \$80,000 and \$150,000. As noted in the

The TSPA agrees with USET that in most cases, the only way to prove conclusively that archeological resources are not below ground is to dig into that ground.⁴ That is the standard that the NPA appears to have adopted for invoking the “geomorphological evidence” exception. But the Commission has acknowledged that the National Historic Preservation Act (“NHPA”) does not require that kind of perfect proof for Section 106 reviews. As the Commission expressed in the Report and Order: “[W]e note that the NHPA and the Council’s rules do not require that federal undertakings avoid all impacts on historic properties . . . [T]he Council and the federal agency need not ensure that every possible effect on a historic property is individually considered in all circumstances, but that they should take into account the likelihood and potential magnitude of effects in categories of situations.” At ¶ 21. The Commission further explained: “. . . the NHPA does not require perfection in evaluating the potential effects of an undertaking in every instance.” At ¶ 35.

A “universal” survey standard might be one approach for surveying the entire country for lost archeology, but surely no SHPO would suggest such an unscientific, inefficient and ruinously expensive survey approach using state resources. Neither does such an approach seek

petition, archeological field surveys can cost up to \$6,000 to \$8,000 or much more, and so can exceed 10% of the cost of some towers.

⁴ Opposition at 5. The TSPA does not agree, however, either that a ground intrusive archeological field survey is the “only archeological tool that can provide a universally accepted answer as to whether a historic property will be affected by a particular action,” or that any approach must be “universally accepted” under Section 106 standards. It is also important to remember that not all archeological resources are protected by Section 106 and the NPA, but only those properties included in or eligible for inclusion in the National Register of Historic Places.

a proper balance between reasonable resource protection and the need to avoid unnecessary compliance burdens on industry, as the Commission has said the NPA must do.⁵

The opposition doesn't credit the need for such balancing, claiming that a tribe should "always have the right to see a Phase I survey" whenever it wants to see one. Opposition at 6. The Commission, however, has an obligation to reject standards that are, like this one, completely arbitrary, unsupported in law, and inconsistent with both the requirements in the NHPA⁶ and the Commission's own express standard that "archeological Field Surveys should not be required where archeological resources are unlikely to be affected." Report and Order at ¶130 (emphasis supplied). Common sense and the need to conserve scarce compliance resources both argue against adopting an extreme, rigid and unnecessarily burdensome standard for considering potential effects to archeological properties.

Logically applying and fleshing out the Commission's standard as expressed in the Report and Order, but not fulfilled in the NPA, archeological surveys should not usually be required where a qualified professional archeologist concludes that factors of geography, geomorphology, local or tribal history, historic or current land use, prior surveys or reports covering nearby areas, SHPO comments or other factors suggest a low probability that intact archeological resources will be encountered at a proposed site. Conversely, archeological surveys should be required only where such factors suggest that archeological resources are

⁵ See Id. ("Thus, the standard of review the Nationwide Agreement must provide is not one of perfection but one of reasonableness, taking into account both the likelihood that adverse effects will not be considered in some instances and the overall benefits to be obtained from streamlining.")

⁶ See, e.g., Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F. 3d 161, 167 (1st Cir. 2003) ("Where no historic property has been identified, the Tribe has no basis under the NHPA to demand particular actions by the [agency]").

likely to be present, or when a SHPO, tribe or other consulting party provides a fact-based justification supporting a conclusion that intact archeological resources are likely to be encountered. This type of rational and practical standard is particularly appropriate where the NPA provides a second level of protection for archeological properties inadvertently encountered during construction. Report and Order, Appendix B at B-25 (NPA § IX.).

II. Tribal-Property Exemptions from Some Exclusions are Unjustified

Two exclusions in the NPA afford different treatment to historic properties of significance to tribes than they do for other historic properties, and this disparate treatment is not justified under the law. The opposition does not dispute that tribal exemptions from the industrial-area and right-of-way exclusions are inconsistent and overbroad. It merely asserts that they are justified, first because the unique legal status of Indian tribes entitles historic properties of significance to them to special protection, and second, because under the Indian canon of statutory construction, the NHPA and NPA “should be read broadly to support and protect tribal interests,” and any ambiguities “should be resolved in favor of the Indian tribes.” Opposition at 6-8.

In considering whether historic properties of significance to Indian tribes should be entitled to protections not available to other historic properties, it is certainly appropriate to acknowledge the unique legal status and rights of Indian tribes, as the TSPA does. It is equally true, however that their unique legal status does not demand or allow special treatment for all issues related to tribes. Especially when a right to special treatment is asserted over properties off of tribal lands, and against federal policies that otherwise apply equally to Indians and non-Indians alike, the precise nature and limits of such rights must be carefully considered and applied.

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In this regard, as outlined in the petition (Petition at 12, 13), Section 101(b)(6) provides that any Indian tribe that “attaches religious and cultural significance” to existing historic properties is entitled to be consulted by a federal agency “[i]n carrying out [that agency’s] responsibilities under section 106.” 16 U.S.C. §470a(d)(6)(B). As implied in the statute, the exact nature of a tribe’s right of consultation is subject to change as the agency’s “responsibilities under section 106” might change, and notably, the Commission’s responsibilities have changed under the NPA. Moreover, there is no provision in the NHPA or the ACHP’s rules that purports to provide special protections to historic properties of interest to tribes that are not offered to other historic properties, and there is no justification for providing such in the NPA exclusions.

