Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)))	WT Docket No. 17-79

Comments submitted by

National Congress of American Indians
United South and Eastern Tribes Sovereignty Protection Fund
National Association of Tribal Historic Preservation Officers

With the full support of

Affiliated Tribes of Northwest Indians
Alaska Federation of Natives
All Pueblo Council of Governors
California Association of Tribal Governments
Great Lakes Inter-Tribal Council
Great Plains Tribal Chairman's Association
Inter-Tribal Council of Arizona
Inter-Tribal Council of the Five Civilized Tribes
Midwest Alliance of Sovereign Tribes
Southern California Tribal Chairmen's Association
United Tribes of Michigan

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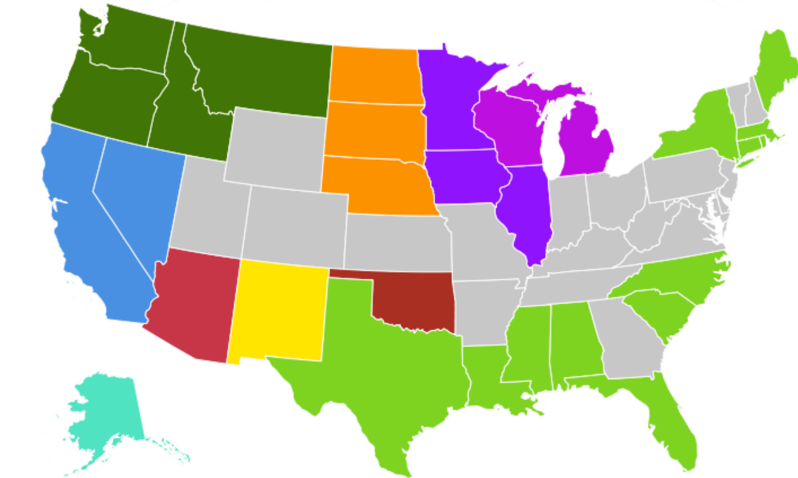
Statement of Signatories

The undersigned organizations representing tribal interests submit these comments on the Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry in the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT 17-79) and Revising the Historic Preservation Review Process for Wireless Facility Deployments (WT 15-180).

The 14 signatories to this filing represent 429 Tribal Governments in 22 States.

TRIBAL NATIONS

NOTICE OF PROPOSED RULEMAKING JOINT COMMENTS
REGIONAL REPRESENTATION



COMMENTING ORGANIZATIONS

National Congress of American Indians
United South and Eastern Tribes Sovereignty Protection Fund
National Association of Tribal Historic Preservation Officers
California Association of Tribal Governments
Midwest Alliance of Sovereign Tribes
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429 TRIBES

22 STATES

14 REGIONAL ORGS

Introduction

The Federal Communications Commission (FCC or The Commission) has a history of working collaboratively with Tribal Nations, as the federal trustee to 567 Federally Recognized Tribes in the area of telecommunications. This collaboration has included its obligation to protect Tribal historic properties and cultural resources. The FCC has been a model example of how government agencies can facilitate infrastructure development while continuing to uphold the government's trust responsibility to Tribal Nations as well as the government's statutory obligations to protect historic properties and cultural resources.

Our organizations urge the Commission to continue this leadership in working with Tribal Governments and their respective Tribal Historic Preservation Officers, to protect cultural resources, human remains and historic properties.

We understand the need for discussions on streamlining buildout of small cell infrastructure. As advocates for underserved populations, we are encouraged by the FCC's emphasis on expanding broadband to Indian Country tribal citizens. However, as the original stewards of the land and as sovereigns, we insist that deployment must be done without impact to Tribal cultural resources. The Tower Construction Notification System (TCNS) was implemented for that very reason. The TCNS has been a model for how the federal government, Tribal Nations and industry can work together in a meaningful way that encourages infrastructure development while respecting tribal sovereignty. In fact, TCNS was created as a partnership between the FCC and Tribal Nations to expedite the very process that is being discussed in this docket. Without TCNS and tribal participation, the telecommunications industry was left on its own to identify and contact an Indian Tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties.

The Commission has a trust responsibility and duty to recognize Tribal Nations as sovereigns. This trust responsibility is derived from the United States Constitution, federal statutes, and legal decisions which outline the government-to-government relationship between Tribal Nations and the federal government. For the past five decades, every presidential administration has adhered to policies supporting Tribal self-determination. In addition to recognizing Tribal sovereignty and upholding Tribal treaty rights, Federal agencies have a legal duty to fully respect and abide by the Federal trust responsibility to Tribal Nations and Indian people. Critical to this responsibility is acting in the best interests of Tribal Nations, as determined by the Tribal Nations themselves. Obtaining consent for Federal actions that affect tribes is the clearest way to uphold the trust responsibility and Tribal sovereignty. The FCC's TCNS is a visionary process that continues to uphold the Commission's trust responsibility while creating efficiencies when facilitating infrastructure deployment. We underscore its continued utility and urge its preservation.

There are 567 federally recognized Tribal Nations in the United States, all with distinct governments, cultures, histories, landholdings, and citizenry. The historic preservation priorities of one Tribal Nation cannot be assumed to be the same as those of another. This is why it is

imperative for the FCC and applicants to treat individual Tribal Nations as the respective sovereigns they are in all aspects of deploying telecommunications infrastructure. The TCNS process provides an opportunity for each Tribal Nation affected by the deployment of wireless technology to assess proposed sites and respond directly to the wireless industry. It also provides a thorough, functional solution to the FCC's obligation to consult individually.

We defer to individual Tribal Nations' comments when considering the specific questions posed in the Notice of Proposed Rulemaking. We can speak to the general policies and legal ramifications proposed in this Notice. However, the Commission should duly consider the comments made by individual Tribal Nations on this docket, in addition to the comments proposed here.

As the Commission deliberates procedural changes, including timeframes, fee schedules and Tribal areas of interest, it is important that these deliberations take place within the context of Government-to-Government Consultation with Tribal Nations that includes more than a few conference calls and in-person meetings. It took at least a year to develop TCNS with tribal participation. Proposing major changes with only a 30-day time period is an affront to the Tribal Nations that have been honoring the existing FCC systems. Modifications to the overall system require the tribal voice and perspective actively involved and for a much longer period of time than 30 days.

