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

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

To: The Commission

REPY COMMENTS OF THE NAVAJO NATION AND THE NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION (NNTRC)

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SUMMARY

Nearly three-quarters of the 567 federally recognized Tribes were represented in initial comments in this proceeding in over 30 separate filings. The Commission need look no further than this turnout to recognize how important this proceeding, and the Section 106 process, is to protecting First American cultural heritage. The comments from Indian Country paint a far different picture than the industry-centric *NPRM* and demonstrate how the FCC has abdicated its trust responsibilities to Tribes in rushing to an *NPRM* without first taking the effort to consult on a government-to-government basis with Tribes. This proceeding marks the low point in FCC-Tribal relationships in the past two decades. A few Chairman speeches cannot replace the hard work of sitting down with Tribes, rolling up your sleeves, and working through the issues, as was done with the National Programmatic Agreement.

Carriers and Tribes view Section 106, and the entire National Historic Preservation Act (NHPA), from diametrically opposite perspectives. Carriers view the process as a cumbersome and useless paper-pushing exercise that costs them money and slows them down. Tribes, on the other hand, recognize Section 106 as the only way to protect culturally sensitive areas from disturbance and destruction. Comments from the Navajo Nation and myriad other Tribes demonstrate one thing: That when the Section 106 process is properly followed by all parties, it works to protect Tribal sacred sites. When carriers and Tribes work together, locations that would encroach upon sensitive areas can be avoided in situations far more common than the few adverse final decisions that carriers discuss in their comments.

The record in this proceeding lacks sufficient evidence for the FCC to find that any delays in processing and responding to TCNS notifications is the fault of Tribes. Many comments point to a systematic lack of sufficient information being provided by carriers and the concomitant delays introduced as Tribes try and get carriers to provide that information.

The NHPA itself calls for financial assistance to be provided to Tribes for their participation in the Section 106 process. Carriers have seized on non-legally controlling language in a handbook to try and avoid their responsibilities. The FCC has a long tradition of charging licensees fees for review of their applications and even annual regulatory fees. Passing the cost of historic review on to carriers is completely consistent with this regulatory model.

The FCC must reject the call by carriers to make public the most sacred places of the First Nations. Even providing this information on a confidential basis to carriers could not be

policed to ensure that sacred sites are not plundered, damaged, or destroyed. It is astounding that carriers would treat the location of their own towers as something that must be keep completely confidential, yet demand that the most important and secret sites of Tribes be disclosed.

Finally, the language used by carriers, and by the FCC in the *NPRM* regarding Twilight Towers represents nothing short of demanding amnesty for those towers. The language used is exactly the same language used in the immigration debate – they've been here for so long, any damage they may have cause is now just history, etc. The fact is that carriers have refused to take any responsibility for Twilight Towers, and until they do so, they will find Tribes far less willing to compromise on other aspects of the Section 106 process.

Carriers have already admitted that there are incentives to not report the discovery of, and damage to, culturally sensitive sites. Placing more power into the hands of carrier's to "do the right" thing in terms of protecting Tribal culture will return us to the Wild Wild West when carriers built wherever they wanted and ignored any damage they might be doing. The Section 106 process must be preserved, so it can serve the purpose Congress intended, to make sure that the cultural heritage of this country, including of the First Americans, is not trampled by the demands for "progress."

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REPLY COMMENTS OF THE NAVAJO NATION AND THE NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION (NNTRC)

The Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission ("NNTRC"), through undersigned counsel, and pursuant to Sections 1.415 and 1.419 of the Commission's rules (47 C.F.R. §§ 1.415 & 1.419) submits these Reply Comments in the above-referenced proceeding in response to the Commission Notice of Proposed Rulemaking, FCC 17-38, released April 21, 2017 and published in the Federal Register on May 10, 2017 (the "*Accelerating Deployment NPRM*" or "*NPRM*").[1] These Reply Comments focus on the paragraphs of the *NPRM* suggesting that the Commission's Section 106 process which acts to protect Tribal sovereignty and protect areas of religious or cultural importance to Native American Tribes should be amended. In support of these Reply Comments, NNTRC submits:

