

Wireless Infrastructure Second Report and Order

On March 22, 2018, the FCC adopted a Second Report and Order in the *Wireless Infrastructure* proceeding (WTB Docket No. 17-79), which clarified and revised its National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) review processes relating to the deployment of wireless infrastructure. These changes became effective on July 2, 2018. This document briefly summarizes those changes, and provides answers to some common questions about the implementation and impact of that Order.

Summary

1. Deployment of small wireless facilities by non-federal entities, for which no Commission authorization prior to construction is required (including a site-specific license), will no longer require NHPA or NEPA review *unless* a facility requires antenna structure registration under Part 17 of the Commission's rules, is located on Tribal lands, or results in human exposure to radiofrequency radiation in excess of the applicable safety standards.
 - The definition of small wireless facilities excluded from review includes limitations on antenna volume, associated equipment volume, and height.
 - *Height.* The Order excludes small wireless facilities if they are deployed on new structures that are either no taller than the greater of 50 feet (including their antennas) or no more than 10 percent taller than other adjacent structures. The rule also excludes any small wireless facility that is affixed to an existing structure, where as a result of the deployment that structure is not extended to a height of more than 50 feet or by more than 10 percent, whichever is greater.
 - *Antenna Volume.* To qualify as a small wireless facility, an antenna associated with the deployment, excluding the associated equipment, must be no more than three cubic feet in volume.
 - *Equipment Volume.* In addition, the wireless equipment associated with the antenna must be no larger than 28 cubic feet.
2. The Order streamlined the historic preservation review process that continues to apply to the deployment of larger wireless facilities by clarifying aspects of the Section 106 Tribal consultation process for construction projects located off Tribal lands.
 - *Process Changes.*
 - *Required Information.* Applicants must provide all potentially affected Tribal Nations and Native Hawaiian Organizations (NHOs) with a Form 620 (new towers) or Form 621 (collocations) submission packet in cases where the applicable form is prepared for the SHPO following the requirements established in the Wireless Facilities NPA.
 - In instances where no Form 620/621 submission packet is otherwise prepared, applicants will have to provide Tribal Nations and NHOs with information adequate to fully explain the project and its location. At minimum, this alternative submission

must include contact information for the applicant, a map of the proposed location of the facility, coordinates of the proposed facility, a description of the facility to be constructed including all proposed elements (such as, for example, access roads), and a description of the proposed site, including both aerial and site photographs.

- *Timeframe for Response.* The 30-day period for a Tribal response provided in the Wireless Facilities NPA will begin to run on the date that the Tribal Nation or NHO can be shown to have received or may reasonably be expected to have received the Form 620/621 submission packet (or the alternative submission where no 620/621 packet has been prepared).
 - There will be a 45-day process for moving forward with construction in cases in which Tribal Nations or NHOs do not respond after having been given the opportunity to review a Form 620/621 submission packet or alternative submission.
 - *Upfront Fees.* Consistent with longstanding ACHP guidance (*see <http://www.achp.gov/regs-fees.html>*), Applicants have no legal obligation to pay up-front fees when providing Tribal Nations and NHOs with an opportunity to comment on proposed facility deployments.
 - *Other Fees.* When additional consultant services are needed in order to satisfy an applicant's obligations, an applicant may negotiate and contract with a Tribe for such services, but is not obligated to hire a Tribe to perform such consultant services or to accede to Tribal requests for fees in the absence of an agreement. The applicant may generally hire any properly qualified consultant or contractor when expert services are required.
3. When NEPA review is still required, it will no longer be necessary to file Environmental Assessments (EAs) solely due to the location of a proposed facility in a floodplain if the proposed structure and associated equipment will be at least one foot above the base flood elevation of the floodplain. The Commission also will be subject to new timeframes for acting on EAs – for an uncontested application, within 60 days from placement on notice unless additional information is required; for a contested proceeding, within 90 days from the completion of the pleading cycle and the filing of all information the Commission requested.