NCAI, USET-SPF and NATHPO filed joint comments on this docket while the notice was still a draft. In addition to our previous comments submitted April 18, 2017, we submit these comments to address specific questions in the Notice of Proposed Rulemaking. These comments do not replace our previous comment, they are meant to provide additional information and guidance to the Commission on how to best move forward with this process.

Updating the FCC Approach to the National Historic Preservation Act and National Environmental Policy Act- Need for Action

We agree on the timeliness of reviewing how the TCNS system is operating and recommendations on how to improve -- both from the Tribal Nations perspective, as well as from the industry and the FCC itself. It is our understanding that in the 12 year history of this program, it has not had the benefit of a systemic review. In this regard, however, the Commission seeks comment on the extent of benefits attributable to Tribal participation under the Commission's Section 106 procedures. Many wireless providers have stated anecdotally that in their deployment of infrastructure, they have never found or caused damage to tribal cultural and historic properties and use this to argue that this is why the TCNS process should be limited. We believe that this is a major misunderstanding and misrepresentation of both the TCNS process and of the uniqueness of Tribal Nations. It is our understanding that industry has convinced themselves of their harmless behavior based on industry consultants anecdotal information.

The fact that there has been so little damage to protected properties in this process is a testament to TCNS being an extremely effective way to avoid irreparable damage to statutorily protected cultural and historic properties. The Commission should recognize this as a success in their efforts to protect cultural and historic properties, not as a means to limit tribal involvement.

By allowing for Tribes to map out their areas of interest, and stay involved in the TCNS process, Tribes are able to give the most credible advice on the infrastructure's impact to cultural and historic properties. For example, many tribes have worked through TCNS and with wireless providers to slightly change construction plans to avoid historic properties. Often times, moving a site as little as 20 feet away can avoid disruption of historic and cultural properties. Avoiding impacts to historic and cultural properties upholds the FCC's trust responsibility, allows for tribes to protect their culture and history, and helps industry avoid costly and legally challenging situations. The costs of a functioning TCNS system surely outweigh the costs to both Tribes and industry if cultural and historic properties are harmed. The FCC has an obligation to make the TCNS System a functional one for both Industry and Tribes and we urge a national deliberation on improving the process that includes Tribal Nations and that is commensurate with the significance and scope of this national effort.

Process Reforms- Tribal Fees

There is no dispute that Tribal Nations should be compensated for providing consultant services.[1] The Commission seeks comment on when Tribes act as contractors or consultants. We believe that this question is clearly answered in the FCC-USET's existing Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act[2].

<u>USET Model for Best Practices</u>

Title IX. Compensation for Professional Services of the FCC-USET Best Practices states,

> "The Advisory Council [on Historic Preservation] regulations state that the "agency official 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." (§ 800.4(c)(1)). Consistent with the ACHP Memorandum on Fees in the Section 106 Review Process, payment to a Tribe is appropriate when an Agency or Applicant "essentially asks the Tribe to fulfill the role of a consultant or contractor" when it "seeks to identify historic properties that may be significant to an Indian Tribe,

[1] References to "consultant services" provided by Tribal Nations to industry is a completely distinct concept from the use of the term "consultation" referring to the FCC's consultation obligation under Federal law to Tribal Nations.

[2] FCC-USET Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act, 2004. https://apps.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf

> [and] ask[s] for specific information and documentation regarding the location, nature and condition of individual sites, or actually request[s] that a survey be conducted by the Tribe[3]." In providing their "special expertise," Tribes are fulfilling a consultant role. To the extent compensation should be paid, it should be negotiated between the Applicant and the Tribe. USET has adopted a model cost recovery schedule for such consultant or contractor services, which it states is intended solely to cover Tribal costs[4]."

Tribes are justified in requesting payment when they provide their unique expertise in a consultant role. Tribes become consultants in this process when they enter into discussions with applicants on the historic and cultural properties that may be impacted by building new infrastructure.

The USET Culture and Heritage Committee simplifies this dichotomy into two elements

1. The FCC has a requirement to consult with Tribes. At this point in the process, this engagement is reflective of the government-to-government relationship.
2. At the point in which "special expertise" or special cultural expertise is necessary, Tribes then take on this "consultant" role. However, Tribal Nations are consultants unlike any others, with expertise in their own cultures that cannot be duplicated by outside entities. The provision of this expertise, for FCC and industry purposes, is best understood in the business model of a "consultant".

This FCC-USET document states that "Contact between Applicants and Tribes is a two-step process," Initial Contact being the first step and a Tribal Interest Discussion being the second. During initial contact, a Tribe determines if it has a cultural or historical interest in the proposed site. The yes or no answer regarding initial interest would not require payment from the applicant.

In the vast majority of these cases, that first contact is now handled by the TCNS system. Prior to that system, it was a guessing game as to which Tribes might have an interest in a certain area. With TCNS, industry is put into direct contact with those Tribes with an interest

[3] See Executive Director Memorandum of John Fowler, Advisory Council on Historic Preservation, regarding Fees in the Section 106 Review Process, at 3 (July 6, 2001).

[4] FCC-USET Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act, 2004.

in a potential cell site area. This information was researched and inputted by Tribes at Tribal expense. Industry is not charged for this initial determination of interest.

If the Tribe indicates that the proposed facility may impact properties eligible for or included in the National Register of Historic Properties, to which that Tribe attaches religious and cultural significance, the Tribe and the Applicant should engage in a discussion regarding whether any further review is necessary and, if so, the terms of that additional review. This discussion is identified as the Tribal Interest Discussion in the FCC's Best Practices. In this discussion the parties should address the Tribal need for adequate information early enough to have input into decision-making and the Applicant's need to move forward in a cost-effective and timely way.[5] ***It is at this point in the process that Tribes are justified for asking for payments from applicants.***

The Commission asks if it should clarify when a Tribal Nation is acting under its statutory role and when it is being hired as a contractor or consultant. We believe that when the Tribal Interest discussion begins (laid out in the FCC-USET Best Practices) is when the Tribal Nation becomes a consultant. Guidance from the Commission supporting this point would be beneficial for all parties to avoid confusion.

