

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY,
DISSENTING IN PART**

*Re: Nationwide Programmatic Agreement, the Section 106
National Historic Preservation Act Review Process, Report and Order,
WT Docket No. 03-128 (adopted September 9, 2004)*

I respectfully dissent in part from the Commission's adoption of the Nationwide Programmatic Agreement. As discussed below, although the Commission's policy goals are sound, I do not believe that the Commission has the legal authority under the terms of the National Historic Preservation Act to adopt this Agreement, except with regard to site-based licensed facilities, such as broadcast facilities.

Despite my legal concerns about the Nationwide Programmatic Agreement, I support many of its aspects from a policy perspective and appreciate my colleagues' efforts in this area. The Nationwide Programmatic Agreement is the culmination of a concerted effort to streamline and improve the review process under the National Historic Preservation Act (NHPA) for communications facilities. Many groups contributed to this important undertaking, including the FCC staff, the Advisory Council on Historic Preservation, the National Conference of State Historic Preservation Officers, industry organizations, and Indian tribal groups, most notably USET. I wholeheartedly endorse the goal of reducing burdens on industry and government, for example, by eliminating the review process for communications facilities that are built on industrial and commercial properties or in utility and transportation corridors. I also applaud the efforts to improve coordination among Indian tribes, the FCC, and private companies with regard to the construction of communications facilities.

Nevertheless, I cannot agree that the construction of *all* communications antenna facilities invariably constitutes a federal undertaking for the purposes of NHPA. As a result, I believe the Commission is exceeding its statutory authority in regulating antenna facilities where the FCC does not issue a construction permit. To the extent there is no license grant for the construction of an antenna facility it does not appear to me that there is any federal undertaking.¹ Although the NPRM that sought comment on the Programmatic Agreement did not raise this issue, we are bound to address it in light of its jurisdictional nature.

The majority has taken the position that the construction, modification, and registration of any and all antenna facilities constitute federal undertakings under the NHPA because the underlying private entity is licensed by the FCC to make use of the public airwaves. I believe that this position is overbroad, however, because it fails to recognize important distinctions among the various categories of radio licenses and construction permits issued by the Commission.

¹ Under Section 106 of NHPA, a federal undertaking exists when there is federal funding, federal ownership, or a federal grant or license.

The clearest case where the NHPA applies involves facilities where the FCC issues antenna licenses on a site-by-site basis. A good example of this are broadcast authorizations. Pursuant to Section 319 of the Communications Act, the FCC grants site-specific licenses for broadcast communications facilities that authorize both the construction and operation of facilities at a specific location. Because such facilities are constructed pursuant to specific FCC licenses and cannot be constructed for the purpose of providing communications services without the issuance of such licenses, it seems clear that such construction constitutes a federal undertaking, as do other constructions where we have the authority to license on a site-by-site basis.

Yet the regime applicable to *other* types of construction where we do not issue licenses for antenna construction appears to me to fall outside the statutory definition of a federal undertaking. While I recognize that when Section 319 was first adopted it also imposed this same site-by-site construction-permit requirement on amateur and mobile stations, amendments enacted by Congress in 1982 and in 1992 expressly eliminated the construction-permit requirement for government, amateur, and mobile stations, and allowed the Commission to waive the requirement for certain other licenses if it found the public interest, convenience, or necessity would be served. Despite the elimination of the construction-permit requirement for amateur and mobile stations, the majority continues to regard the construction of such facilities as a federal undertaking and requires those constructing such facilities to comply with NHPA.

In support of this approach, the majority has relied on Section 303(q) of the Communications Act and the pre-construction registration requirement adopted pursuant to that provision.² Section 303(q) provides, in part, that the Commission has the “authority to require the painting and/or illumination of radio towers.” I believe this reliance is misplaced, since the goal of Section 303(q) is simply to establish painting and illumination requirements for communications towers in order to increase airplane safety. More fundamentally, it is difficult to understand how a mere registration requirement could render the construction of a private tower on private property a federal undertaking. Communications providers are required to comply with all types of federal regulations, but that does not convert all of their operations into governmental action. With respect to operators of amateur and mobile antenna stations, because there is no federal licensing action taking place - in fact, Congress specifically eliminated the licensing requirement - it is far from clear why we would consider this action a federal undertaking for purposes of NHPA. It is for this reason that I dissent in part from adoption of the Nationwide Programmatic Agreement. I hope that the Commission carefully reexamines this important issue in the near future to ensure that all of our actions in this area are consistent with our statutory authority and the NHPA.

² *Streamlining the Commission's Antenna Structure Clearance Procedure*, Report and Order, 11 FCC Rcd 4272 (1995).