

facilities may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places and, if so, to file an Environmental Assessment and obtain a Finding of No Significant Impact (or procure completion by the Commission of an Environmental Impact Statement) prior to construction.<sup>2</sup> The Note to § 1.1307(a)(4) provides guidance as to how applicants should perform this evaluation consistent with the NHPA. In order to make clear that the procedures in the Nationwide Agreement will be binding on applicants, and that non-compliance with these procedures would subject a party to potential enforcement action by the Commission, we propose to amend § 1.1307(a)(4) by removing the Note and adding the following language to the text of 47 CFR 1.1307(a)(4):

The National Register is updated in the **Federal Register**. To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 CFR part 800, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Appendix B to Part 1 of this Chapter, and the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, Appendix C to Part 1 of this Chapter.

We seek comment on this proposed revision to our rules. The Nationwide Programmatic Agreement for the Collocation of Wireless Antennas may be found at 66 FR 17554, April 2, 2001.

### III. Procedural Matters

#### A. *Ex Parte* Rules—Permit-But-Disclose Proceeding

6. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. *Id.* §§ 1.1200–1.1216. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See Id.* § 1.1206(b)(2). Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission’s rules.

*See Id.* § 1.1206(b). Under the Council’s rules, the Council and Conference must be parties to the Nationwide Agreement. Therefore, for purposes of the Commission’s *ex parte* rules, in this proceeding we shall treat presentations from these entities and their staffs as exempt presentations under 47 CFR 1.1204(a)(5).

#### B. Initial Regulatory Flexibility Analysis

7. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>3</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on a substantial number of small entities of the policies and rules proposed in this *NPRM*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in paragraph 7 of the item. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>4</sup> In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.<sup>5</sup>

#### C. Need for, and Objectives of, the *NPRM*

8. The *NPRM* seeks comment on a draft Nationwide Programmatic Agreement (“Nationwide Agreement”) among the Federal Communications Commission (“Commission”), the Advisory Council on Historic Preservation (“Council”) and the National Conference of State Historic Preservation Officers (“Conference”). The Nationwide Agreement would tailor and streamline procedures for review of certain Undertakings for communications facilities under the National Historic Preservation Act of 1966 (“NHPA”).<sup>6</sup> In November 2001, representatives of the Commission, Council, Conference, American Indian tribes, the communications industry, and historic preservation consultants, as part of a working group sponsored by the Council, began drafting a proposed Nationwide Agreement. Consistent with the Council’s rules, the draft Nationwide Agreement is intended to

tailor the section 106 review<sup>7</sup> in the communications context so as to improve compliance and streamline the review process for construction of towers and other Commission Undertakings.

9. The Commission proposes to adopt the Nationwide Agreement in order to clarify and streamline the obligations<sup>8</sup> of its regulatees<sup>9</sup> (“Applicants”) with respect to assisting the Commission in meeting its responsibilities under the NHPA. For example, the draft Nationwide Agreement would exclude from routine Section 106 review<sup>10</sup> certain Undertakings that are unlikely to affect historic properties.<sup>11</sup> For those Undertakings that would remain subject to review, the draft Nationwide Agreement would specify standards and procedures that Applicants shall follow when completing the section 106 review. For example, the Nationwide Agreement sets forth the manner in which Applicants should seek participation of Indian Tribes and Native Hawaiian Organizations; should seek tribal consultation; should seek public participation and consulting parties; should identify, evaluate, and assess effects on historic properties;

<sup>7</sup> Section 106 of the NHPA, codified at 16 U.S.C. 470f, requires federal agencies to take into account the effects of certain of their undertakings on historic properties, listed or eligible for inclusion in the National Register of Historic Places, and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertakings.

<sup>8</sup> *See* 47 CFR 1.1307(a)(4).

<sup>9</sup> Commission regulatees, in this instance, include licensees, tower owners, and applicants for authorization to construct facilities in the wireless, media, and satellite services.

<sup>10</sup> Commission Applicants are required to review whether a proposed tower or antenna may affect historic properties that are either listed or eligible for inclusion in the National Register, including properties that may affect sites of religious or cultural importance to Indian tribes or Native Hawaiian organizations. To do this, Applicants must begin the section 106 process by first presenting documentation of the review to the State Historic Preservation Officer and any relevant Tribal Historic Preservation Officers.

<sup>11</sup> An “Undertaking” subject to review under the NHPA is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 16 U.S.C. 470w(7). The Commission’s environmental rules currently treat construction of licensed communications facilities as “Undertakings.” An illustrative list of Commission activities in relation to which Undertakings covered by the draft Nationwide Agreement may occur is provided here as Attachment 2 to Appendix A (“Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission”).

<sup>3</sup> *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 through 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Public Law No. 104–121, Title II, 110 Stat. 857 (1996).

<sup>4</sup> *See* 5 U.S.C. 603(a).

<sup>5</sup> *See* 5 U.S.C. 603(a).

<sup>6</sup> *See* 16 U.S.C. 470 *et seq.*

<sup>2</sup> *Id.*; *see also* 47 CFR 1.1308, 1.1311.