Further, the FCC-USET Best Practices Title E. Written Request for Review states that "if a Tribe has indicated during Initial Contact or pursuant to Commission contact that it has an interest in the project area, an Applicant following these Best Practices should, unless otherwise negotiated, send a Request for Review Packet to the Tribal Official." This indicates that the applicant sends in materials to the Tribe, based on the Tribe's requirements as set forth in the TCNS.

The NPRM asks "should the Commission infer if the applicant does not ask explicitly for such information and documentation, then no payment is necessary?" No, the Commission should not infer that to be the case. If the Commission created such an inference or presumption, it would unfortunately encourage Industry practices that would take advantage of the fact that many Tribes are under resourced and cannot always respond quickly. Such an inference is also contradictory to the principles behind the FCC-USET Best Practices and would essentially violate the Trust Responsibility. The Applicant should expect to pay for the work product and to follow the law, regardless of the applicant's explicit request for information and documentation, when Tribes make determinations on effects to their statutorily protected cultural and historic properties.

The Commission should provide guidance, consistent with its established policy of Voluntary Best Practices, to address the circumstances when tribes act in the role of consultant and contractor and therefore are entitled to seek compensation.

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[5] Many Tribal Nations list in the TCNS the information they need to receive to complete an evaluation. Frequently, Industry does not provide that information, at least not initially. It would improve efficiency if all Tribal Nations listed their requirements in the TCNS and if Industry actually met those requirements.

Before the establishment of the TCNS, cell tower companies had, with few exceptions, been unwilling to pay fees to cover Tribal costs despite the onerous workload involved in responding to letters from industry. The companies argued that Tribal Nations should provide this information as a free government service. The companies also wanted this work done immediately.

Of course, it is common for Federal agencies, including the FCC, as well as other types of government experts to charge reasonable fees for their services. Charging fees for government services is a well-practiced and common part of working with governments in America. As sovereign governments, it is appropriate for Tribal Nations to assess reasonable fees for reviewing industry applications.

Without a Tribal Nation's unique expertise in its cultural and religious history, it is impossible to properly evaluate the historic significance of a proposed site or its potential impact on properties of cultural and religious significance to that Tribal Nation. 36 CFR 800.4(c)(1) recognizes that Tribal Nations have "special expertise" in the evaluation of sites of importance to them. Indeed, Tribal Nations have unique expertise that is not replicable by individuals outside of the respective Tribal Nation. This is especially important given that moving a site as little as 20 feet can avoid disruption of historical and cultural properties. Like access to engineering, environmental, architectural and other expertise, access to unique Tribal expertise should be compensated at a fair rate.

The Difference Between Government-to-Government Consultation and Tribes as Consultants

Accessing Tribal expertise to benefit a commercial enterprise is a wholly separate issue from a Tribal Nation invoking its right to consult with the FCC. Industry applicants may confuse the government's Section 106 consultation obligations as a Tribe's role as a consultant when navigating Tribal fees through the TCNS Process.

In accordance with the federal trust responsibility, consultation occurs between two governments only: Tribal Nations and the Federal Government. Industry applicants seeking to use government expertise for government services is not consultation. Since wireless telecommunications companies are not governments and do not have a trust responsibility to Tribal Nations, they cannot conduct government-to-government consultation.

Tribal Nations should determine for themselves, taking into account market rates for similar professional services, what their reasonable costs are for providing a review of the impacts to historical and cultural of wireless infrastructure of proposed cell tower and collocation sites.

Monitoring and Site Visits

The Commission seeks comment on "if a Tribal Nation chooses to conduct research, surveying, site visits or monitoring absent a request of the applicant, would such efforts require payment from the applicant?" Site monitoring and site visits require substantial resources. Tribes do not undertake these activities lightly. When Tribes indicate that these measures are necessary it is because without a TCNS Tribal Representative or THPO physically viewing the proposed site, there is no possible way for an applicant to know the potential effects. Contractors or consultants not associated with the Tribe cannot fill this role because they do not have the cultural knowledge – or authority -- to make a determination for the Tribe. Tribal fees associated with monitoring and site visits must be paid for by the applicant.

When considering monitoring, it is inconsistent and unwise for the Commission to compare archeological consultants to sovereign Tribal Nations. Tribal Nations have over 200 years of federal law affirming their inherent sovereign status. Accordingly, any regulation must reflect the Tribes' status as governments even when Tribes facilitate the role of consultants in this context. Because Tribes are the only entity that exists to determine the effects proposed infrastructure on the Tribes' own cultural and historic properties, they should be compensated for offering their expertise. Often times, the only way a Tribe can determine the adverse effects of proposed infrastructure is by conducting site monitoring. Tribal Nation representatives have noted the success of site monitoring. Experience has proven that monitoring the site before construction can avoid damage to cultural resources by asking the applicant to slightly change or move construction plans. The Commission should consider site monitoring as a part of the Tribal response to the request to review.

For the example noted in the NPRM, if an archeological contractor conducted site monitoring absent the request of an industry applicant, that is a disagreement between the archaeological contractor and applicant or a disagreement between two business entities. In the case of Tribes conducting monitoring absent the request of the applicant, that activity is undertaken because the Tribe, not only as a sovereign entity but also as the party that is going to be injured, has identified a risk that the applicant, likely for financial reasons, chooses to ignore. This is not a business relationship, but a relationship appropriately recognized by the Federal government when it provided for Section 106 review and acknowledged the unique expertise of Tribes within that review process. If the applicant has a concern, its issue is with the FCC. This disagreement would be between the applicant and the Federal Government that acts as the trustee to the Tribal Nation, or a business-government disagreement. If a Tribe determines that a certain level of review is required to protect its cultural heritage, it is not for the applicants to disagree and refuse to pay the costs of that review, especially as their business interests are the ultimate beneficiary.

Batching Possible Sites

We understand that the catalyst of this discussion and Notice of Proposed Rulemaking is the advent of 5G technology, involving an increased proliferation of smaller cell sites.