Questions and Answers

Overview

1. Why did the Commission make these changes?

The Commission undertook these reforms to promote this country's buildout of advanced wireless services, including 5G, which will deliver benefits for American consumers and help maintain the United States' leadership in wireless. Prior to the Order, our approach to environmental review reflected a time when all or nearly all deployments involved large macrocell facilities. Our rules did not envision the relatively diminutive size of small wireless facilities or the rapid proliferation of these facilities necessary for deployment of advanced wireless technologies. In addition, the per-site cost of compliance with the NHPA and NEPA has been increasing at a time when we are seeing increased deployments across the country, the vast majority of which are small wireless facilities.

Our approach to small cells will cut the NHPA and NEPA regulatory costs of deployment by 80 percent, trim months off deployment timelines, and make thousands of new wireless deployments more economically feasible, thus expanding the reach of 5G and other advanced wireless technologies to more Americans.

2. Do applicants have to pay requested Tribal review fees for projects that were submitted to TCNS prior to the Order taking effect?

For projects submitted before July 2, if an applicant and a Tribal Nation are unable to resolve a dispute about Tribal fees or other issues, such as whether requested information is necessary for review of a specific project, the applicant must seek resolution from the Commission via the pre-Order process before the project can proceed. Alternatively, an applicant may opt to abandon the initial notification and resubmit under the new rules if review is still required.

3. How is the TCNS system being updated to reflect the changes made in the Order?

For a description of the specific changes, see [Public Notice](#), Changes and Updates to Tower Construction Notification and E-106 Systems on July 2, 2018, WT Docket No. 17-79, DA 18-675 (WTB rel. July 2, 2018).

4. How will the FCC treat TCNS notifications for projects other than small wireless facilities that are pending on the effective date of the Order?

Notifications will be subject to the regulatory framework in effect on the date that the filing is submitted into TCNS. Specifically, the policies adopted in the Order will apply only to notifications submitted **on or after July 2, 2018**, the effective date of the new rules.

We recognize that some Applicants may choose to withdraw a TCNS notification submitted prior to July 2 (by updating the Status of the notification to "Abandoned") and then resubmit it on or after July 2 (if review is still required) so that the project will be reviewed under the new policies. We strongly encourage Applicants in such cases to note that the new filing is a resubmission and to include the earlier notification number in any new filing.

5. If an Applicant elects to abandon and resubmit a TCNS filing, is it possible to update an existing Form 620/621 with the new TCNS number so that the notification is sent to the Tribe to start the review period?

Yes. After an Applicant has abandoned the TCNS filing that was submitted prior to July 2nd, they can submit an update to the E-106 filing, delete the old TCNS number and associated data and then copy in the new TCNS number and related tribal consultation process information into the existing E-106 filing. Submitting an update will reset the notification date in the E-106 system which is what is used to trigger and calculate the tribal review period(s). The E-106 system will then send out a notification of

updated filing email or informational notice letter for the updated Form 620/621 to Tribes and all other consulting parties. The Applicant must still provide Tribal reviewers with all of the required review information associated with the new filing number via their preferred means, which may require mailing or emailing information.

6. What happens to a TCNS notification for small wireless facilities that is pending on the effective date of the Order?

Because TCNS cannot identify whether a pending notification may require ASR registration or a construction permit, or if it concerns a site-specific license, such a notification will continue to be processed under the older rules and guidance unless Applicant updates the Status of the notification to “Abandoned.” If an Applicant abandons a notification because it is a small wireless facility, it is encouraged to directly notify Tribal Nations and NHOs that it has done so.

Small Wireless Facilities

1. Does an entity have to provide the FCC with documentation that the facilities it plans to construct would qualify as small wireless facilities under the Commission’s rules? Does it have to provide notice to the FCC or to SHPOs or Tribal Nations about where it plans to construct small wireless facilities?

No. As has always been the case, applicants are responsible for screening to confirm what level of historic preservation and environmental review, if any, is required under the FCC rules. They need not notify the FCC or others of construction that are not federal undertakings.

2. The small wireless facilities definition includes facilities “mounted on structures no more than 10 percent taller than other adjacent structures...” What does “other adjacent structures” mean?

“Other adjacent structures” means any structure located in the immediate vicinity of the planned facilities, including, but not limited to buildings, utility or lighting poles, and other man-made structures.

3. Does it matter where the “small wireless facilities” are located? Do small wireless facilities in historic districts still require review?

Small wireless facilities meeting the height and volumetric limits established in the Order are excluded from environmental and historic preservation review no matter where they are located, unless they are located on Tribal land. For facilities on Tribal lands, the Commission, based on the record, determined that wireless providers have not experienced the same challenges arising from the historic preservation review. Tribal land includes lands within the exterior boundaries of any Indian reservation and all dependent Indian communities, and does not include lands Tribal Nations may own outside their reservation.

4. Does the Order preempt review of small wireless facilities by state or local government entities or by other federal agencies?

No. The Order does not preclude any otherwise permissible review conducted by other authorities—such as other federal agencies, or state and local authorities—insofar as they have review processes encompassing small wireless facility deployments.

5. What can a SHPO, Tribal Nation, or citizen do if it identifies a small wireless facility adversely affecting a historic property?

It should consider contacting a state or local government entity, or other authority that may have rules addressing the facility’s siting. As noted above, nothing in the Order precludes review conducted by other authorities with potentially applicable rules and procedures that are independent of the NHPA and its implementing regulations.

- 6. Does the exemption of small wireless facilities from NHPA have any effect on the application of the FCC's Nationwide Programmatic Agreement to macro cell towers and other facilities that still require NHPA review?**

No. The NPA remains unchanged and fully in effect for those facilities that require NHPA review.

- 7. How will the FCC provide guidance on the deployment of small wireless facilities so that applicants know the types of equipment that are exempted from NHPA and NEPA review?**

Section 1.1312 has been modified to identify small wireless facilities as an additional category of facilities for which no preconstruction authorization is required.

- 8. Does the FCC intend its policy on the deployment of small cells to apply to other Federal agencies such as land managing agencies? If so, how will that be implemented?**

No. The rules do not affect how other Federal agencies define undertakings (or major federal actions) or address or alter any associated historic preservation or environmental review requirements.

Tribal Process

- 1. May an applicant use TCNS to contact Tribal Nations and NHOs about proposed facility deployments before submitting the required FCC Form 620/621 submission packet (or alternative submission)?**

Yes, and we encourage early communications – through TCNS or otherwise – to help expedite the review process. A Tribal Nation or NHO is under no obligation to respond to a notification, however, until it receives a Form 620/621 submission packet (or alternative submission).

- 2. If a Tribal Nation has already disclaimed interest in a proposed facility (for instance, in response to an initial TCNS notification), does an applicant still have to provide the Tribal Nation with a Form 620/621 submission packet (or alternative submission)?**

No. While a Tribal Nation or NHO is not obligated to respond to an applicant until it receives a Form 620/621 submission packet (or alternative submission), a Tribal Nation or NHO may affirmatively disclaim interest in a proposed project at any time. If all Tribal Nations and NHOs receiving a notification disclaim interest in reviewing a proposed project, the applicant will have completed its Tribal outreach obligations and will not be required to provide Form 620/621 submission packets (or alternative submissions).

- 3. When may an applicant use the alternative submission instead of a Form 620 or 621?**

Applicants may use the alternative submission only in cases in which a Form 620/621 submission packet is not required to be prepared for the SHPO because the construction is excluded from SHPO review under Section III.D or III.E of the [Wireless Facilities NPA](#).

- 4. What information must an applicant provide in an alternative submission?**

At minimum, the alternative submission must include contact information for the applicant, a map of the proposed location of the facility, coordinates of the proposed facility, a description of the facility to be constructed including all proposed elements (such as, for example, access roads), and a description of the proposed site, including both aerial and site photographs.

- 5. How should an applicant determine whether to send information electronically or by mail?**

Applicant contact and communications with a Tribal Nation or NHO should be made in accordance with preferences expressed by the Tribal Nation or NHO in TCNS. Where the Tribal Nation or NHO is notified by email that a Form 620/621 submission packet has been submitted, the submission packet is presumed to have been received on the day the submission packet is provided. Where the applicant sends

the notification through the mail, the Commission will presume that the packet may reasonably be expected to have been received by no later than the fifth calendar day after the date it is sent.

6. What if the FCC Form 620/621 submission packet (or alternative submission) information provided by the applicant is inadequate? How does this affect the review clock?

Applicants must provide all required information in their Form 620/621 submission packets (or alternative submissions) to Tribal Nations and NHOs. The information they provide must be accurate and complete, and it must include a specific and correct site address or a detailed description of the location of proposed facilities if no address is available, as well as a complete description of all elements of a proposed facility.

If the information an applicant provides is inaccurate or incomplete, the time period for Tribal response shall be restarted. If a Tribal Nation or NHO examines an applicant's submission and determines that it is incomplete, the Tribal Nation or NHO should promptly notify the applicant in the first instance. If the applicant disagrees with the determination, the Tribal Nation or NHO should notify the FCC. Failure to challenge the submission as incomplete within the 30-day notice period may result in the submission being treated as complete regardless of any deficiencies.

7. What if a Tribal Nation or NHO fails to respond after it receives information from an applicant?

If an applicant does not receive a response within 30 calendar days of the date the Tribal Nation or NHO can be shown or may reasonably be expected to have received notification that the Form 620/621 submission packet (or alternative submission) is available for review, the applicant can refer the matter to the Commission for follow-up.

Upon receiving a referral, the Commission will contact the Tribal Nation's or NHO's designated cultural resource representative by letter and/or email to request that the Tribal Nation or NHO inform the Commission and applicant within 15 calendar days of the date of the letter and/or email of its interest or lack of interest in participating in the Section 106 review. If the Tribal Nation or NHO does not respond within 15 calendar days, the applicant's pre-construction obligations are discharged with respect to that Tribal Nation or NHO and the applicant may move forward with construction.

8. [revised August 17, 2018] What may a Tribal Nation or NHO enter into the Additional Details Box in TCNS?

The Additional Details Box in TCNS may be used to provide guidance for applicants. For example, a Tribal Nation may wish to indicate that it has no interest in reviewing proposed facilities on previously disturbed ground, certain types of proposed facilities, or proposed facilities in certain parts of the geographic area for which the Tribal Nation has expressed interest.

Requests for mandatory upfront fees or requests that applicants pay upfront fees voluntarily are not permitted and will be removed from the Additional Details Box. In addition, a Tribal Nation or NHO may not use the Additional Details Box to request that applicants provide additional information beyond that required in the Form 620/621 submission packet (or alternative submission).

While a Tribal Nation or NHO may use the Additional Details Box to express a preference that an applicant use a third-party website for communication with the Tribal Nation or NHO, that preference may not be contingent upon the assessment of a fee to use that website. In the absence of an alternative contact preference, the applicant should contact the Tribal Nation or NHO via TCNS.

9. Under the changes adopted in the Order, can a Tribal Nation still request monitoring of the construction process?

Yes. Section IV of the NPA requires that, if a Tribal Nation or NHO indicates that a historic property of religious or cultural significance to it may be affected by a proposed facility, the applicant must invite the

Tribal Nation or NHO to become a consulting party. In the context of its participation as a consulting party, a Tribal Nation may request monitoring. If a Tribal Nation makes a generalized request for monitoring without identifying a concern about a historic property, the applicant should evaluate the request, and if it disagrees that monitoring is warranted, it should refer the request to the Commission.

10. If an applicant needs to hire a consultant, is the applicant required to hire a Tribal Nation as the consultant?

Applicants are not obligated to hire a particular person or entity to perform consultant services. Rather, they are obligated only to hire a properly qualified consultant or contractor when such expert services are required. The appropriate qualifications will depend upon the work to be performed. For example, different qualifications may be needed to confirm the presence or absence of archeological properties during a site visit, to apply traditional knowledge in assessing the significance of above-ground features, or to monitor construction.

11. Can Tribal Nations charge fees for performing consultant services?

A Tribal Nation or NHO must be compensated for fulfilling its role as a consultant or contractor where there is an agreement in place between the Tribal Nation and the applicant to perform a compensable service. Without such an agreement, the applicant has not undertaken to engage the Tribal Nation or NHO, and it is not compelled to comply with a unilateral request for fees.

