

June 10, 2005

Ms. Catherine W. Seidel
Acting Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Regulatory Issues Threatening the Continued Build Out of
Wireless Telecommunications Systems

Dear Ms. Seidel:

Two years ago, the Commission adopted a strategic plan designed to streamline the Section 106 historic preservation review process and at the same time, protect valuable historic and environmental resources. With the adoption of the 2004 Nationwide Programmatic Agreement for Review of Effects on Historic Properties (“2004 NPA”) and the release of the FCC-USET Best Practices Agreement (“BPA”), the Commission took a major step forward to improve the regulatory process associated with Section 106 reviews, including Tribal notification and consultation. CTIA and its members are appreciative of the FCC’s desire to work with stakeholders to improve the Section 106 process. Indeed, our recent meetings with both the Wireless Telecommunications Bureau and the Consumer and Governmental Affairs Bureau staff concerning the BPA demonstrated a consensus among the participants that the broadcast and wireless industries, the FCC and Tribes are committed to working together to develop solutions to implementation issues as they arise. While all parties, including the wireless industry, are attempting in good faith to comply with the NPA and voluntarily use the BPA, such efforts will be futile if NPA implementation and regulatory approval procedures generate interminable delays.

CTIA is writing to suggest several pro-active initiatives the FCC may undertake to ensure that the 2004 NPA and BPA function as intended and to avert potential procedural bottlenecks in the Section 106 review process. Such bottlenecks could create significant delays in the tower siting process, impeding the provision of wireless services to rural areas and could deprive first responders of access to new communications links.

The Commission has worked closely with Section 106 stakeholders in developing the 2004 NPA and BPA. In particular, CTIA commends the ongoing efforts of the Consumer and Governmental Affairs Bureau (“CGB”) and Wireless Telecommunications Bureau (“WTB”). Indeed, as recently as May 20, 2005 the CGB and WTB hosted the FCC-USET Best Practices Agreement Follow-Up Meeting (“BPA Meeting”) to hear from the Tribes and the wireless and broadcast industries on implementation issues. While these are laudable efforts, CTIA believes that more must be done to prevent significant delay and uncertainty in the Section 106 process, which surely would be an unintended consequence of these efforts.

Since the effective date of the NPA, March 7, 2005, CTIA’s members have experienced numerous unanticipated obstacles related to the necessary environmental review of proposed new towers. Such obstacles are substantially hampering their efforts to continue to build out their networks. Preliminary data indicate that the most immediate hurdle to the implementation of the 2004 NPA and BPA (collectively “the Agreements”) is that, at least initially, most Tribes are not responding to Tower Construction Notification System (“TCNS”) notifications.¹ For example, CTIA’s initial research show that in approximately 82% of the 641 sites submitted to TCNS by five CTIA members, there has been no tribal response to either the initial TCNS notification or to applicants’ second notification efforts. Moreover, these carriers have referred, *i.e.*, sent to the FCC for resolution, 96 of these non-responses requesting the FCC to contact the appropriate Tribes. To our knowledge, the FCC has been successful in securing a response from Tribes in only 13 of the 96 referred sites. In short, there are 628 proposed sites that are currently in regulatory limbo, with the carriers unable to construct,² and suspect the number is higher if all applicants using the TCNS were to respond. Further, it is reasonable to expect that these numbers will increase as other applicants report on their notification efforts and more sites are referred to the FCC in the near future. Clearly, such a potential backlog would bring to a standstill the rollout of new wireless sites, including those which extend coverage to rural areas and provide important communications links for first responders.

¹ TCNS is a computerized notification system, created and administered by the FCC, which notifies a participating Tribe of proposed tower sites which are located within an ‘area of interest’ identified by the Tribe. Once an applicant has submitted its proposed site to TCNS, TCNS sends the relevant Tribes a notification of the proposed tower, its location and its design parameters. The Tribes are then requested to respond to the notification. Absent a tribal response, the Applicant is required to attempt a second contact. *See* Section IV, F of the NPA. If the Tribe still does not respond, the Applicant may request the FCC attempt to contact the Tribe. *See* Section IV, G of the NPA. If the Tribe remains unresponsive, the FCC may notify the Applicant that it authorizes the Applicant to “complete its assessment of the Tower site without Tribal input.” *See* Section III.C. of the BPA.

² CTIA has started collecting data from its member companies regarding TCNS. Based on discussions with CTIA member companies, we anticipate that the number of proposed sites in regulatory limbo to be even higher.

In addition to the potential for a bottleneck resulting from the notification process, the 2004 NPA has imposed time-consuming and expensive procedural requirements that must be followed for the vast majority of new towers. The 2004 NPA has had the consequence of transforming what was previously the “exception” (conducting an archeological field survey) into the “rule.” The time necessary to conduct these studies will further extend the Section 106 timeline and impose additional significant costs.