Tribes have been generally receptive to the idea of batching small cell applications but have experienced some industry consultants attempts to "batch" sites that are of great distance apart, thus negating the perceived benefit of batching facilities located near one another and of similar nature. This is a bigger discussion than a 30-60 day review of documents if the desired result is to work for all parties. For example, a batching application could incorporate small cells that are uniform, all within 500 horizontal feet of one center point that do not include any ground disturbance whatsoever. Any sort of batching of applications must allow for Tribes to have the option to look into or separate one or multiple sites out of the "batch," as one site may be more concerning than others in the same application. Any Commission action on batching applications for small cells should be reasonable, considering similar localities and limited to less than 20 sites in one batch. Review periods for all types of infrastructure, whether batched, small cell, collocation or large tower, should be consistent and rely on existing FCC rules and procedures.

Amount of Fees Sought by Some Tribal Nations

We are aware that the actions of a few Tribal Nations may be driving this conversation in a way that will impact all Tribal Nations. If the FCC believes a Tribal Nation is charging exorbitant fees, it is the responsibility of the FCC to work with that individual Tribal Nation to remedy the situation. Changing policy in reaction to a small number of Tribal Nations, to the detriment to all Tribal Nations, would set a harmful precedent and would be contrary to the Commission's trust responsibility to work in the best interest of all Tribal Nations.

Flat Upfront Fees

The ACHP states that "an agency or applicant may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe." When an agency or applicant asks for specific information and documentation, it is appropriate for a Tribe to request a flat upfront fee. This speeds the review process, by assuring a Tribe has the resources it needs (if it does not, then the applicant has grounds to inquire with the Tribe regarding the basis for any delay). This request occurs when the applicant enters into a Tribal Interest discussion with a Tribe.

This approach to cost recovery, i.e., upfront fees at the time of Tribal Interest Discussion, is consistent with the ACHP guidance. For many Tribes, a flat upfront fee for all applications is the best cost recovery model to promptly answer requests through TCNS. Several Tribes have also noted that they were not compensated for work done in previous situations and have thus required payment up front.

Areas of Interest

The NPRM seeks comment on Tribal Areas of Interest in the TCNS. Applicants seem concerned that working with multiple Tribal Nations is more difficult than working with one. The Commission also seeks comment on requiring a form of certification for areas of interest and how to move forward if a Tribal Nation does not certify their heritage.

Since 1492, Tribal Nations collectively have lost 98% of their aboriginal land base. Prior to the establishment of the United States, Tribal Nations traveled great distances throughout the country. Their traditional homelands stretched much farther than the reservations that Tribal Nations inhabit today. As a result, the overwhelming majority of Tribal properties of cultural, historical and religious significance eligible for inclusion on the National Register are located off Indian Reservations and Federal trust lands. Many Tribal Nations in the eastern region of the United States were removed by the Federal Government and relocated to live in Indian Territory, now called the state of Oklahoma, thousands of miles away from their original homelands. The intent of the National Historic Preservation Act was to protect the historical and cultural properties of Tribal Nations outside the confines of their current reservations, on all areas that their Tribal Nations determined to have cultural and historical significance. This includes areas along the "Trail of Tears" and other removal routes in the southern United States.

Since the inception of the TCNS over a decade ago, Tribal Nations across the country have been more active in the areas their ancestors have always called home. This can be attributed to a variety of developments including changes in technology, historic preservation techniques and research, and enhanced capacity due to economic development throughout Indian Country. Only recently, have Tribal Nations been able to prioritize historic preservation for their communities for the first time. In doing so, they have the resources to be more active in the geographic localities where they once resided. It is important for the Commission and Industry applicants to not view Indian Country as static. Just as economic development, technology and the Internet has changed the work of the FCC, it has changed the work of historic preservation for Tribal Nations.

There are 567 federally recognized Tribal Nations in the United States, all with distinct governments, cultures, histories, landholdings, and citizens. The historic preservation priorities of one Tribal Nation cannot be assumed to be the same of those of another. This is why it is imperative for the FCC and applicants to treat individual Tribal Nations as the individual sovereigns they are in all aspects of deployment: application review, historic property interest discussions, site visits, site monitoring and final completion. The TCNS process provides an opportunity for each Tribal Nation affected by the deployment of wireless technology to assess proposed sites and respond directly to the wireless industry. It also provides a thorough, functional solution to the FCC's obligation to consult individually.

Certifying Areas of Interest

The Commission asks if Tribal Nations should provide a form of certification for areas of interest. It is sufficient that Tribal Nations use the TCNS. Asking Tribal Nations to quantify further their culture and provide documentation when attempting to protect their own historic and cultural properties would be offensive and is a rejection of Tribal Sovereignty and the history of government-to-government relations between the US and Tribal Nations.

If the Commission has reason to believe that an individual Tribal Nation is expanding their area of interest in an unreasonable way to take advantage of the TCNS system, it is the duty of the FCC to remedy the situation directly with that individual Tribal Nation. Forcing all Tribal Nations to certify their culture and heritage in an attempt to protect their own cultural properties is not the proper remedy. We further challenge whether it is within the FCC's legal authority to require a sovereign entity to provide this information, in the context of what is essentially a business activity, as a prerequisite to entering into formal government-to-government consultation.

The FCC has an obligation to make the TCNS a system that works (which it has done), and that requires respectfully working with Tribal Nations on an individual basis to ensure the best outcomes for all parties.

Prior Clearances

The NPRM seeks comment on whether TCNS should be modified to retain information on areas where concerns were raised and reviews conducted so that the next applicant knows whether there is a concern about cultural resources in that area or not.

It is the right of Individual Tribes, as sovereigns, to determine if prior clearances will be honored for future deployment. The clearances made by one tribe in the past may work for that tribe and not another.

We have heard that some Tribal Nations are open to the idea of allowing prior clearances, but we stress that this is not indicative of all Tribal Nations and should not be the basis for national policy. The FCC needs to approach this on a tribe by tribe basis.

If the FCC looks to move forward with this topic, we recommend the FCC create a forum to bring all interested parties together to discuss this important topic and work together in reaching a solution. One outcome of such a forum, for example, could be an agreement to distribute to tribes that would set a voluntary framework for allowing deployment in places that had been previously cleared and only upon the Tribe's consent would an applicant be able to undertake new development in areas that were previously cleared.

