

October 8, 2009

Ms. Blythe Semmer
Office of Federal Agency Programs
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue, NW
Suite 803
Washington, DC 20004

Dear Ms. Semmer:

This letter provides CTIA - The Wireless Association's ® ("CTIA") comments concerning the proposed Program Comment developed jointly by the National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS").¹ The purpose of the proposed Program Comment is to "streamline Section 106 review of the construction and modification of communications towers and antennas for which FCC and RUS or NTIA share Section 106 responsibility." This streamlining will be accomplished by NTIA and RUS utilizing the FCC's Section 106 process as described in the FCC Collocation Programmatic Agreement and the FCC Nationwide Programmatic Agreement.

CTIA continues to fully support the concept of utilizing the FCC's Section 106 processes for BTOP/BIP applications. On June 22, 2009, and August 27, 2009, CTIA filed comments advocating that the FCC's environmental expertise be utilized in the BTOP/BIP process.² In addition, CTIA's August 27, 2009, letter suggested that a minor 'tweak' of the BTOP/BIP process - requiring only Step Two applicants to contact Tribes, and NTIA and RUS increasing the time for Step Two applicants to provide their Section 106 documentation from 30 to 45 days - would eliminate "the need for hundreds of Tribes to review thousands of Step One applications

¹ By letter dated September 4, 2009, NTIA and RUS sent the Advisory Council on Historic Preservation ("ACHP") a proposed program comment. On September 17, 2009, the Federal Register published the ACHP's resulting Notice of Intent to Issue Program Comments. The Notice established October 8, 2009, as the date by which comments must be filed.

² See Letter to The Honorable Gary Locke, Secretary, U.S. Department of Commerce, from Christopher Guttman-McCabe, CTIA-The Wireless Association® *et al.*, Re: Avoiding Unnecessary Delays in Deploying BTOP-Funded Broadband Facilities (June 22, 2009); and Letter to Mark S. Plank, Director, Engineering and Environmental Staff, RUS, Laura Dean, PhD, Federal Preservation Officer/Archeologist, RUS, and Cynthia Schultz, Director, Compliance and Audits, Broadband Technology Opportunities, NTIA, from Andrea D. Williams and Brian M. Josef, CTIA (August 27, 2009). A copy of CTIA's August 27, 2009, letter is attached.

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that will never be granted.” This would have the dual benefit of allowing Tribes to be “responsive to BTOP and BIP applicant requests without slowing down their reviews of the steady stream of important wireless projects that have short FCC construction deadlines.”

While it is important to the success of the BTOP and BIP programs that they are designed to provide for expeditious review of Section 106 issues, it is equally important that this laudable goal be accomplished without adversely affecting the FCC’s Section 106 process upon which FCC licensees and tower owners are dependent. CTIA is concerned that unless one aspect of the BTOP and BIP Section 106 process and the FCC’s Section 106 process are similar, there is a potential for the FCC’s Section 106 process to come to a standstill.

One of the proposals contained in the conceptual NTIA and RUS Nationwide Programmatic Agreement³ is to provide an abbreviated time period for Tribal input after which the consultative process will be complete if no Tribe identifies historic properties.⁴ CTIA believes that finality, which is currently absent in the FCC’s Section 106 process, is a laudable goal. However, if the proposed Nationwide Programmatic Agreement provides finality while the FCC’s Section 106 process does not, Tribes would feel compelled to immediately review BTOP and BIP applicants’ proposals to avoid foreclosure from later objections. However, the FCC’s open ended process does not contain similar penalty. The unintended yet real consequence of this regulatory disparity would be that Tribes will give FCC applicants’ proposals secondary priority. Given the finite nature of Tribal resources, the resultant delays would not only be significant, they would endanger FCC’s licensees’ abilities to meet FCC mandated construction deadlines (e.g., FCC 700 MHz licensees have four years to meet specific construction benchmarks). Therefore, to the extent that the NTIA and RUS Nationwide Programmatic Agreement provides finality, it will be imperative both from the perspective of the public interest as well as equity that the FCC’s Section 106 process be similarly modified.

Sincerely,



William J. Sill
Wilkinson Barker Knauer, LLP
Counsel to CTIA-The Wireless Association ®

Attachment

³ See Letter to William J. Sill, Counsel for CTIA-The Wireless Association® from Mark S. Plank, Director, Engineering and Environmental Staff, RUS, and Cynthia Schultz, Director, Compliance and Audits, Broadband Technology Opportunities, NTIA, Re: Conceptual Plan for Development of a Programmatic Agreement (September 23, 2009).

⁴ As currently envisioned in the conceptual Nationwide Programmatic Agreement, this abbreviated procedure would also apply to State Historic Preservation Offices. CTIA does not take a position on whether seven calendar days is adequate time for Tribes and SHPOs to comment.