In addition, while the Indian canon is a time-honored guideline of statutory construction, the U.S. Supreme Court has made clear that the canon does not create statutory protections that do not exist, or support interpretations of law that Congress clearly and unambiguously never intended.⁷ The Supreme Court has stated that with regard to the canon: “[e]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.” Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

Here, there is no doubt that Section 214 of the NHPA permits the ACHP to exempt federal programs or undertakings “from any or all the requirements of this Act when such

⁷ S.C. v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) (“The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.”); Chickaloon-Moose Creek Native Ass’n v. Norton, 360 F.3d 972, 983-984 (9th Cir. 2004) (“The canon may not be used to avoid a contract’s plain language.”).

exemption is determined to be consistent with the purposes of this Act . . .” 16 U.S.C. § 470v (emphasis supplied). The NPA expressly cites Section 214 as the authority for adopting the exclusions, and the ACHP’s execution certifies that it believes the NPA is consistent with the purposes of the NHPA. Thus, as the Commission recognizes, the NPA may legally exempt undertakings described in the exclusions from both Section 106 and the tribal consultation requirements of Section 101(d)(6). Report and Order at ¶ 75.

The only remaining question is one of policy. As pointed out in the petition, if undertakings in industrial areas and rights-of-way may be excluded because the likelihood of adverse effects to historic properties of whatever kind in these areas is deemed to be minimal, there is no logical justification for exempting a class of properties from these exclusions simply because of an Indian tribe’s interest in the properties. The tribal exemptions unlawfully create new rights and grant special treatment to tribal properties without policy support or statutory justification.

As noted in the petition, if the Commission concludes that tribal properties are unlikely to be included in SHPO inventories, then nearby tribal properties that could be adversely affected might appropriately be protected in the same way as other properties in the NPA, by requiring the applicant to go through the process of tribal participation, but only to identify historic properties in very close proximity that might not appear in SHPO records. For consistency, the search for such properties should be limited the same as for other properties: for the industrial-area exclusion, to properties with boundaries that encompass, or are within 500 feet of, the tower; and for the right-of-way exclusion, to properties whose boundaries encompass the tower.

While not specifically addressing the industrial area exclusion, the opposition defends the tribal exemption from the right-of-way exclusion because rights-of-way often track historic

Indian trails or traverse areas of dense historic Indian habitation. Opposition at 9, 10. This argument misses the point of the exclusion. Again, the exclusion is not valid because historic properties will never be found in the area, but because the incremental visual impact from the addition of a single tower to these industrial or utility areas will be minimal to such properties, even if they exist.

III. Confidentiality

The opposition briefly addresses the problem raised in the petition that the confidentiality provisions in the NPA pertaining to tribal participation are excessively broad and lack reasonable limits. USET says that it supports strong confidentiality standards because of the need to protect historic properties of significance to Indian tribes from exploitation by looters. The TSPA fully agrees with USET on this point and the TSPA is willing to help develop the strongest possible standards to permit confidential treatment of all information whose disclosure might expose an otherwise protected historic property to damage or destruction.

The TSPA emphasizes again, however, that because the confidentiality standards of the NPA can be used to assert broad and unlimited confidential treatment of any information and all proceedings, for purposes other than the protection of vulnerable historic properties, these standards go too far and they should be clarified and appropriately limited.

CONCLUSION

The achievement of a workable NPA that truly streamlines and tailors as much as possible the Section 106 process for all FCC-licensed and registered facilities, while maintaining full Section-106 protection for historic properties, is a worthy goal toward the achievement of which the TSPA and its members have invested a great deal over the past four years. The TSPA

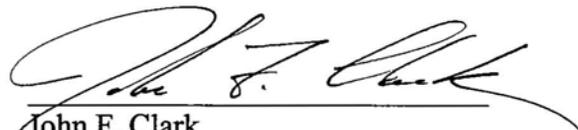
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understands and agrees that finally achieving this goal will require that stakeholders engage in good faith negotiations, with an open and honorable exchanges of views, and a reasonable willingness to compromise. Because the wireless industry was not included in the development and approval of the points in the NPA raised in the petition, its filing was necessary and proper, and should not be taken as a rejection of the TSPA's commitment to these collaborative methods. Despite pointed differences of principle and opinion with USET concerning the current NPA, the TSPA and its members are committed to working out such differences as can be resolved, in good faith and without rancor, with USET, the Commission, the ACHP, SHPOs, other Indian tribes and Native Hawaiian organizations, and other Section 106 stakeholders.

With this understanding, the TSPA asks the Commission to reconsider the arbitrary and capricious provisions of the NPA addressed here and in the petition, because the requested corrections will eliminate arbitrariness, because they will restore fair treatment to all parties affected by the NPA, because they will allow appropriate protection of historic properties, including tribal historic properties, without imposing undue and unnecessary compliance burdens, and because the public interest will be served thereby.

Respectfully submitted,

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