

NOTICE OF PROPOSED RULEMAKING

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

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Jeffrey Steinberg, Deputy Chief
Jill Springer, Deputy Federal Preservation Officer
Competition and Infrastructure Policy Division
Wireless Telecommunications Bureau



Updating FCC's Approach to NHPA and NEPA

1. Background
2. Process Reforms
 1. Tribal Fees
 2. Other NHPA Process Issues
 3. NEPA Process
3. NHPA Exclusions for Small Facilities
 1. Pole Replacements
 2. Rights of Way
 3. Collocations
4. Twilight and Non-Compliant Towers

Overview

The FCC is examining the regulatory impediments to wireless network infrastructure investment and deployment to determine how we may remove or reduce such impediments consistent with the law and the public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans.

The examination includes:

- The Commission's environmental and historic preservation review processes.
- State and local government reviews of wireless facilities.

Consultation

- The Commission's review of its rules and procedures implementing NEPA and the NHPA may uniquely affect Tribal governments
- NPRM directs ONAP and WTB to consult with Tribal Nations
- Beyond participating in regional meetings and conference calls, Tribal Nations may notify ONAP of their desire for consultation via email to tribalinfrastucture@fcc.gov

Why Update NHPA/NEPA Approach?

- Environmental review, like any regulatory process, increases the costs of deployment and may impose lengthy delays
- Impact of costs and delays may be intensified by the transition to small cell technology
- At the same time, benefit of review for small facilities is in many instances less apparent
- Providers assert that the Tribal component of the Section 106 review process is particularly cumbersome and costly

General Questions: Costs and Benefits

- What are the costs of the FCC's Section 106 process and its Tribal component?
 - Time
 - Money
 - Impact on deployment of services
- What are the benefits in terms of preventing damage to historic and culturally significant properties?
- Specific data and examples are encouraged

Background and Framework

QUESTIONS AND DIALOGUE

Tribal Fees: Framework (¶¶ 45-46)

- Under ACHP guidance, agency/applicant is not required to pay Tribe for providing its views
- Payment is appropriate when Tribe fulfills role of consultant or contractor when asked for “specific information and documentation.”
- Applicant must provide Tribes with all information reasonably necessary and an opportunity to respond.
- Applicant may refuse payment but retains the duty of obtaining information to fulfill Section 106 obligations.

Tribal Fees: Practices (§ 42)

- Current Tribal and industry practices
- Impact on timely deployment of broadband services to all Americans

Tribal Fees: When Appropriate (§§ 45-47)

- If an applicant does not request specific information but a Tribe independently conducts research, site visits, etc., is payment required? If so, under what circumstances?
- Are compensable services less likely for certain types of construction (*e.g.*, poles in ROW or collocations)?
- Is a flat fee for all applications to recover TCNS costs consistent with ACHP guidance?
- Would the Commission's clarifying when a Tribe is engaged in its statutory role versus a contractor alleviate concerns about timely payment?

Tribal Fees: When Appropriate (¶ 48)

- Should the Commission issue guidance distinguishing requests for Tribal views from requests to perform consulting services?
 - What Bright Line test, if any, could be used?
- How does the requirement to use “reasonable and good faith” efforts to identify properties affect the analysis?
- How can the Commission resolve fee disputes?

Tribal Fees: Amounts (§§ 50-52)

- What is a “reasonable” fee?
- Are there extant fee rates or schedules that could be helpful in avoiding or resolving disputes?
- Should the Commission, and can it legally, establish a fee schedule?
- How would a fee schedule be applied?
- How do Tribal sovereignty and Government treaty obligations factor into potential development and adoption of a fee schedule?

Tribal Fees: Areas of Interest (§ 53)

- Can the Commission limit the burden on applicants when a large number of Tribes have interest in a proposed site?
- Should the Commission require Tribes to delineate their areas of interest by county rather than by full states?
- Should the Commission require certification of areas of interest?
 - If implemented, what would happen if a Tribe failed to provide this?

Tribal Fees: Other Issues (¶¶ 54-55)

- What TCNS changes would improve the Tribal review process?
- Should TCNS retain geographic information on cleared areas?
- Should an applicant have to pay multiple responding Tribes and accommodate multiple monitors?
 - Can one Tribe provide services and share its work product?
 - Can an independent monitor function on behalf of multiple Tribes?
 - Should monitors be required to meet established standards and provide applicants with reports?

Tribal Fees: Other Issues (¶¶ 56-59)

- When should the Commission allow a project to proceed without Tribal response?
- Is G2G consultation required to resolve fee disputes?
- Should the Commission continue to facilitate the meetings among Tribal and industry representatives that began last year?
 - Should we continue to pursue consensus principles?
 - Should we pursue best practices agreements with Tribal Nations?

Tribal Fees

DIALOGUE

NHPA Process: Other Potential Improvements

- Review timeframes and requirements
- Applicant self-certification of Tribal engagement
- Batching submittals

NHPA Process: Timeframes (¶ 60)

- How can SHPO and Tribal reviews be sped up?
- Should different time limits apply to categories of construction (e.g. macrocell towers vs small cell)?
- Effect of Internet communications:
 - Different expectations for timeliness?
 - Different threshold for reasonable follow up?

NHPA Process: Self-certification (¶ 61)

- Should the Commission permit applicants to self-certify their Section 106 compliance and proceed without further Commission involvement once Tribal notifications have been provided?
- How could we ensure that such certifications are truthful and well-founded?

NHPA Process: Batching (¶¶ 62-63)

- Should we adopt a batched submission process?
 - Voluntary or mandatory?
 - Limits on number, geographic proximity, size, etc?
 - Different time frames or fees?
 - Changes to TCNS or other processes?
 - Other considerations?

NEPA Process (¶ 65)

- Are there ways to improve and streamline NEPA compliance regulations?
 - New CatExes for DAS/Small Cells?
 - Streamlined process for floodplains?
 - Other suggestions?

NHPA and NEPA Process Reforms

DIALOGUE

New NHPA Exclusions for Small Facilities

- Pole replacements
- Rights-of-way
- Collocations

NHPA Exclusions: Process (¶ 66)

- Potential vehicles include FCC rule change or ACHP Program Alternative
- Which approach is available for each potential exclusion?
- If a Program Alternative is required, which one?
 - Amendment to NPA?
 - Second amendment to Collocation NPA?
 - Other?

NHPA Exclusions: Pole Replacement (§§ 67-68)

- Existing exclusions
 - Replacements of poles classified as towers
 - Poles in utility ROW, if not in historic district and meet size limits (with Tribal review)
- Potential new exclusion for all replacement poles in ROW, even if in historic district
 - Conditions on excavation?

NHPA Exclusions: Rights of Way (¶¶ 69-71)

- Exclude construction in transportation as well as utility/communication ROWs.
 - Additional conditions on excavation, historic properties, size?
 - Exclude from Tribal review as well as SHPO?
- Expand the utility/communications ROW exclusion to:
 - Apply within historic properties?
 - Eliminate Tribal review requirements?

NHPA Exclusions: Collocations (¶¶ 72-74)

- Reduce the historic district buffer from 250' to 50'
- Eliminate or streamline Tribal reviews for collocations:
 - On historic properties or in historic districts with no identified Tribal significance
 - In urban ROW or indoors, with no ground disturbance
 - On new structures in industrial zones or within 50' of utility or communication ROW

NHPA Exclusions: Collocations (¶ 75)

- Exclude SHPO and Tribal Section 106 review for collocations that:
 - Undergo local review and receive approval by a NPS Certified Local Government; or
 - Undergo local historic preservation board review and achieve a Certificate of Appropriateness consistent with local historic preservation ordinance.

NHPA Exclusions for Small Facilities

DIALOGUE

Collocations on Twilight Towers (¶¶ 78-82)

- What steps can we take towards a definitive solution?
- Consider excluding towers built prior to March 7, 2005 from review for collocations
 - Consistent with those built before March 16, 2001
 - Commission rules at time did not specify review process
 - Towers have been standing for 12 years or more with no adverse effects identified

Collocations on Twilight Towers (¶¶ 83-85)

- Could there be adverse effects not yet identified for towers in ancestral lands?
 - Can such effects be mitigated?
 - Do collocations exacerbate the adverse effects?
- Alternative tower by tower review process
 - Voluntary or mandatory?
 - Existing or streamlined process?
 - Priority for public safety?
 - How to implement?

Other Non-compliant Towers (¶ 86)

- Should we take measures to facilitate collocations on non-compliant towers built after March 7, 2005?
- If so, what measures?

Twilight and Non-compliant Towers

DIALOGUE

Scope of Undertaking and Action (§ 76)

- Should Commission revisit when wireless facilities construction constitutes its federal action or undertaking?
 - Site-specific vs. geographic licenses
 - DAS/Small cell vs. macrocell towers
 - Only towers meeting EA triggers
 - Antenna Structure Registration

Scope of Undertaking and Action (§ 77)

- How do requirements apply when tower constructed by non-licensee?
 - Contract with licensee vs. speculative construction
- Complications under Collocation NPA for towers potentially not subject to NHPA when constructed?

Scope of Undertaking and Action

DIALOGUE