12. [added July 25, 2018] What should a TCNS applicant do if it receives a request for upfront fees from a Tribal Nation or NHO?

Applicants have no legal obligation to pay up-front fees. If a Tribal Nation or NHO purports to condition its response to an applicant's TCNS contact on the receipt of up-front compensation, the FCC will treat its position as a failure to respond, and the applicant will be able to avail itself of the process discussed above for when a Tribal Nation or NHO fails to supply a timely response (*see* Question 7).

13. [added August 17, 2018] How should an applicant determine whether to send information electronically or by mail?

The NPA (Section IV.F) instructs that, "Applicants' direct contacts with Indian tribes and NHOs, where accepted by the Indian tribe or NHO, shall be made in a sensitive manner that is consistent with the reasonable wishes of the Indian tribe or NHO, where such wishes are known or can be reasonably ascertained." Such preferences may be expressed by the Tribal Nation or NHO in the Notice of Organizations generated by TCNS or otherwise, and may require submission by email, postal service, or both.

14. [added August 17, 2018] What if a Tribal Nation or NHO fails to respond after it receives information from an applicant?

The applicant can refer the matter to the Commission for follow-up *if* it does not receive a response within 30 calendar days of the date that the Tribal Nation or NHO, consistent with its indicated preferences (see Question 5), either received TCNS notification that the Form 620/621 submission packet (or alternative submission) is available for review; or can be shown or may reasonably be expected to have received the submission packet itself. The applicant is responsible for ensuring that a Tribal Nation or NHO has the applicant's submission packet for at least 30 calendar days, counted as described below, before a referral is made.

For purposes of allowing referral via TCNS, the system calculates the notice period based on the date that the information is uploaded to E-106 (Form 620 or Form 621) or in TCNS (Alternative Submission

Packet), adjusted by an additional five calendar days to account for delivery time for Tribes preferring postal delivery of TCNS notifications. TCNS is not currently programmed to take into account instances where a Tribe's TCNS notification preference differs from their preferred means of receiving Submission Packets to review. As a result, TCNS may allow for referrals as a technical matter when referral is not yet appropriate. *We therefore emphasize that even when TCNS allows a referral, the applicant is responsible for providing Tribes a minimum of 30 days from receipt or expected receipt of the submission packet to review complete submittals prior to referring within or outside the system.*

NEPA Process

1. If the proposed facility is in a floodplain, does an applicant have to provide anything to the Commission to demonstrate that the structure will be at least one foot above ground, or can it self-certify?

There is no need for an applicant to make any showing to the Commission unless one or more other criteria trigger the requirement to file an EA under the Commission's rules.

2. How will the Commission treat EAs that were filed before the effective date of the Order solely because the proposed facilities are located in a floodplain?

The Commission staff will review EAs that are pending on the effective date of the Order. For EAs that were submitted solely because the location of the planned facilities is in a floodplain, staff will notify each applicant that the EA may be withdrawn, unless the EA has raised other concerns identified by commenters or staff.

3. For facilities that will still require the submission of an EA for reasons other than their proposed location in a floodplain, do applicants have to provide documentation that the proposed structure will be at least one foot above ground?

Yes. Although modified, the requirement to consider the effects of facilities located in floodplains remains part of the Commission's rule identifying when an EA is necessary, *see* 47 CFR § 1.1307. When an EA is submitted, it must document that the proposed facilities will not have a significant effect for any of the other triggers for EA identified by the Commission's rules. Therefore, for facilities that still require the submission of an EA for reasons other than their location in a floodplain, applicants will need to provide documentation that the proposed structure and associated equipment will be at least one foot above the base flood elevation (*e.g.*, local building permit or construction plans). The documentation requirement also applies to such applications that are pending on the effective date of the Order.

4. What needs to be elevated and how?

In addition to antenna structures generally, and consistent with pre-Order staff guidance, all cabinets and equipment must be elevated by being raised above the floor or being placed on a platform. Poles, however, do not need to be elevated.