In sum, CTIA is concerned that unless the FCC takes steps to improve its procedures, the FCC’s implementation of the 2004 NPA and the BPA will increase the already substantial backlog of applications for new sites that are being held up due to environmental considerations. Even prior to the 2004 NPA, applications for new sites subject to challenge on environmental grounds had, in some instances, taken years to resolve. As noted above, however, the 2004 NPA and BPA appear to have resulted in an increase, rather than a diminution, of the resources all stakeholders, especially the Commission staff, must devote to identifying and resolving potential issues under the NHPA. CTIA is, therefore, concerned that if the problem of environmental uncertainty and delay continues to grow, carriers’ important and time-sensitive network build-out projects will be delayed or thwarted. As the Acting Bureau Chief, you are in a position to marshal the Wireless Bureau’s resources to avert such problems. Accordingly, CTIA urges you to take several specific actions to help reduce the delay and uncertainty currently surrounding the Commission’s environmental processes. We encourage you to take the following steps as part of a new, publicly announced FCC implementation program for the 2004 NPA and the BPA.

- Immediately adopt procedures to bring finality to the Tribal notification phase of the Section 106 process so that the notification procedures do not create additional delay. In this regard, CTIA supports a recommendation offered by USET at the BPA Meeting. Specifically, USET suggested that the required Tribal contacts should be deemed completed if two attempts by the applicant and one attempt by the FCC to contact the relevant Tribe or Tribes were unsuccessful in securing a response from them.
- Participate in joint outreach efforts among the Tribes and the wireless and broadcast industries to improve understanding and communication among the stakeholders regarding TCNS, the Agreements, and the Section 106 process.
- Adopt pro-active approaches to reduce and then eliminate the backlog of contested environmental cases.³ For example, the Commission has already

³ There are a number of pending cases that involve existing towers that were constructed under the Commission’s rules prior to the Collocation Agreement but which are subject to challenges on the basis that the towers were built without appropriate consultation under NHPA Section 106. The FCC is best positioned to develop a generic solution acceptable to all stakeholders in the Section 106 process. The Advisory Council on Historic Preservation

considered and rejected pursuant to its rules and policies, oppositions to proposed towers that raised migratory bird issues.⁴ The Commission should complete action on similar applications rather than allow them to remain pending indefinitely.⁵

- Adopt definite timelines for resolving the backlog of existing contested environmental cases and publish these time lines so that the participants and the public could chart the progress of each case. The Commission should conduct a status call with parties involved in all contested cases and, if settlement is not likely, decide the cases within three months of this contact.
- Adopt timelines for resolving future contested environmental cases. For example, the Commission staff should release an initial decision on an Environmental Assessments (“EAs”) by no later than six months of the date the application and EA are filed.
- The pro-active approach outlined above may place additional resource demands on the WTB’s NEPA Adjudication Team and the CGB at a time when both Bureaus have recently experienced departures of personnel with environmental and historic preservation expertise. While the FCC is in the best position to assess its own resource needs, it appears that additional personnel with relevant expertise may need to be allocated to the relevant bureaus.

In conclusion, we want to underscore the urgency of these matters, and the wireless industry’s commitment to work with the FCC and the relevant stakeholders to reduce delays and uncertainty in the FCC’s environmental review process. The FCC’s wireless licensing process is in jeopardy. We ask that you focus on these issues and direct that appropriate actions be taken. We thank you in advance for taking time to consider these critical issues, which could adversely affect wireless subscribers, public safety organizations and our homeland security. Please do not hesitate to call me if you or your staff wishes to discuss any of these issues further.

and the National Conference of State Historic Preservation Officers have both expressed a willingness to work with the FCC and the wireless industry to develop a solution to this problem.

⁴ See, e.g., *In the Matter of State of Ohio Department of Administrative Services-Application for Antenna Structure Registration-Deersville, OH Petition to Deny-Forest Conservation Council and the American Bird Conservancy*, File No. A060240, Memorandum Opinion and Order, DA 04-2990 (rel. Sept.16, 2004).

⁵ Decisions on contested proposed towers should not be delayed based upon the initiation of a Notice of Inquiry that may never result in a Notice of Proposed Rulemaking. To do so would be to indefinitely delay the siting of important towers and thus increase, rather than diminish, the backlog.

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Yours truly,

Michael F. Altschul

Michael F. Altschul
Senior Vice President & General Counsel

cc: The Honorable Kevin J. Martin, Chairman
The Honorable Kathleen Q. Abernathy, Commissioner
The Honorable Michael J. Copps, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner