



STATE WIRELESS ASSOCIATIONS INFLUENCE FCC “THREE STRIKES” RULING

On March 7, 2005, the FCC implemented changes to its National Environmental Policy Act (NEPA) process. These changes, which incorporated a new Nationwide Programmatic Agreement (NPA) into the FCC environmental regulations, were designed to streamline environmental processing of new wireless telecommunications facilities. However, the NPA stated that pursuant to Section 106 of the National Historic Preservation Act (NHPA) a response from all federally recognized Native American Tribes and Native Hawaiian Organizations (Tribes) expressing a general interest in a geographic area was necessary. Therefore, rather than streamlining the process, the changes resulted in a quagmire where thousands of applications were delayed for months due to lack of responses from some Tribes.

On August 25, 2005, the Alabama Wireless Association, Georgia Wireless Association, and Tennessee Wireless Association held a joint regional regulatory roundtable in Birmingham, Alabama involving panelists from many southeastern Tribes, USET, PCIA, FCC tribal liaison and NEPA officials, southeastern SHPOs, carriers, tower companies, and industry regulatory experts. During this important event, the FCC heard accounts of shortcomings of the new process and received industry and tribal suggestions for improving the process.

Based on further work by CTIA, PCIA, and industry, on October 6, 2005, the FCC issued its “Three Strikes” Declaratory Ruling. The text of the ruling can be found at www.fcc.gov. This ruling cleared approximately 1,100 pending applications that had been referred to the FCC before September 10, 2005 for resolution due to lack of responses by some Tribes. It is important to note that the clearance provided by the ruling only addresses cases referred to the FCC due to failure of Tribes to express an interest or lack of interest in an undertaking after at least two attempts by an applicant to contact potentially affected Tribes.

Going forward, the Declaratory Ruling gives applicants the ability to move forward after at least two attempts to solicit a statement of interest or lack of interest from each potentially affected Tribe within a 40-day period and at least one attempt by the FCC to obtain a response during a subsequent 20-day period after the applicant refers the matter of lack of response to the FCC – hence, the moniker “Three Strikes”.

It is important to note that for Tribes who do express an interest in an undertaking and are engaged by the Applicant in the consultation process under Section 106 of the NHPA, the NPA and the Declaratory Ruling intend that the Applicant work in good faith with such Tribes. In such a case, the Applicant is required by the FCC regulations and the NPA to provide Section 106 review documentation, as required by the NPA and requested by the Tribe. The Applicant is also required to see the consultation process to its end with any such Tribes.

The consultation process ends with the Tribe ultimately concurring with a finding of ‘no effect’ or ‘no adverse effect’ for sacred sites, possible human burials, and traditional cultural properties of tribal significance. The Tribe should normally respond within 30-days of receiving the requested Section 106 documentation as to whether the Tribe concurs with

a favorable finding by the Applicant or with an indication that additional information may be necessary. In a limited number of cases, an unfavorable finding may require relocating a proposed facility or otherwise mitigating to avoid an adverse effect.

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