



MEMORANDUM OF UNDERSTANDING
between the
FEDERAL COMMUNICATIONS COMMISSION
and the
UNITED SOUTH AND EASTERN TRIBES, INC.,
regarding



Recommended Best Practices and the Section 106 Process

Whereas, Section 106 of the National Historic Preservation Act of 1966, as amended (“NHPA”) (codified at 16 U.S.C. § 470f), requires federal agencies to take into account the effects of their undertakings on historic properties, included in or eligible for inclusion in the National Register of Historic Places (“National Register”), which may include properties of “traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization” (16 U.S.C. § 470a(d)(6)(A)); and

Whereas, Section 101 of the NHPA also requires Federal agencies to consult with Indian Tribes with regard to historic properties to which an Indian Tribe or Native Hawaiian organization attaches religious and cultural significance (16 U.S.C. § 470a(d)(6)(B)); and

Whereas, the Federal Communications Commission (Commission) was created by the Communications Act of 1934 for the regulatory purpose “to make available...a rapid, efficient, Nation-wide, and world-wide, wire and radio communication service...for the purpose of promoting safety of life and property...”(47 U.S.C. § 151); and

Whereas, under the authority granted by Congress in the Communications Act of 1934, as amended, the Commission establishes rules and procedures for the licensing of non-federal government communications services, and the registration of certain antenna structures in the United States and its Possessions and Territories; and

Whereas, under the framework established in the Commission's environmental rules (47 C.F.R. §§ 1.1301-1.1319), Commission licensees and applicants for authorizations and antenna structure registrations (Applicants) are required to prepare, and the Commission is required to independently review and approve, a pre-construction Environmental Assessment (“EA”) in cases where a proposed tower or antenna may significantly affect the environment, including situations where a proposed tower or antenna may affect historic properties that are either listed in or eligible for listing in the National Register, including properties of religious and cultural importance to an Indian Tribe or Native Hawaiian organization that meet the National Register criteria; and

Whereas, the Commission, as an independent regulatory agency of the Federal government, has adopted a *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* (16 FCC Rcd 4078 (2000)), pursuant to which the Commission: recognizes the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, Treaties, federal statutes, Executive Orders, and numerous court decisions; affirms the federal trust relationship with Indian Tribes, and recognizes that this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes; commits to working with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance; commits, in accordance with the federal government's trust responsibility, and to the extent practicable, to consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources; strives to develop working relationships with Tribal governments; endeavors to identify innovative mechanisms to facilitate Tribal consultations in the Commission's regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian Tribes; and

Whereas, the Commission has certain trust responsibilities when dealing with Federally Recognized Tribes (those Tribes listed by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a *et seq.*)(Tribes) that devolve from the unique government-to-government trust relationship it shares with Tribes and the inherent sovereign status of Tribes; and

Whereas, the Commission has formally recognized this unique relationship with Tribes, general trust responsibility to Tribes, and the rights of Tribal governments to set their own communications priorities and goals for the welfare of their memberships; (16 FCC Rcd 4078, 4080 (2000)), and

Whereas, Tribes, as sovereign nations, have an inherent right and responsibility to protect and promote the welfare of their people, which includes the right to protect their properties of religious and cultural significance; and

Whereas, the Advisory Council on Historic Preservation (ACHP) has specifically required in its regulations that "agency official[s] shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them" (36 C.F.R. § 800.4(c)(1)); and

Whereas, the Commission commits, in accordance with the federal government's trust responsibility and as provided in the NHPA, to take account of, and where possible, avoid adversely affecting tribal properties when Commission actions

may have an impact upon tribal properties listed in or eligible for the National Register; and

Whereas, the Commission has engaged in consultation with duly authorized representatives of the United South and Eastern Tribes, Inc. (USET) on the guidance it should provide its Applicants who may wish to locate communications towers and antennas in areas that may contain properties that are listed or eligible for listing in the National Register and that are of religious and cultural significance to USET's member Tribes; and

Whereas, the Commission and USET recognize and agree that the involvement of Commission Applicants in this process does not nullify or substitute for the Commission's obligations to consult with Tribes under section 101(d)(6) of the NHPA, or abrogate the general trust relationship which the Commission has with Tribes; and

Whereas, the Commission and USET recognize and agree that the early involvement of the Commission's Applicants in the historic preservation process facilitates the Commission's fulfillment of its responsibilities to identify, avoid, and minimize potential adverse impacts on cultural and religious properties eligible for listing on the National Register and of interest to USET member Tribes (16 U.S.C. § 470 *et seq.*, 36 C.F.R. § 800 *et seq.*); and

Whereas, the Commission and USET agree that it is useful to reach a mutual understanding regarding the creation of voluntary Best Practices procedures for Applicants and the development of a Tower Construction Notification System that will facilitate the identification and evaluation of properties of religious and cultural significance to Tribes, as well as expedite, streamline and tailor the NHPA Section 106 process for communications facilities while protecting properties of religious and cultural significance to Tribes that are listed in or eligible for listing in the National Register; and

