

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Clarification of Procedures for Participation of)
Federally Recognized Indian Tribes and Native)
Hawaiian Organizations Under the Nationwide)
Programmatic Agreement)

DECLARATORY RULING

Adopted: October 5, 2005

Released: October 6, 2005

By the Commission: Chairman Martin and Commissioner Abernathy concurring and issuing a joint statement; and Commissioners Copps and Adelstein issuing separate statements

I. INTRODUCTION

1. By this Order, we interpret and clarify the application of the provisions in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (“Nationwide Agreement”)¹ that govern participation of Indian tribes and Native Hawaiian organizations. Specifically, this Order addresses situations where a federally recognized Indian tribe (“Indian tribe”)² or Native Hawaiian organization (“NHO”) has not responded to an Applicant’s³ and the Commission’s efforts to determine whether the Indian tribe or NHO has an interest in participating in the review of proposed construction of communications towers and antennas.

2. We clarify that once an Applicant has made two good faith efforts over 40 days to obtain a response as specified in the Nationwide Agreement, the Commission upon notice will communicate by letter or e-mail with the Indian tribe’s or NHO’s designated cultural resources representative seeking an indication, within 20 days, of the Indian tribe’s or NHO’s interest in participating in review of the proposed construction. The Indian tribe or NHO thus will have received at least three contacts and will have had a total period of at least 60 days in which to respond. If the Indian tribe or NHO does not respond to either the Commission or the Applicant within 20 days of the Commission’s communication, it will be deemed to have no interest in pre-construction review, and the Applicant’s obligations with respect to that Indian tribe or NHO under Section IV of the Nationwide Agreement are complete. This process is effective immediately.

¹ 47 C.F.R. Part 1, Appendix B.

² As used herein, the term “Indian tribes” encompasses those Indian tribes, including Alaska Native Villages, recognized by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a *et seq.* See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1075 n.3 (2004) (*Nationwide Agreement Report and Order*).

³ An “Applicant” is defined as “[a] Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.” Nationwide Agreement, § II.A.2.

II. BACKGROUND

3. The Nationwide Agreement implements the Commission's fulfillment of its obligations under Section 106 of the National Historic Preservation Act of 1966 ("NHPA")⁴ in a streamlined manner that is tailored to the construction of communications towers and other Commission undertakings.⁵ Section IV of the Nationwide Agreement governs the participation of Indian tribes and NHOs in undertakings off of tribal lands. Under the Nationwide Agreement, in order to enable the Commission to fulfill its duty of consultation with Indian tribes and NHOs, Applicants must make reasonable and good faith efforts to identify, and ensure contact is made with, Indian tribes and NHOs that may attach religious and cultural significance to historic properties that may be affected by an undertaking.⁶ To assist Applicants in meeting this requirement, the Commission has established the Tower Construction Notification System ("TCNS"), an interactive, login and password-protected system which contains contact information for all Indian tribes and NHOs, and which automatically forwards Applicants' notices of proposed construction to Indian tribes and NHOs. Because each Indian tribe and NHO voluntarily provided information to TCNS regarding the geographic areas in which historic properties of religious and cultural significance to that Indian tribe or NHO may be located, reference to TCNS constitutes a reasonable and good faith effort at identification with respect to that Indian tribe or NHO.⁷ Applicants may fulfill their obligation to ensure that initial contacts are made with potentially affected Indian tribes and NHOs either by using TCNS, which will automatically make the initial contacts on behalf of the Commission, or by making contact independently pursuant to a pre-existing relationship.⁸ While Applicants are not required to use TCNS, they must make reasonable and good faith efforts to identify potentially affected Indian tribes and NHOs, and they must ensure that these Indian tribes and NHOs are contacted in an effective manner that is respectful of tribal sovereignty.⁹ Under the Nationwide Agreement, Applicants must ensure that Indian tribes and NHOs have a reasonable opportunity to respond to communications, ordinarily 30 days, and should make a reasonable effort to follow up in case an Indian tribe or NHO fails to respond to an initial communication.¹⁰

4. The purpose of the initial contact with an Indian tribe or NHO is to begin the process of ascertaining whether historic properties of cultural or religious significance to the Indian tribe or NHO may be affected.¹¹ Thus, the initial contact does not itself constitute or stand in the place of Section 106 consultation. To the contrary, if an Indian tribe requests government-to-government consultation in the course of its

⁴ 16 U.S.C. § 470f.