I. PARTICIPATION BY INDIAN COUNTRY DEMONSTRATES HOW IMPORTANT THE SECTION 106 PROCESS IS TO PRESERVING NATIVE AMERICAN HISTORY AND CULTURE

Nearly 30 individual Tribes, and organizations representing 429 Tribes (more than three-quarters of the 567 Federally recognized Tribes) filed comments in this proceeding. While a

[1] 82 FR 21761 (May 10, 2017). The date for filing comments was set as June 9, 2017. *Order*, DA 17-525, released May 26, 2017, the Commission extended the reply comment date to July 17, 2017, and these Reply Comments are therefore timely filed.

number of tribes raise individual and distinct arguments, the comments from Indian Country make clear that the Section 106 process is vitally important to preserving Native American heritage, culture, and the sacred places of the First Americans.

A. Comments from Indian Country Uniformly Decry the Lack of Prior Tribal Consultation

The comments coming from Indian Country universally echo the comments of the Navajo Nation and NNTRC protesting against the lack of ***prior*** government-to-government consultation with individual Tribes on these issues before the FCC issued the *NPFM*.[2] As so many Tribes point out in their comments, the FCC's process in issuing a notice of proposed rulemaking, as opposed to a notice of inquiry, in current slang, represents an "epic fail" on the part of the FCC in upholding its trust responsibilities with Tribes. Tribes rightly feel betrayed by this process, and finding common ground in this proceeding is now going to be extremely difficult. What happened to the "partnership" between the federal government and Tribes set forth in Section 470-1?[3] This proceeding marks the low point in FCC-Tribal relationships in the past two decades. A few Chairman speeches cannot replace the hard work of sitting down with Tribes, rolling up your sleeves, and working through the issues, as was done with the National Programmatic Agreement. The Navajo Nation and the NNTRC renew its call on the FCC to

[2] *See, e.g.*, Comments of NCAI at p. 5; Comments of Tonkawa Tribe of Oklahoma at p. 2; Comments of Citizen Potawatomi Nation at p. 2; Comments of Gila River Indian Community at p. 3; Comments of Shohone-Bannock Tribes, p. 2; Comments of Muscogee (Creek) Nation at p. 3; Comments of Lower Brule Sioux Tribe, at p. 2; Comments of Catawba Indian Nation at p. 3; Comments of Standing Rock Sioux Tribe at p. 2; Comments of Thlopthlocco Tribal Town at p. 1; Comments of Central California Yokuts Nagpra Coalition at p. 2; Comments of Quapaw Tribe at p. 2; Comments of the National Association of Tribal Historic Preservation Officers at pp. 1-2.

[3] 16 U.S.C. § 470-1(2) ("provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments").

dismiss the current *NPRM* until the FCC has fulfilled its obligation to consult with Tribe ***prior*** to taking a regulatory action, which the current *NPRM* most certainly was.

B. Comments from Indian Country Demonstrate that the Section 106 Process and TCNS Works as Intended

Carriers and Tribes view Section 106, and the entire National Historic Preservation Act (NHPA) from diametrically opposite perspectives. Carriers view the process as a cumbersome and useless paper-pushing exercise that costs them money and slows them down.[4] Based on the comments in this proceeding, there are some carriers that would simply ignore the requirements of the NHPA if left to their own devices, or at best notify Tribes ***after*** sacred site has been disturbed or destroyed by excavation.[5] Tribes, on the other hand, recognize Section 106 as the only way to protect culturally sensitive areas from disturbance and destruction. So lest the FCC and carriers forget what the NHPA is all about, the Navajo Nation and NNTRC invites you to pause and review the Congressional findings underpinning the NHPA:

> (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
>
> (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

[4] On the one hand, Verizon believes that 29 cases of adverse findings among over 8100 TCNS applications is so small as to be worthy of being ignored, yet when only 2.5 percent of reviews (242) take longer than nine months, CTIA deems that to be a national emergency. *See* Comments of CTIA at p. 12. *See also,* Comments of Competitive Carrier Association at p. 24 ("The historic review process is a material impediment to deployment"); Comments of T&T at p. 31 (eliminate all Tribal review of small cell and DAS systems – "The SHPO review process is more predictable, making it easier to plan infrastructure deployments, and qualifying small cell deployments without ground disturbance would rarely implicate Tribal interests"); Comments of PTA-FLA at p. 7 (few TCNS result in an adverse finding – "[t]he result is that a vast amount of money and time are being devoted to activity that has no social utility whatsoever").