Confidentiality of Cultural and Historic Properties

Tribal Nations are very concerned about the confidentiality of their cultural and historic properties. The FCC, as the Federal Trustee, has an obligation to protect the confidentiality of these sites. Because Industry does not have this same obligation to protect the confidentiality of tribal historic and cultural properties, there is nothing stopping them from sharing this information, even inadvertently, with bad actors who might take up the practice of grave robbing and looting tribal historic and cultural objects and sites. This is a very serious concern and the Commission should not take confidentiality lightly.

The National Historic Preservation Act, the Antiquities Act, and the Native American Graves Protection and Repatriation Act were enacted to protect tribal cultural and historic properties from looters and thieves. Looting Indian graves and stealing tribal cultural items for profit has been a common practice since the 1800's. The intent of these other federal laws and as outlined in the authorizing language for this docket is to protect tribal cultural objects and remains.

Unless it has secured specific Tribal consent, the FCC should not share with Industry the location of sacred sites or protected properties. It is not only the morally wrong thing to do, it could open up the possibility for lawsuits against the Commission.

Sharing sensitive information outside of the Commission and the Tribe with the Applicant is also inconsistent with the FCC's Voluntary Best Practices that states in Section VII. Confidentiality which reads,

> "A. Applicant Concerns. USET and the Commission acknowledge that both the Applicant and the Tribe have substantial confidentiality concerns. When the Applicant considers tower site locations, project design, or other data to be confidential, and advises the Tribe that it is presenting proprietary business information, the Tribe shall agree to treat the material received from the Applicant as confidential, except where disclosure is authorized in writing by the Applicant or otherwise required by law.
>
> B. Tribal Concerns. USET and the Commission acknowledge that Tribes consider the location of many properties of cultural and religious significance to be proprietary cultural information, and seek confidentiality in order to protect those properties. ***The Applicant shall not disclose information it has acquired, whether from the Tribe or from another source, that relates to properties of cultural and religious significance to the Tribe, except where disclosure is authorized in writing by the Tribe or otherwise required by law.*** The Commission and USET acknowledge that there may be some circumstances in which the Tribe cannot divulge to the Applicant the exact nature or location of a Tribal cultural or religious property. In such circumstances, the Tribe should endeavor, in good faith and to the extent consistent with its need for confidentiality and Tribal custom or law, to provide as much relevant information as possible to the Applicant.

C. Authorized Disclosure. Notwithstanding Section VIII.B. of these Best Practices, the Applicant may disclose such Confidential Information only to those employees, contractors, representatives and agents, including subtenants and entities collocated on the Applicant's tower (Receiving Party), who have a need to know such Confidential Information for compliance with laws and regulations governing the preservation of historic properties. The Applicant and the Receiving Party shall hold such Confidential Information in strict confidence, and use at least the same degree of care as they use to safeguard their own most confidential and proprietary information so as to insure that no unauthorized person has access to it. The Applicant shall ensure that the Receiving Party is aware of and abides by the Tribal restrictions regarding the use of such Confidential Information, and should bind the Receiving Party legally from improperly disclosing Confidential Information."

If the FCC catalogues or shares information with Industry on the location of tribal areas of concern or areas that have known cultural objects, the FCC is obligated to require industry representatives with access to any information sign a non-disclosure agreement to protect the confidentiality of the historic properties and lastly to ensure that bad actors are prosecuted for violating existing law should their disclosure result in harm to cultural resources.

Multiple Tribal Reviews for a Single Application

The FCC asks when it is necessary for an applicant to compensate multiple Tribal Nations for the same project and whether there are mechanisms to gain efficiencies to ensure that duplicative review is not conducted by each Tribal Nation.

Developing such mechanisms is within the purview of each Tribal Nation, but should only be undertaken within the following context. Recognizing individual sovereigns is the responsibility of the FCC. The historic preservation concerns of one Tribal Nation cannot and should not be considered the same historic preservation concerns of another Tribal Nation. Tribal Nations are sovereign governments, permitted by statute to consult on the impacts to historic and cultural properties. Each individual Tribal Nation has a unique history and culture, and the federal government has acknowledged this for over 200 years.

The FCC has a trust responsibility to each of the 567 Tribal Nations in America. Limiting Tribal input out of concern for industry convenience, as described in the NPRM, is a violation of the FCC's trust responsibility.

When it comes to questions of duplicative review, each Tribal Nation is entitled to their own distinct review of each new application meaning it is not duplicative. This means that if two or more Tribal Nations review one application under Section 106, there is no duplication because each has is its own government and its own concerns. Again, it is important for the Commission to recognize that the historic preservation concerns of one Tribal Nation are not the same as those of another, leaving no room for duplicative review. If Tribal Nations agree to collaborate

on receiving projects, then that is the purview of those Tribal Nations and those Tribal Nations only. In other words, when considering a project that may have effects in multiple States, the applicant would be required to work with all States because they are sovereigns. The same is true for Indian Tribes.

The idea of recognizing individual Tribal Sovereigns also applies to site monitoring. The physical, visible monitoring determination of one Tribal Nation should not be considered the same as another Tribal Nation. If two or more Tribes agree and consent to work together on site monitoring, the FCC should allow them to do so. However, if a tribe does not consent to pooling monitoring resources, the FCC is not recognizing the sovereign status of the individual tribes.

Hiring site monitors that are not authorized to do historic preservation work for the Tribe would not fulfill the FCC's Section 106 obligations. A "qualified, independent site monitor" could review historic and cultural impacts ***alongside*** tribally appointed monitors, but could not replace any Tribal representative or THPO's determination. If the FCC moves forward with considering site monitors who are not affiliated or appointed by Tribal Nations, it is not upholding its Section 106 responsibilities.

Tribally appointed monitors could provide written reports explaining their determinations and share them with the applicant and the FCC. However, these reports should remain confidential and subject to non-disclosure agreements.

Applicant Self-Certification

With respect to Tribal Nations, the Commission seeks comment on whether the process can be revised in a manner that would permit applicants to self-certify their compliance with Section 106.