August 27, 2009

Mark S. Plank, Director
Engineering and Environmental Staff
Rural Utilities Service
1400 Independence Avenue, SW
Mail Stop 1571, Washington, DC 20250-1571

Laura Dean, PhD
Federal Preservation Officer/Archeologist
Rural Utilities Service
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Cynthia Schultz, Director
Compliance and Audits
Broadband Technology Opportunities
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Mark, Laura and Cynthia:

It is CTIA's understanding that National Telecommunications and Information Administration ("NTIA"), Rural Utilities Service ("RUS"), the Federal Communications Commission ("FCC") and the Advisory Council for Historic Preservation ("ACHP") are working on finalizing a Program Comment, whereby proposed BTOP/BIP projects would undergo Section 106 review in accordance with the FCC's rules – including the 2001 Collocation Agreement and the 2004 Nationwide Programmatic Agreement – and would not be subject to separate Section 106 review by NTIA and RUS as result of their funding such activities.

Prior to the release of the first NOFA, CTIA has been a proponent of NTIA and RUS utilizing the FCC's environmental expertise.¹ Thus, CTIA fully supports this initiative as it would tap into the FCC's environmental expertise as well as provide applicants with a well known and time tested process.

CTIA believes that in light of the number of additional applications the BTOP/BIP program will generate, it is essential to the success of these programs that one simple procedural 'tweak' be made. As the application process is currently structured, Step One

¹ See Letter to The Honorable Gary Locke, Secretary, U.S. Department of Commerce, from Christopher Guttman-McCabe, CTIA – The Wireless Association® *et al.*, Re: Avoiding Unnecessary Delays in Deploying BTOP-Funded Broadband Facilities (June 22, 2009).



applicants are inadvertently motivated by the rules to contact the Tribes for their review rather than wait until Step Two.² As a result, Tribes will be asked to review thousands of projects proposed by Step One applications that will not be asked to file Step Two applications. Thus, the already overtaxed resources of Tribes will be unnecessary stretched thinner in order to review projects that will never be approved.

Fortunately, the fix consists of one simple ‘tweak’:

NTIA and RUS need only increase the time period for Step Two Applicants to provide their Section 106 documentation from 30 to 45 days and provide clarification that only Step Two applicants need contact the Tribes.

In order to assess the significant savings of Tribal resources that would result from this one small procedural change, one need only consider that there are 562 federally recognized Tribes that are called upon to review projects and often multiple tribes are asked to review a single project. Thus, by eliminating the need for hundreds of Tribes to review thousands of Step One applications that will never be granted, Tribes can focus on the far smaller subset of Step Two applications which may be granted. Thus, Tribes will be able to be responsive to BTOP and BIP applicant requests without slowing down their reviews of the steady stream of important wireless projects that have short FCC construction deadlines.

The Tribal consultation portion of the FCC’s Section 106 process has been largely successful due to the combined commitment of the Tribes, the FCC and the wireless industry to work together to resolve any unanticipated challenges that arise. CTIA believes it is essential to bring this same cooperative spirit to the FCC’s Section 106 process for BTOP and BIP programs so that NTIA and RUS programs can award timely grants and so the FCC’s existing tribal consultation process for wireless services is not adversely affected.

CTIA is proffering this suggestion at this juncture so that NTIA and RUS will have time to consider requesting comment on it in the Federal Register notice of the Program

² The BTOP and BIP Guidelines require that an applicant’s Step Two application “must...include[...]the appropriate environmental review documentation prepared in accordance with 7 CFR 1794 and other environmental requirements,” *see* BTOP Guidelines at 57; BIP Guidelines at 58, and all required environmental approvals, *see* NOFA Section VI.D.1.b.v. Sections 7 CFR 1794.22 requires an Environmental Report (“ER”) for many categorically excluded projects. Section 1794.32(b) states that the requirements for a telecommunications project’s ER are found in RUS Bulletin 1794A-600 (“Bulletin”). The Bulletin specifies that a minimum of 30 days must be given to an agency to respond, and there must be a follow up contact if the agency fails to respond. Both the BTOP and BIP Guidelines treat SHPOs and THPOs as functional equivalents and require that the applicants approach both and provide information concerning their responses in the ER. *See* BTOP Guidelines at 60; BIP Guidelines at 70. In addition, assuming the FCC Section 106 procedures will govern, they require tribal consultation for many projects in order to complete the Section 106 process. *See, e.g.*, 2004 Nationwide Programmatic Agreement. Given that there is only 30 days between the announcement of the Step 2 applicants and the deadline for filing the Step Two submissions, including an applicant’s environmental review materials, applicants cannot comply with the Bulletin’s timing edicts without initiating the Tribal contacts prior to filing their Step One application.

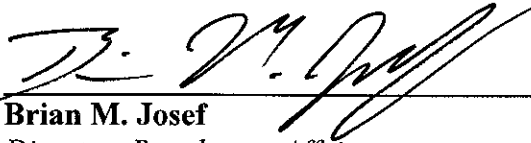
Comment.

Please contact the undersigned if you have any questions or if you would like to discuss the matter further.

Sincerely,



Andrea D. Williams
Vice President of Law & Assistant General Counsel



Brian M. Josef
Director, Regulatory Affairs

cc: Jane Jackson, Associate Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission

Dan Abeyta, Assistant Chief-
NEPA Adjudications
Wireless Telecommunications Bureau
Federal Communications Commission

Stephen DelSordo, AICP Cultural Resource
Specialist
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Javier Marques, Associate General Counsel
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Charlene Vaughn, Assistant Director for Program
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