[5] *See, e.g.,* PTA-FLA Petition, filed May 3, 2016, p. 16 (emphasis added) (because the discovery of native artifacts during construction requires the builder to stop and bring in experts, there is an incentive not to even disclose the discovery and disturbance). *See also* Comments of the Competitive Carriers Association at p. 37 (carriers should have no obligation if a Tribe doesn't respond within 30 days "unless artifacts or burial sites are discovered during excavation").

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.[6]

Nowhere in the NHPA does it say, "unless protecting historic sites slows progress," or "unless private entities deem it too expensive or inconvenient to comply."

Industry comments focus on how few TCNS filings have resulted in formal adverse findings.[7] What these comments ignore, and what the comments from Indian Country demonstrate, however, is that there are so few formal adverse findings precisely because of the TCNS process that allows Tribes and applicants to work together to avoid building in areas that

[6] 16 U.S.C. § 470.

[7] *See, e.g.,* Comments of PTA-FLA at p. 7; Comments of AT&T at p. 39 (AT&T rarely needs to consult with Tribes to "avoid adverse effects to a significant Tribal property"); Comments of CTIA and the Wireless Association at p. 6 ("[t]here is compelling evidence demonstrating that the existing Section 106 Tribal consultation process results in delay and increased costs, all without meaningfully facilitating the goal of preserving historic sites of religious and cultural significance to Tribes").

would adversely impact sensitive Native American sites. The National Association of Tribal Historic Officers (NATHO) puts it best:

> Industry representatives 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 needs major overhaul. 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. . . . For example, because of TCNS many tribes have worked with industry to slightly change construction plans to avoid tribal historic properties. Often times, moving a proposed site by several feet 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 extremely costly and legally challenging situations.[8]

While carriers claims that of the more than 8,000 TCNS filings its members have made, only 29 (or 0.33 percent) result in an adverse finding, they say nothing of the cases where, after consultation by Tribes, in which Tribes bring their unique knowledge and expertise to the problem, modifications are made to the application to specify a slightly different site that does not threaten a Tribal historic area. In contrast, in addition to NATHPO, numerous Tribes point to specific instances where the Section 106 and TCNS process was successfully utilized to avoid a potential incursion and damage to a culturally sensitive area.[9] In addition to those four sites on

[8] Comments of NATHPO at p. 4.

[9] *See* Comments of the Navajo Nation and NNTRC at p. 6; Comments of the Seminole Nation of Oklahoma at p. 3 ("the Tribe has identified numerous existing communication towers built on traditional cultural properties w/out consultation. The Tribe has worked diligently with the wireless industry to mitigate for existing or replacement towers on traditional cultural properties or newly proposed towers"); Comments of the Choctaw Nation of Oklahoma at p. 1 (noting an example of a possible negative impact of a proposed tower in Kentucky); Comments of Chippewa Cree Tribe at p. 6 (citing example of a proposed tower that was moved after the Tribe informed the carrier that it could have a negative impact on a Tribally sensitive area); Comments of Osage Nation at p. 7 (citing numerous specific sacred grounds

the Nation, there are dozens of sites off the Reservation in Navajo aboriginal lands which consultation resulted in relocation of a tower site.

C. It is Unclear from the Record Why Carriers Believe that Tribes are not being Responsive to TCNS Notifications or the Cause of Delays

Carriers in this proceeding uniformly decry the delays they claim are introduced by Tribal participation in the Section 106 process.[10] Comments from Tribes paint a distinctly different picture of Tribes genuinely committed to speedy responses, but often faced with confusing and/or incomplete TCNS notifications.[11] According to the Muscogee (Creek) Nation, 63 of 75 small cell projects received in February, 2017 from Mobilitie (84 percent), were incomplete.[12] "We could not complete a review because we did not receive the address, city, country, zip code, poll height, poll type, or a combination of these variables were missing from

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that have had to be protected from disturbance from potential tower construction); Comments of Eastern Shawnee Tribe of Oklahoma at p. 4 ("It is our tribe's practice to communicate with industry consultants to avoid sites by advocating for slight changes in construction plans to avoid cultural sites which in turn is a benefit to industry which assists them in avoid costly and legal challenges. 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").