⁵ See *Nationwide Agreement Report and Order*, 20 FCC Rcd at 1074-75, para. 1.

⁶ Nationwide Agreement, §§ IV.B, IV.C.

⁷ Nationwide Agreement, § IV.B. We note that TCNS contains geographic preferences for all but 21 of the more than 570 federally recognized Indian tribes. For those few Indian tribes and NHOs that have not entered geographic information into TCNS, the Applicant must make reasonable and good faith efforts at identification and contact using other sources. See Public Notice, "Wireless Telecommunications Bureau and Consumer & Governmental Affairs Bureau Announce Enhancement and Provide Clarifications Regarding Use of Tower Construction Notification System," 20 FCC Rcd 7546, 7549 (WTB/CGB 2005).

⁸ See Nationwide Agreement, § IV.E; *Nationwide Agreement Report and Order*, 20 FCC Rcd at 1107, para. 94.

⁹ See Nationwide Agreement, §§ IV.C, IV.E, IV.F. We note that all the major carriers and tower companies are using TCNS.

¹⁰ *Id.*, §§ IV.F.4, IV.F.5.

¹¹ *Id.*, § IV.C; see also *id.*, § IV.G ("The purposes of communications between the Applicant and Indian tribes or NHOs are: (1) to ascertain whether Historic Properties of religious and cultural significance to the Indian tribe or NHO may be affected by the undertaking and consultation is therefore necessary, and (2) where possible, with the concurrence of the Indian tribe or NHO, to reach an agreement on the presence or absence of effects that may obviate the need for consultation.").

communications with an Applicant, the Applicant must promptly refer that request to the Commission.¹² If an Indian tribe or NHO indicates that a historic property of religious and cultural significance to it may be affected, the Applicant must invite the Indian tribe or NHO to participate in the Section 106 review as a consulting party.¹³ Finally, if an Indian tribe or NHO does not respond to an Applicant's inquiries, the Applicant must seek the Commission's guidance.¹⁴ Hence, the initial contact is not intended directly to elicit a final statement from an Indian tribe or NHO regarding the effect of proposed construction on historic properties, but rather to separate undertakings that may have such an effect, and in which the Indian tribe or NHO therefore has an interest in further participation, from those in which it has no interest.

5. Shortly after completing the Nationwide Agreement, the Commission and the United South and Eastern Tribes, Inc. ("USET") agreed on Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act ("USET Best Practices").¹⁵ The USET Best Practices are intended to guide Applicants in review under Section 106 of the impact of communications facilities on historic properties of religious and cultural significance to USET tribes, consistent with the Nationwide Agreement.¹⁶

6. In order to address delays in facilities construction that have arisen in instances when Indian Tribes and NHOs have not timely responded to initial contacts from Applicants and the Commission, representatives of the wireless industry have asked the Commission to clarify what the Nationwide Agreement requires in these cases.¹⁷ Representatives of Indian tribes have supported the request for clarification.¹⁸ We therefore issue this Declaratory Ruling on our own motion to resolve uncertainty.¹⁹

III. DISCUSSION

7. As set forth in the Nationwide Agreement, the initial steps in identifying Indian tribes and NHOs that may attach cultural and religious significance to potentially affected historic properties and in ensuring that these Indian tribes and NHOs are contacted must be undertaken by the Applicant. An Applicant's initial attempts at making these contacts should be undertaken through TCNS or as otherwise authorized under the Nationwide Agreement.²⁰ Ordinarily, 30 days is a reasonable period of time for an Indian tribe or NHO to

¹² *Id.*, § IV.G.

¹³ *Id.*, § IV.H.

¹⁴ *Id.*, § IV.G. We note that an Indian tribe or NHO may specify in TCNS that it is not interested in reviewing proposed construction of certain types or in certain locations, in which case the Applicant need not wait for a response. *Id.*, § IV.F.4. An Indian tribe or NHO may also specify that if it does not respond to initial notifications within 30 days, its lack of response may be taken as an indication of no interest, and no follow up is necessary.

¹⁵ See News Release, "Tower Siting Voluntary 'Best Practices' Released" (October 25, 2004).

¹⁶ USET Best Practices at 1.