Indian Country strongly opposes revisions that would allow applicants to self-certify Section 106 compliance. Not only is this putting the proverbial fox in charge of the henhouse, but would also violate the National Historic Preservation Act. We remind the Commission that the trust responsibility lies only between the federal government and Tribal Nations, not with Industry. The role of the Commission is to protect the varied interests of historic preservation of Tribal Nations to which it is a trustee. Allowing for applicants to self-certify compliance is in direct violation of the National Historic Preservation Act and the Trust Responsibility the government has to Tribal Nations. As a branch of the Federal Government, the Commission's role, as defined by numerous court cases and statutes, is to protect the interests of Tribal Nations from these situations, not assist industry in skirting around the law.

Additionally, self-certification will embolden industry bad actors, resulting in a dramatic increase in requests for FCC intervention through government-to-government consultation. Regrettably, we state this because there have been a number of industry bad actors that have not worked in good faith with Tribal Nations. In relying on industry's interpretation of compliance,

the Commission will be called in for direct consultation by Tribal Nations more often, thus straining FCC resources and undermining the gains made through the TCNS system.

Setting up a system to allow applicants to self-certify their section 106 compliance could lead to legal ramifications and the potential for lawsuits against the Commission.

Remedies and Dispute Resolution

Although the ACHP has indicated that tribal concurrence is not necessary to find that no historic properties of religious or cultural significance would be affected by an undertaking, the FCC is responsible for facilitating information sharing necessary to make that determination. Ultimately, the responsibility to protect cultural and historical resources is with the FCC.

Given the FCC's responsibilities under federal law and the trust responsibility, the FCC must work with Tribes on a government-to-government basis to understand a particular Tribe's position when a dispute arises between the Tribe and Industry--including when the dispute involves fees. Additionally, the FCC, as trustee to all Tribal Nations, must work to resolve such disputes in a manner that reflects the FCC's trust responsibility and considers a particular Tribe's unique expertise, status as a government providing services to an Applicant, and interests in protecting cultural resources. NATHPO has developed a Dispute Resolution Process in consideration of the interest to modify TCNS that could serve as a model for resolving disputes on a variety of topics.

Negotiated Alternative

National and regional Tribal organizations all agree that discussions between our organizations, Industry representatives and the FCC are within the scope of our work, however, we view our role as providing industry and the FCC guidance for working through this issue, not as negotiators or representatives of Tribal Nations. We are eager to assist Industry and the FCC when working with Tribal Nations. However, we do not agree that our organizations can provide a "negotiated alternative."

Lack of Response

We understand that the lack of response from Tribal Nations for the review of wireless applications can cause delays in deploying wireless infrastructure. The National Programmatic Agreement (NPA) and the FCC internal process lays out a time frame for review, which is not always met by any of the parties, including Tribal Nations, industry consultants, and the FCC. In our research on this topic, we have found that basic information is not provided to Tribal Nations in which to make a determination to move forward, as well as minor technical issues with TCNS that prevented industry consultants from understanding that tribal review had been completed,

and with the FCC not communicating with Tribal Nations in an effective manner with regard to their interests.

The FCC's Voluntary Best Practices also lays out a time frame that the Commission should consider when moving forward on Tribal timelines for review.

USET-FCC Voluntary Best Practices Timeline Example

- Tribal Nation replies to Initial Contact within 14 days
    - If no response after 14 days, the Applicant should make a second effort to contact the tribe
    - If not response after 7 more days (21 days since TCNS submission) the Applicant can ask the FCC to initiate Government to Government Consultation.
- Government-to-government Consultation (if necessary) will occur within 30 days
- Request for Review and Tribal Response, no later than 30 days (consistent with NPA)
    - During the Request for Review there are 6 determinations Tribes can make
        - Request additional information. Upon receiving the requested information, review will be completed within 30 days
        - No interest. Applicant can move forward
        - Request for additional time. 30 day extension
        - No effect. Applicant can move forward
        - No Adverse effect. This is when the Tribe identifies properties of significance within the area of potential effect but has determined that the property will not be effected by the construction of the infrastructure. Applicant can move forward.
        - Adverse Effect- a property is identified and a tribe submits it in writing.
    - Resolving Adverse Effects in 30 days under resolution plan
    - If a Tribe does not respond within 30 days of the Request for Review, the applicant should contact the tribe. If no response after 7 further days, the applicant can ask the FCC to consult with the tribe.

The Timeline in the USET Best Practices, could serve as the foundation for future timelines or shot clocks when considering Tribal Review, keeping in mind that Tribes always have the option to consult directly with the FCC. Should other national or regional tribal organizations choose to adopt these as similar best practices, the FCC should also use these as a similar basis. For many cases, Industry applicants will have determinations within 14 days, ahead of the schedule established in the NPA. Otherwise, within 44 days (14 for initial interest + 30 for Review), Tribes should respond to applications.

Given the timeline the FCC has already established above and the NPA, the FCC should establish a schedule that honors the Best Practices and allows Tribes enough time to protect their resources.

Many Tribes note that incomplete applications with necessary information are the principle reason for delay. Each Tribe has a determined set of application requirements. In some cases in the USET region, Tribes and Industry consultants have formed good working relationships and the industry consultants understand what each Tribal Nation needs to make their determination. However, in many other cases, incomplete applications and insufficient information result in delays for tribal review. In these cases, Tribes often must wait more than 30 days to receive complete materials from industry applicants. When determining Tribal Response timeframes, the Commission needs to recognize each Tribe's individual application requirements and should not count time against the tribe when an applicant has not submitted a complete application.

While it may make sense from an industry perspective to shorten response times for different types of wireless infrastructure, it is not consistent with the established processes of Tribal Nations. Tribes take each TCNS application very seriously, and request to continue reviewing for 30 days, regardless of type of technology. If there is a sincere effort to work with Tribal Nations on additional streamlining of the TCNS process, then time and resources need to be dedicated to achieve this goal.