[10] *See, e.g.*, Comments of CTIA and the Wireless Infrastructure Coalition at p. 6; Comments of AT&T at p. 31; Comments of the Competitive Carriers Association, p. 43.

[11] *See, e.g.*, Comments of the Choctaw Nation at p. 1 (97.4% of 1,318 projects since 2014 covering 9 states have been responded to within 30 days); Comments of Lower Brule Sioux at p. 4; Comments of Fond du Lac Band of Lake Superior Chippewa at p. 3 ("If delays arise, it is often because the project applicant did not timely contact the Tribe, or did not provide the Tribe with sufficient information to assess the impacts of the proposed project"); Comments of Osage Nation at p. 6 ("Currently, a tremendous amount of time is wasted waiting on consultants to provide the tribe's requested information"); Comments of Standing Rock Sioux Tribe at p. 3 (delays more often than not caused by industry delay or incomplete applications); Comments of Thlopthlocco Tribal Town; Comments of NCAI *et al.* at p. 18.

[12] Comments of Muscogee (Creek) Nation at pp. 4-5. *See also* Comments of Citizen Potawatomi Nation at p. 3 (less than half of projects contain sufficient information to make a finding, and on average, it takes carriers 67 days to provide the necessary documents).

the projects we received."[13] While we do not have an exact number at this time, it is common to hear the same frustration echoed by the Nation's Land Department and General Land Development Department as well—and obtaining the proper information from the company after the application has been dropped off is challenging at best.

Even the poster child of carrier claims of Tribal overreaching, the 2017 Super Bowl incident[14] may not be as cut and dried as claimed. According to the Northern Cheyenne THPO, the Super Bowl incident was not a single filing which resulted in hundreds of thousands of dollars of expense, as carriers claim, but rather was submitted as 24 different, unique projects – with individual project names and TCNS numbers.[15] In addition, according to the Northern Cheyenne THPO, the projects were submitted to TCNS without any files attached. It took another two months for the Tribe to receive the necessary information to respond to the TCNS filing, which it did within a week of receiving the necessary information.[16] The overall costs of the Super Bowl project may actually reflect the cost of 40 different projects, spread out across Texas.[17] If so, the total cost per project for Tribal consultation would have been $4,325 per site, which is hardly unreasonable given that there were twelve Tribes involved ($360 per Tribe per site).

Before the FCC even considers changing the Section 106 process to somehow limit or exclude Tribes from participation, a far better record needs to be developed. To the extent carriers can demonstrate that there are individual Tribes with a consistent track record of

[13] *Id.* Those same comments indicate that the Muscogee (Creek) Nation has received back-dated documents from consultants seeking to accelerate the 30 day clock.

[14] *See, e.g.*, Comments of Competitive Carrier Association at p. 27.

[15] *See, e.g.*, Comments of Northern Cheyenne THPO entitled "NC Super Bowl".

[16] *Id.*

[17] *Id.*

delaying the Section 106 process, the FCC needs to consult on a government-to-government basis with those Tribes and determine the cause of such delays. If Tribes need more information than is currently being submitted on FCC Forms 620/621, then it is the duty of the FCC to consult with Tribes on a government-to-government basis and change those forms such that they provide the information Tribes need to be able to provide a swift response to a TCNS notification. To the extent that the delays are caused because the Tribe cannot financially afford to protect their rights, then the FCC needs to look at solutions to help fund those Tribes, as called for in the NHPA.[18]

Ultimately, Tribes should not be punished for the shortcomings of the carriers. If the Tribe cannot even begin the review process until months after the initial and incomplete submission by the carrier, this puts the Tribe at an unfair advantage and essentially gives the companies a loophole to avoid a real, substantive review.