¹⁷ See Letter from Andrea Williams, Assistant General Counsel, CTIA – The Wireless Association, to Fred Campbell, Acting Wireless Legal Adviser, Office of Chairman Martin, dated August 26, 2005. We note that, of the more than 1500 currently pending tower sites referred to the Commission because one or more Indian tribes or NHOs have not responded to an Applicant's inquiries whether a historic property of religious and cultural significance may be affected, more than 1000 sites have been referred since August 1, 2005.

¹⁸ See Letter from James T. Martin, Executive Director, USET, to Kevin J. Martin, Chairman, FCC, dated August 26, 2005; Letter from James T. Martin, Executive Director, USET, to Monica Desai, Chief, Consumer and Government Affairs Bureau, and Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau, dated August 15, 2005.

¹⁹ See 47 C.F.R. § 1.2.

²⁰ See Nationwide Agreement, §§ IV.B, IV.E.

respond to such initial contact.²¹ If an Indian tribe or NHO does not respond within this time frame, the Applicant should attempt a second contact in a manner reasonably calculated to elicit a response - for example, a telephone call or e-mail directed to the Indian tribe's or NHO's designated cultural resources representative.²² If an Indian tribe or NHO does not respond to this second contact within 10 calendar days, we conclude that it is consistent with the NPA for the Applicant to refer the matter to the Commission for guidance.²³ To facilitate prompt processing of its request, the Applicant may submit its referral to the Commission by e-mail at TribalTowerExchange@fcc.gov.²⁴

8. By this order, we clarify the process that the Commission will follow, effective immediately, upon receiving a referral for follow-up contacts where an Indian tribe or NHO has not responded to two reasonable and good faith contacts initiated by the Applicant. Under current practice, once an Applicant seeks Commission guidance, Commission staff is making multiple efforts to contact the Indian tribe or NHO by telephone, e-mail, and/or letter on an ongoing basis and for an indefinite period of time. We now clarify that, consistent with requirements of the NPA, for future referrals the Commission staff will promptly contact the Indian tribe's or NHO's designated cultural resources representative by letter and/or e-mail to respectfully request that the Indian tribe or NHO inform the Commission and the Applicant within 20 calendar days as to its interest or lack of interest in participating in the Section 106 review.²⁵ In addition, staff will attempt to contact the potentially affected tribes and NHOs by telephone both to alert them that such a letter and/or e-mail has been sent, and to advise them that they should contact Commission staff if they do not receive our letter and/or email and should contact the Commission and the Applicant if they wish to express an interest in a particular site.²⁶ Staff will also inform the Applicant when this letter or e-mail is sent, either by copying it on the correspondence or by other effective means. If the Indian tribe or NHO does not respond within 20 days of the date of this letter or e-mail,²⁷ the Applicant's pre-construction obligations under the Nationwide Agreement are discharged with respect to that Indian tribe or NHO. If the Indian tribe or NHO responds that it is interested in participating within the 20-day period, the Applicant must involve it in the review as set forth

²¹ *Id.*, § IV.F.4.

²² *Id.*, § IV.F.5.

²³ We note that this process allows the Indian tribe or NHO a longer opportunity to respond than is recommended for USET's member Tribes under the USET Best Practices. *See* USET Best Practices, §§ III.B (Tribe should respond to initial contact within 14 days), III.C (Applicant may ask the Commission to initiate government-to-government consultation if Tribe does not respond to second contact within seven days).

²⁴ Based on staff experience, requests can be processed most efficiently if the subject line includes: a) the words "Referral to Commission"; b) the TCNS file number, if used; and c) the Applicant's name. It is helpful for the text of the e-mail to include: a) Applicant's contact name and e-mail address; b) tower street address, city, county, and state; c) complete and correct names of the federally recognized Indian tribe(s) or NHO(s) that have not responded to the Applicant's contacts (as found on TCNS); d) date the Applicant first notified each Indian tribe or NHO; and e) dates of any follow-up inquiries.

²⁵ If the Indian tribe or NHO has not designated a cultural resources representative to the Commission, this communication will be sent to the Tribal Leader. To avoid undue burdens on tribal and NHO representatives and implement a practical process, Commission staff may aggregate a number of referrals into one communication to the appropriate representative.

²⁶ If Commission staff does not successfully contact the designated representative in the telephone call, it will attempt to phone the central administrative office of the Indian tribe or NHO. If staff has aggregated a number of referrals into one letter and/or e-mail, it need not make separate calls for each tower referral, but may instead make one call to alert the Indian tribe or NHO to the communication. An Indian tribe or NHO is free to indicate to Commission staff that it would prefer not to receive such phone calls. Staff efforts to contact the Indian tribes and NHOs by phone do not affect the running of the 20-day period set out in the letter and/or e-mail for an expression of interest in a particular tower site.