Whereas, the Commission and USET agree that embracing the principles and procedures to be set forth in a voluntary Best Practices document will afford Applicants useful guidance in facilitating and expediting their compliance with Section 1.1307(a)(4) of the Commission's environmental rules (47 C.F.R. § 1.1307(a)(4));

Now therefore, in consideration of the above provisions and the agreements contained herein, the Commission and USET agree to the following:

I. Best Practices

- A. The Commission and USET are in the final stages of developing a Best Practices document that the Commission and USET encourage Applicants and USET Tribes to use in order to facilitate and expedite historic preservation and environmental reviews. The parties recognize that implementation of the Best Practices will not be mandated in order to comply with Commission rules and the decision as to whether to abide by any or all of the Best Practices is intended to be left with each Applicant and each Tribe so long as all parties comply with applicable law and regulations.
- B. The Commission will publicize the Best Practices to its Applicants and the consultants with whom they contract, and will encourage Applicants to use the Best Practices when considering construction of facilities in areas in which USET member Tribes have a current or historical interest.
- C. USET will encourage adherence to the Best Practices by its member Tribes in connection with the construction of communications facilities.
- D. The Commission and USET will publicize the Best Practices as a model for use by and in relation to other federally recognized Indian Tribes.
- E. On a going-forward basis, the Commission and USET commit to amend the Best Practices as necessary to maintain consistency with Federal law, regulations, applicable programmatic agreements, and any amendments thereto.

II. Tower Construction Notification System

- A. The Commission and USET will continue to cooperate on the establishment and maintenance of an electronic database and notification system (Tower Construction Notification System) to assist Applicants in identifying and contacting, for purposes of the Section 106 process, Tribes with cultural and religious ties to properties that are listed or eligible to be listed in the National Register in areas in which Applicants propose to construct facilities. The Commission and USET believe that this system can, in an efficient manner, provide greater certainty to Applicants that they are contacting appropriate Tribes and certainty to Tribes that they will be contacted in areas of interest to them. The Tower Construction Notification System includes: (1) a secure and limited access database of geographic areas (defined at the county level) in which Tribes may attach religious and cultural significance to historic properties, as identified by the Tribes; and (2) an automated method through which Applicants may voluntarily provide initial notification to such Tribes of potential construction in these areas, and through which Tribes may respond to such notifications. The Tower Construction Notification System includes explicit legal disclaimers indicating that the information therein is provided solely for the purpose of Section 106, and that it does not reflect, nor can it be used for evaluating, Tribal land, water, and other related claims.

B. USET will encourage its members to provide information to the Tower Construction Notification System with information regarding their geographic areas of historic interest, and to make use of the Tower Construction Notification System to reduce burdens on all parties to the Section 106 process to the maximum extent they are comfortable.

C. The Commission will use its best efforts to cooperate with other federal agencies that may have an interest in or need for similar information and systems, and to unify administration in one federal agency so as to avoid creating databases with duplicative and possibly conflicting information.

D. The Commission and USET agree that use of the Tower Construction Notification System as a good-faith effort, but not the exclusive means, to identify USET member Tribes that may attach religious and cultural significance to historic properties within a geographic area, provided that the Tribe has chosen to participate in the Tower Construction Notification System.

E. The Commission and USET will continue to work together on means to improve the ability of the Tower Construction Notification System to facilitate compliance and reduce burdens in the Section 106 process.

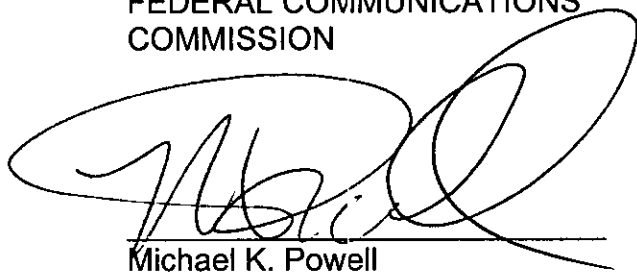
III. Term, Amendments, and Future Meetings

A. This Memorandum of Understanding will continue in effect until terminated in writing by either party.

B. This Memorandum of Understanding may be amended only in writing by the Commission and USET.

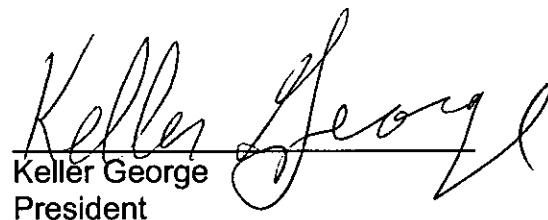
C. The Commission and USET agree to meet at one-year intervals to review their experiences under this Memorandum of Understanding, the Best Practices, and other aspects of their relationship.

FEDERAL COMMUNICATIONS
COMMISSION



Michael K. Powell
Chairman

UNITED SOUTH AND EASTERN
TRIBES, INC.



Keller George
President

Dated: February 3, 2004