D. Tribal Fees are Justified under the NHPA

A number of carriers argue that the NHPA does not call for or even allow for the paying of fees to Tribes for their participation in the Section 106 process.[19] Yet the NHPA discusses financial assist to Tribes in order to participate in the Section 106 process and protect their cultural heritage at least three times.[20]

> It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, ***Indian tribes***, and private organizations and individuals to- (1) ***use measures, including financial and technical assistance***, to foster conditions under which our modern society and our

[18] *See infra,* Section I(D).

[19] *See* Comments of PTA-FLA at p. 12; Comments of Competitive Carriers Association at p. 25; Comments of Verizon at p. 44; Comments of CTIA and the Wireless Infrastructure Association at p. 13.

[20] *See* 16 U.S.C. §§ 470-1(1); 470a(d)(4)(A)(v); 470a(j)(2)(C).

> prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.[21]

There is absolutely no prohibition in the NHPA against allowing the FCC to pass along to carriers the cost of Section 106 compliance as fees paid to Tribes, since the carrier has received a highly valuable asset from the FCC in the form of its spectrum license.[22] The FCC has a long tradition of charging fees to carriers (everything from application fees to annual regulatory fees). Providing Tribes with the ability to receive "financial assistance" in the form of review fees is completely consistent with both Congressional intent in the NHPA and FCC prior practice vis-à-vis its licensees. Instead, carriers want to quibble over interpretations of a handbook issued by the Advisory Council on Historic Preservation, which has no authority under the NHPA to promulgate any regulations, but rather is merely in the position to "advise," "encourage," "recommend," "review," and "inform."[23]

If the FCC believes that the financial assistance received by a particular Tribe through the TCNS and Section 106 process is excessive, then the FCC needs to consult on a government-to-government basis, rather than eliminate fees and thus place the financial burden on Section 106 compliance with Tribes, who lack the resources to police their aboriginal lands. It is surprising that the carriers cry because of the fees a Tribe

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[21] 16 U.S.C. §§ 470-1(1) (emphasis added).

[22] The U.S. wireless industry, for example, had 2016 revenues of $255 billion dollars, virtually none of which would have been generated but for the FCC licenses and building authorizations granted by the FCC. *See* https://www.statista.com/statistics/293490/revenue-of-wireless-telecommunication-carriers-in-the-us/. AT&T enjoyed $13 billion in profits on $163.8 billion in sales in 2016, ranking it as the 11th largest company in the world, while Verizon made $13.1 billion in profits off of $126 billion in sales in 2016, making it the 18th largest company in the world. *See* https://www.forbes.com/global2000/list/#tab:overall. To argue that they should not contribute financially to assist Tribes in avoiding destruction to their sacred places represents the height of corporate greed.

[23] 16 U.S.C. § 470j(a)(1-7).

charges to do its reviews. It is quite possible that the Tribal reviewer conducting the review may not have electricity when they go home at night, or have to use an outhouse at home in the snowy, cold winter nights, because they do not have running water. These companies that make billions per year in profits are so far disconnected from the reality of what it actually takes for the poorest population in the country to be able to afford to do their job. If representatives of these companies were to take a trip to some of the Tribal government offices, they would see that many Tribes can't afford to keep up proper building maintenance, let alone properly pay their staff. While Tribal Nations aren't asking for cell companies to fix deep-seated tribal poverty, they are asking that carriers pay a reasonable fee for services rendered that entail unique Tribal knowledge so that at least the personnel involved in the review can be paid for their time.

E. Tribal Sacred Sites Must Remain Confidential

The height of carrier hubris in this proceeding is evidenced in their approach to confidential information. Carriers demand access to information related to Tribal sacred places,[24] while refusing to disclose the existence or locations of "Twilight Towers," claiming that this information must remain confidential in order to protect their competitive positions.[25] So on the one hand, carriers demand that Tribes open up their most sacred spots to looters by making those locations known to carriers,[26] yet the locations of Twilight Towers are so "sacred" to carriers that over the past decade they have refused to provide that information to Tribes, so they can determine whether any of these towers were built on culturally sensitive sites.