The Commission asks if advances in communications during the past decade, particularly with respect to communications via the Internet, have changed reasonable expectations as to timeliness of responses and reasonable efforts to follow up. Considering that 41% of Tribal Lands and 68% of rural Tribal Lands lack broadband access, [6] the reasonable expectations for responses has not changed in 41% of Indian Country. If the Commission chooses to shorten response times under this reasoning, Tribal Nations should be excluded because the Commission has not seen to make broadband accessible for all Americans in Indian Country. If the Commission makes substantial, concerted efforts to bridge the digital divide in Indian Country to bring tribal broadband access to national levels, then it would be fair for the Commission to act on this question as it relates to Tribal Nations. That said, the TCNS has successfully served as such a tool for over a decade.

Exclusions

Exclusions for Small Facilities

The purpose of TCNS and the Historic Preservation Act is to protect historic properties by consulting with Tribes on the effects federal undertakings. Tribal Nations are most concerned with ground disturbance in this process. Considering that many installations of small facilities

[6] Federal Communications Commission's 2016 Broadband Progress Report

will not disturb the ground at all, these exclusions could be well received in Indian Country. However, if the ground is to be disturbed at all, whether it is replacing a pole, in a right of way or collocating with ground disturbance, Tribes will need the opportunity to identify effects on historic properties.

Pole Replacements

Pole Replacements are excluded from Section 106 Review under the NPA if they meet the definition of a "tower." However, in the example given in the NPRM where the facility does not constitute a substantial increase in size over nearby structures and is not within the boundaries of a historic property, Tribal Section 106 review is needed.

Simply put, if the pole replacement increases in size or disturbs ground, Tribes need to conduct Section 106 review. Our organizations do not support exclusions for pole replacements that substantially increase in size or disturb ground. If a pole replacement site has never undergone Tribal Section 106 review, in the example noted in the NPRM, it should be subject to Tribal review.

If the pole being replaced has already undergone Tribal Section 106 review, Tribes could voluntarily opt out of reviewing replacement poles with the FCC, thus creating the exclusion. However, that is the decision of the individual sovereign Tribal Nation.

Rights of Way (ROW)

The Commission asks for comment on whether Tribal Nation participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties.

To understand why Tribal review of applications in Right of Ways (ROWs) is important, we need to examine the history and geographies of Tribal Nations before ROWs existed. American Indians and Alaska Natives were nomadic people who would travel often based on the seasons, food sources, weather, and for many other reasons. The way of life was fluid throughout the land that is now the United States and heavily trafficked trails were established. These trails connected population centers, provided easy access to bodies of water and paths to cross mountain ranges. These trails that were blazed by American Indians and Alaska Natives were the obvious choice for colonists and settlers to use as roads, trails and later, highways. The path of least resistance across America had already been established by the first Americans.

The first ROWs were granted to railroad companies in 1899 as rails lines were built across Indian lands. Later, the network of Tribal trails and routes were used to establish state, local, and Interstate Highway Systems, as well as for infrastructure development and pipelines to transport oil, gas and other natural resources from Tribal lands.

The earliest ROWs were often granted without the permission of or consultation with the local Tribal Nations. For instance, when construction of the Interstate Highway System started in 1956, Tribal Nations were not consulted even though the highway was a federal undertaking with impacts to Tribal cultural and historic properties. Because American Indian and Alaska Native life was concentrated on these routes, many historic, cultural and archeological properties exist in ROWs. ROWs have the potential to harbor the most cultural and historic properties protected by the National Historic Preservation Act. The Commission should consider this high concentration of historic and cultural properties when determining exclusions within ROWs.

The National Historic Preservation Act was passed in 1966, protecting Tribal historic and cultural properties and human remains, including properties found in ROWs. When constructing the Interstate Highway System prior to passage of the NHPA and other laws, the Federal government did not consult with Tribal Nations. Thus, existing ROWs cannot and must not be excluded from review under Section 106. The law is clear that any new federal undertaking must go through the Section 106 process and allow for tribal consultation. Because the Commission is looking to permit new federal undertakings on known historic properties, by law, the Commission needs to consult with Tribal Nations.

The Commission asks whether exclusions should be adopted, subject to certain conditions that would protect historic properties and asks what they should be. We believe that the first condition should be that all transportation ROWs (federal, state, or local) should not be excluded. Because of the long history of using transportation corridors noted in the NPRM, it would not be wise to categorically exclude anything in a transportation ROW. Secondly, if an entire ROW has already undergone Tribal Section 106 review, the tribe may voluntarily chose to forgo a second round of Section 106 review. Much like pole replacements, this is up to the individual tribe choosing to act as a sovereign and waiving their right to review. We believe that these two conditions -- no exclusions in transportation ROWs and Tribal voluntary option to waive their review -- allow for deployment of infrastructure while maintaining the protection of historic properties.

Tribal Nations are deeply concerned that the Commission seeks comment "on whether to amend the current right of way exclusion to apply regardless of whether the right of way is located on a historic property." This is in direct conflict with the National Historic Preservation Act. The Commission should not allow for building on known historic properties without proper Section 106 Review, regardless of increases in size.

The Commission asks how ground disturbance should be defined. We define ground disturbance as turning of soil, in any way. This would include one shovel's worth of dirt being moved from its original place in the ground, or one ton of dirt being moved. If a site is being added and does not turn the slightest bit of dirt that would not constitute ground disturbance, like collocations (unless they require ground disturbance for associated equipment).

Tribal participation in Section 106 Review should continue for all sites in Rights of Way if exclusions are adopted for utility or communications ROWs on historic properties. Because the

Commission is looking to permit new federal undertakings on known historic properties, by law, the Commission needs to consult with Tribal Nations on the historic preservation impacts.

Collocations

Tribal Nations, under Section 106, can consult with the Federal Government on new federal undertakings. Collocations are considered a federal undertaking because they require licensing in order to transmit communications. The nature of collocations is different than other exclusions noted in this Notice.

Collocations can significantly affect Tribal cultural and historical properties by disturbing ground as a consequence of deploying a new collocation. Indian Country is most concerned with collocations and the possibility of ground disturbance when installing new wiring through the ground.

