

FEDERAL COMMUNICATIONS COMMISSION REVISES ITS PROCEDURES FOR TRIBAL CONSULTATION



In order to streamline its National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) review processes, the FCC will amend its procedures for tribal consultation on large wireless facilities that are proposed to be located off tribal lands and outside reservation boundaries. The FCC clarifies that, through its applicants, it has full discretion on how to fulfill its legal obligations to make good faith efforts to identify Historic Properties and to invite participation by tribes.

BACKGROUND

An important component of the FCC review requirements under Section 106 of the NHPA requires the FCC, through its applicants, to make a good-faith effort to invite Tribal Nations and Native Hawaiian Organizations (NHOs) to identify Historic Properties of religious or cultural significance that may be affected by FCC undertakings.

Tribal consultation procedures were first set forth in the Wireless Facilities Nationwide Programmatic Agreement (NPA), which became effective in 2005. At that time, an electronic portal, the Tower Construction Notification System (TCNS) was created to facilitate tribal participation for FCC undertakings. Per the 2005 NPA, the applicant was required to obtain a statement of no interest from each participating tribe. Some tribes were not reliable in providing their response. The FCC attempted resolution through its October 2005 Declaratory Ruling, which provided a referral mechanism within TCNS to involve the FCC in closing open-ended consultations. However, with the passage of time tribes began to block applicants' efforts to involve the FCC and began to withhold responses unless an up-front review fee was paid. Tribal review fees soared!

FCC CREATES NEW TRIBAL CONSULTATION SHOT CLOCK

In its recent order, the FCC replaces the open-ended procedures of the 2005 Declaratory ruling with a 45-day shot clock. The clock begins when the tribe receives the Section 106 Review documentation. If after 30 days, the applicant has not received a response, the applicant may refer the matter to the FCC through TCNS. In this iteration, it will not be possible for tribes to prevent applicant referrals.

FCC applicants have full discretion on how to fulfill the legal obligations to identify and evaluate Historic Properties.

Applicants are not obligated to hire a particular entity (tribe), but must use a qualified professional for NHPA compliance.

Upon referral, the FCC will promptly contact the tribe by letter or email to request that the tribe inform the applicant and the FCC, within 15 calendar days, of its interest in a project. If the tribe does not provide comment within 15 days, the applicant's pre-construction Section 106 Review obligations are discharged with respect to that tribe.

Under the FCC procedures, applicants must grant consulting party status to any federally-recognized tribe that identifies a Historic Property that may be affected. As a consulting party, the tribe must be provided with the relevant project information. However, in its recent order, the FCC has clarified that the applicant's obligation is limited to providing tribes with the FCC Form 620, 621, or equivalent materials and correspondence, but no other extraneous studies or reports.

NO REQUIREMENT TO PAY UP-FRONT REVIEW FEES

Finally, in its recent order, the FCC clarifies that applicants do not have (and apparently never have had) a legal obligation to pay up-front review fees when providing tribes an opportunity to comment on proposed deployments. Under the amended procedures, if tribes attempt to condition responses on receipt of up-front review fees, the FCC will treat this position as a failure to respond. In addition, when consultant services are required after the identification of the likely presence of a potentially

affected Historic Property, neither the applicant nor the FCC is obligated to hire a particular person or entity (tribe) to perform such services. The applicant's only obligation is to utilize a qualified professional, as defined in the 2005 NPA, to complete its obligations under NHPA.

ECA has completed NEPA and NHPA evaluations for thousands of macro, DAS, and small cell facilities. For NEPA and NHPA compliance for wireless facilities, please contact Marvin Webster of ECA at marvin.webster@eca-usa.com or (770) 667-2040 x 101.

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