²⁷ If the 20th day falls on a Saturday, Sunday, or federal holiday, the time period is extended until the next business day. *See* 47 C.F.R. § 1.4(e)(1),(j).

in the NPA.²⁸

9. We conclude that this process satisfies the Commission's obligation to make reasonable and good faith efforts to identify Indian tribes and NHOs that may attach religious and cultural significance to historic properties that may be affected by an undertaking, as specified under the Nationwide Agreement and as required under the NHPA and the rules of the Advisory Council on Historic Preservation.²⁹ At the conclusion of the process specified herein, the Indian tribe or NHO will have had a total of at least 60 days to respond to at least two contacts by the Applicant (either directly or through the Commission via TCNS) and one contact by the Commission staff made to the official whom the Indian tribe or NHO has designated to receive such contacts. Moreover, in order to respond to these contacts, the Indian tribe or NHO need not evaluate the effect of the proposed construction on historic properties, but need only indicate whether there is a possibility of an effect on historic properties of cultural and religious significance to it such that it wishes to participate in the review. We believe that, in this context, the process as a whole is reasonable and is consistent with our government-to-government relationship with federally recognized Indian tribes. Hence, it satisfies the requirements of the Nationwide Agreement.

10. We recognize that many sites are currently pending in which an Indian tribe's or NHO's failure to respond to initial contacts has been referred to the Commission for resolution. While we conclude that the process set forth above satisfies the requirements of the Nationwide Agreement and will be followed going forward, it is not the only process that could do so. For those tower sites referred to the Commission by Applicants before September 10, 2005, we find that the public interest would be best served by declaring the Applicant's obligations with respect to those Indian tribes and/or NHOs under Section IV of the Nationwide Agreement to be complete. We do so for several reasons. First, virtually all of the initial contacts in the pending referral cases were made through the Commission's TCNS system. These contacts thus came in the form of a communication directly from the Commission to the Indian tribe or NHO that was sent to the representative designated by the Indian tribe or NHO, at the address the representative had selected. Second, in many instances over the past several months, the Commission's staff has already made efforts to contact Indian tribes and NHOs. For example, over a period of several weeks, the staff may have made several attempts by telephone to contact an Indian tribe or NHO and/or sent a letter or e-mail. We also note the large number of tower site referrals currently pending before us solely because of a lack of response as well as the impending close of the construction season over much of the country as winter approaches. Accordingly, we find that, for those sites referred to the Commission before September 10th because of a failure of one or more Indian tribes and/or NHOs to respond to contacts seeking an expression of interest or lack of interest, and which remain pending, the necessary actions under Section IV of the Nationwide Agreement have been completed and the Applicant may proceed.³⁰ For those pending matters that have been referred to the Commission on or after September 10, 2005, the Bureau shall send forthwith the letter and/or e-mail discussed in paragraph 8 above.

11. Finally, we emphasize that Section IX of the Nationwide Agreement imposes independent obligations on an Applicant when a previously unidentified site that may be a historic property, including an archeological property, is discovered during construction or after the completion of review. In such instances, the Applicant must cease construction and promptly notify, among others, any potentially affected Indian tribe

²⁸ In the event an Indian tribe or NHO responds only to the Commission and not to the Applicant, Commission staff will promptly inform the Applicant of the response. In most cases we expect that staff will inform the Applicant on the same day the response is received by the Commission. In the event of a slight delay in the Commission's processes, however, the Applicant must comply with a timely request by the Indian tribe or NHO when it receives notice of that request.

²⁹ See 16 U.S.C. §§ 470a(d)(6); 36 C.F.R. § 800.3(f)(2).

³⁰ See attached list in Appendix.

or NHO.³¹ An Indian tribe's or NHO's failure to express interest in participating in pre-construction review of an undertaking does not necessarily mean it is not interested in archeological properties or human remains that may inadvertently be discovered during construction. Accordingly, an Applicant is still required to notify any potentially affected Indian tribe or NHO of any such finds pursuant to Section IX or other applicable law.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.2 and 1.1307(a)(4) of the Commission's rules, 47 C.F.R. §§ 1.2, 1.1307(a)(4), that this Declaratory Ruling IS ADOPTED effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ Nationwide Agreement, § IX.A.