Because collocations are added to existing infrastructure that has already gone through the Section 106 process and Tribal Review, they may pose less potential harm to historic and cultural properties protected by law. Tribal Nations are most concerned with federal undertakings that disturb the ground and turn up dirt. However, the Commission still has an obligation to consult with Tribal Nations on collocations and on any exclusion regarding collocations. Of the 567 Tribal Nations in the US, there are may be 567 opinions on the potential effects of collocations on historic and cultural properties. This is why it is so important for the Commission to consult on major changes in policy directly with Tribal Nations. One Tribal Nation may view collocation exclusion favorably while another may not.

Another concern when considering collocations is the impact on traditional viewsheds. The cultural and spiritual traditions of Tribal Nations across the United States frequently involve the uninterrupted view of a particular landscape, mountain range, or other viewshed. For example, the Wampanoag Tribal Nation of Gay Head (Aquinnah) and Mashpee Wampanoag are Tribal Nations of the Great Nation of Wampanoag People, known as "The People of the First Light". Their name defines who they are and differentiates them from all other Tribal Nations. As the People of the First Light; one of the most important aspects and fundamental components of their religious and cultural beliefs and practice is their ability to experience, embrace and give ceremony and prayers of thanksgiving to the first light. These ceremonies, spiritual and religious practices are dependent upon maintaining the ability to view the first light; the eastern horizon vista and view-shed without obstructions. Collocations could disrupt these types of religious practice.

Possible Alternative for Streamlining Collocation Review - Government to Government consultation

We suggest that the Commission work directly with individual Tribal Nations to come to an agreement on collocations. If a tower has already been found to have no effects to Tribal historic and cultural properties, and an applicant wishes to collocate on that same tower or structure without any ground disturbance, the FCC should work with the Tribal Nation to find agreement on which towers or buildings the Tribal Nation would no longer like to review. This would satisfy Industry by allowing for known areas or towers that can be developed without the involvement of the Tribal Section 106 review, after the Tribal Nation has agreed with the FCC that it has no interest . Perhaps the FCC is asking that Industry work out issues with Tribal Nations first, but with the process of finding exclusions, the government-to-government relationship trumps the Commission's preference to defer to Industry.

Collocations on Twilight Towers

The existence of Twilight Towers is an example of the FCC failing to uphold its trust responsibility to Tribal Nations. We understand the history that allowed for Twilight Towers and understand why the Commission seeks comment regarding collocations on Twilight Towers. These towers, whether they were built between 2001 and 2005 or after 2005, have the same probability as other towers to impact, disturb, and affect tribal cultural and historic properties. In fact, it is well known throughout the FCC and with Tribal Nations that non-compliant and Twilight Towers have affected Tribal Nations. The FCC has been informed repeatedly about these occurrences.

In several national meetings over the past several years to discuss Twilight Towers and non-compliant towers, Tribal Nations have made repeated requests for the locations of said towers, but we have been rebuffed by industry and the tower companies with the statement that they do not know where these towers are located. Tribal Nations request the locations of these towers prior to recommending how to move forward with a process to resolve the outstanding nature of their compliance with federal laws. The reluctance of industry and the tower companies to work together and share information on the locations of Twilight Towers and non-compliant towers is in stark contrast to statements in the NPRM, such as the FCC seeks comment on allowing collocations with NHPA review because "the vast majority of towers under the NPA have had no adverse effects and no reason to believe Twilight Towers any different." (paragraph 82) The NPRM also includes the statement, "These towers have been standing for 12 years or more and in the vast majority of the cases, no adverse effects have been brought to the attention of the FCC."

Tribal Nations should be allowed to review all non-compliant towers, including Twilight, for impacts to historic and cultural properties. If collocations are to disturb ground, we believe that Tribal Nations should be consulted.

Allowing for Tribal Nations to review collocations on Twilight Towers is an opportunity for the FCC to make up for its failure in upholding the trust responsibility. The FCC could implement an option in TCNS to allow for Tribal Nations to review Twilight Towers. After thorough historic preservation review, these towers could be considered an approved tower and no longer a Twilight Tower and be eligible for collocation.

Commission's Next Steps

The Commission asks "what steps, if any, can the Commission take to issue our own guidance on the circumstances in our process when the Tribal Nation is expressing its views and no compensation by the agency or the applicant is required under ACHP guidance, and the circumstances where the Tribal Nation is acting in the role of a consultant or contractor and would be entitled to seek compensation."

One step that the Commission could take to alleviate a lot of tension on this subject would be to allow for a voluntary option for Tribal Nations to identify "areas of non-interest." A concerted effort by the FCC to reach out to Tribes for them to **voluntarily** identify areas of "areas of non-interest" could allow for some urban or suburban areas to not go through the Tribal Section 106 Process. As a part of the TCNS mapping tools, Tribes could voluntarily sketch out areas where they do not want to take part of the Section 106 review process. Often times, county or state boundaries do not accurately represent traditional homelands of Native people.

Some Tribes have approached us claiming that applicants send packets when the site is nowhere near the Tribe, its original homeland or its TCNS area of interest. This inefficiency could be solved by a voluntary approach for Tribes to specifically identify areas where they wish to not receive TCNS updates. For example, some Tribes do not wish to receive TCNS applications for some far urban centers, but do want to receive applications for areas nearby towns or cities. The Tribes claim that the applicants are sending applications when sites are far outside of areas of interest.

Conclusion

Tribal Nations are deeply concerned with the proposed policy changes contained in the NPRM. Not only do these changes have the potential to harm a largely functional Tribal review process and Tribal culture resources, they run counter to the intent of many laws, including the National Historic Preservation Act.

We strongly urge the Federal Communications Commission to uphold the TCNS Process, and allow for Tribes to protect their cultural and heritage.

It is the Commission's obligation to the United States' 567 Tribal Nations to consult on any major changes to Federal Government processes that impact Tribal Nations. The Commission's obligation to consult with Indian Country does not end when the Public Comment period ends. Outside of this 30-day comment time frame, our organizations stand ready to work with the FCC as federal partners to resolve outstanding issues. Tribes should be consulted on all changes at the FCC, including the implementation of this Proposed Rulemaking.

Respectfully Submitted by

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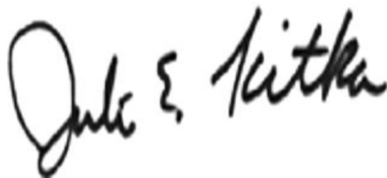

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