

FCC Streamlines Wireless Environmental Review Process—Part 2

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FCC Process Changes for Larger Wireless Facilities

Part 1 summarized the exemption of small wireless facilities from the FCC's environmental review process under conditions specified in the new FCC rules adopted in March 2018. In its Second Report and Order, the FCC also took actions to streamline the review process for larger wireless facilities under the National Historic Preservation Act (NHPA) and the (NEPA).

The FCC clarified its procedures for engaging Tribal Nations and Native Hawaiian Organizations (NHOs) in review of construction projects located off of Tribal lands. The FCC specified that applicants must provide all potentially affected Tribal Nations and NHOs with a Form 620 (for new towers) or a Form 621 (for collocations) packet where one of these forms is prepared. Forms 620 and 621 are required for review by State Historical Preservation Officers (SHPOs). If no SHPO review is required and thus there is no Form 620 or 621, applicants must provide Tribal Nations and NHOs "information adequate to fully explain the project and its locations." At a minimum, that must include applicant contact information, coordinates, a description of the facility to be constructed including all of its elements, and a description of the proposed site including both aerial and site photographs. The FCC timelines for Tribal responses will not begin to run until a complete and accurate submission has been made by the applicant.

Regarding timelines, the FCC reduced the period in which Tribal Nations or NHOs must respond to notification if they have issues with proposed construction from up to 60 days to up to 45 days. If there has not been a response within that maximum of 45 days, the applicant's pre-construction obligation to the non-responding entity is discharged. The 45 days includes time for an FCC follow-up notification in National Environmental Policy Act addition to the initial notification by the applicant.

The FCC clarified that applicants may choose to but are not required to pay fees requested by Tribal Nations or NHOs that have been invited to participate in this process. The FCC stated that some Tribal Nations and NHOs have been asking for an "up-front fee" before they will participate (i.e., respond). The FCC found that "up-front fees" are in the nature of a processing fee and applicants are not required to pay such fees. The FCC stated that if a Tribal Nation or NHO conditions its response on receipt of up-front compensation, the FCC will treat that as a failure to respond.

The FCC addressed situations in which Tribal Nations have requested payment for activities undertaken after initial determination that historic properties are likely to be located in a site vicinity. The FCC concluded that while an applicant may negotiate and contract with a Tribal Nation or NHO for services, “an applicant is not obliged to hire a Tribal Nation or accede to Tribal requests for fees in the absence of an agreement” and may seek other means of having needed work done. An applicant’s selection of a consultant is subject to the requirement that with respect to the identification and evaluation of historic properties, any assessment of effects shall be undertaken by a professional who meets the Secretary of the Interior’s Professional Qualification Standards.

The FCC specified a conflict resolution system to apply in individual cases of disagreement between an applicant and a Tribal Nation or NHO as to whether the applicant has met the reasonable and good faith standard in connection with the hiring of paid consultants.

The FCC adopted some reforms to its own processes as well. It modified a requirement for filing an Environmental Assessment (EA) for any proposed facility located in a floodplain. The FCC exempted from that requirement facilities that, including all associated equipment, will be constructed at least one foot above the base flood elevation, unless other criteria in the FCC rules trigger an EA.

The FCC also adopted time lines on its own processes when EAs are filed. The FCC puts EAs on public notice for 30 days to allow public input. It stated that most EAs are acted upon by its issuance of a Finding of No Significant Impact (FONSI) about 15 days after the close of the public notice period. In the Second R&O, the FCC directed its staff to review EAs for completeness and adequacy to support a FONSI within 20 days of the date the EA is placed on public notice. If that review is positive, the FCC staff is instructed to advise the applicant that unless there is an informal complaint or petition to deny filed, a FONSI will be issued within 60 days of the date the EA was placed on public notice. If the staff review finds that additional information is required, the applicant will be notified within 30 days after the EA is placed on public notice. In that case, if a FONSI is warranted, it will be issued by the later of 60 days after the EA is placed on public notice or 30 days after the additional information is provided. If the additional information might affect the public’s ability to comment effectively, a new 60 day period may commence from the publication of the additional notice. Finally, if an informal complaint or petition to deny is filed against an application containing an EA, FCC staff is instructed to endeavor to try to resolve the matter within 90 days of the close of the pleading cycle.

These changes go into effect on July 2, 2018.

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National Law Review, Volume VIII, Number 136

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