[24] *See* Comments of Comments of PTA-FLA at p. 11; Comments of Critical Infrastructure Coalition at p. 7; Competitive Carriers Association at p. 25.

[25] *See NPRM* at n. 151 (referencing draft 2016 Twilight Towers Draft Term Sheet and noting that carriers have refused in the past to identify their Twilight Towers).

[26] There clearly is a market for Native American artifacts. Type in "Native American Artifacts" on eBay, and you'll see more than 1,500 items for sale, several with asking prices over $10,000.00.

This brings us back to the Congressional intent of the NHPA, in which Congress sought "to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."[27] It simply is impossible to square the position of carriers on this issue with the clear statutory language quoted above. Requiring Tribal disclosure of the locations of its sacred sites while protecting the confidentiality of towers that might have disturbed those sites is an affront to what Congress intended when it passed the NHPA. The Commission should continue to protect the locations of Tribal sacred sites, ***and*** should require carriers to disclose the locations of all "Twilight Towers."

F. No Amnesty for Twilight Towers

Carriers and tower owners are effectively seeking amnesty for their Twilight Towers. They argue that they've been where they are for over a decade, and many tower owners don't even know whether the towers they've purchased during that time underwent the Section 106 historical review process. Further, carriers and tower owners argue, any damage has already occurred, so we should all just forget it and move on. This argument is ***exactly*** the argument in favor of granting amnesty to the approximately 11 million undocumented immigrants in the United States. Many have been here for a decade or more. The government doesn't know where many of them are now living. Whatever jobs they may or may not have taken away from U.S. citizens, that damage has already been done. If the FCC is willing to sweep this travesty under the rug, then it should also recommend to the White House that it adopt a policy of amnesty for all undocumented immigrants.

[27] 16 U.S.C. § 470-1(1).

The point that is never made by carriers when they argue that collocations on these Twilight Towers should be allowed is that disturbances to sacred sites do not occur just from the tower itself, but from all the machinery that has to be rolled into place to do both construction and colocation. It is wrong to conclude that whatever damage that could have been done has already been done. What if a carrier brings in equipment over a different road? What if it stages its antennas and other equipment in a slightly different place than when the tower was originally constructed? In any of those scenarios, new ground disturbance is likely and new or additional damage could be caused to any sacred site. Twilight Towers must undergo Section 106 review for exactly this reason. Carriers and tower owners should not be heard to cry that they're losing the value of those towers because they are not available for collocation. They could have any time in the past decade have voluntarily submitted such towers to Section 106, and know for sure whether such towers are cleared for collocations.[28] This is an issue of their making, which they could have rectified, but have chosen not to, most likely because many of these towers also are being operated without valid leases, and to get them into the TCNS system would identify them to land owners who could rightfully demand lease payments. Again, carriers have put their own economic interests far ahead of the letter and spirit of the NHPA.

II. CONCLUSION

The Navajo Nation and the NNTRC continue to believe that the Section 106 process has a great value and can continue to provide both Tribes and carriers with a mechanism to work together to avoid disturbing sensitive Tribal sites. To the extent that, as CTIA claims, the

[28] The same situation applies regarding Rights of Way (ROWs). Even though an area may be approved as an ROW for one purpose, does not mean that the entire area was disturbed, and therefore, new telecommunications facilities going into that ROW need to undergo Section 106 review. *See* Comments of Osage Nation at p. 5; Comments of Quapaw Tribe at p. 4 (a Positive Train Control (PTC) antenna proposed within an existing ROW would have adversely affected a sacred mound site).

process takes too long, then the FCC needs to work with Tribes to determine how to cut the response time. Cutting Tribes out of the process, or cutting off a Tribe's ability to be able to afford to participate, is not the answer and is not consistent the FCC's obligations under the NHPA.

THEREFORE, the Navajo Nation requests that the FCC properly consult with Tribes before proposing any changes to the Section 106 process, and ensure that those changes continue to recognize the sovereign rights of Tribes to protect their culturally sensitive locations.

Respectfully submitted,

THE NAVAJO NATION AND THE NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION

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