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GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

March 12, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

RE: *Accelerating Wireless Broadband Deployment*, WT Docket No. 17-79

Dear Mr. Dortch:

On March 8, 2018, D. Bambi Kraus of the National Association of Tribal Historic Preservation Officers, Terence Clouthier of Thlopthlocco Tribal Town, Joseph Montano of the Red Cliff Band of Lake Superior Chippewa, and Jim Graves of the Institute for Public Representation at Georgetown University Law Center (collectively, “NATHPO *et al.*”) met with Louis Peraertz, Senior Legal Advisor to Commissioner Clyburn, to discuss issues related to the draft Second Report and Order circulated in advance of the Commission’s March 22, 2018, open meeting.

In the meeting, NATHPO *et al.* presented the following arguments:

1. The FCC did not engage in government-to-government consultation with Tribal Nations. Although the Second Report and Order lists a series of meetings between FCC Commissioners or staff members and tribal representatives, these meetings were not government-to-government consultations. Government-to-government consultation requires joint development between the FCC and tribes of an agenda well in advance of the meeting and sufficient detail for tribal representatives to make an informed decision as to their participation and ability to make an informed decision. Before the draft Second Report and Order was circulated on March 1, 2018, Tribal Nations had no idea of what was to be proposed. The list of meetings in the draft Second Report and Order is also riddled with inaccuracies, listing organizations who were not present and “tribes” who are not federally recognized tribes. For example, NATHPO did not attend the October 2017 meeting in Milwaukee (para 26), but the larger issue is that attendance does not equate to tribal consultation.
2. Industry has overstated and inflated the cost of the Section 106 compliance process.

3. The draft Second Report and Order allows industry to hire “any properly qualified consultant or contractor when expert services are required, whether in the course of identifying historic properties, assessing effects, or mitigation.”¹ But it does not acknowledge the unique qualifications and knowledge of tribal historic preservation officers and other tribal representatives to assess their own history. It leaves the issue of qualifications open to interpretation on a case-by-case basis. Because the FCC intervenes when there are complaints about whether a non-tribal contractor was qualified or whether an applicant made a reasonable and good faith effort, the draft Second Report and Order is likely to create a massive case load at the FCC.
4. The FCC has no authority to redefine an “undertaking” that would trigger the Section 106 process. The draft Second Report and Order cites 36 C.F.R. § 800.3(a) in claiming that “the FCC has authority to determine what activities constitute federal undertakings.” Section 800.3(a) does not, however, define what qualifies as an undertaking. That definition is established in 36 C.F.R. § 800.16(y) and includes activities or projects “requiring a Federal permit, license, approval, federal funds or financial assistance.” The FCC does not have the authority to change this definition.
5. Industry’s claim that there are no adverse effects in 99% of tower deployments shows that the current system is working. Often, after an applicant enters a location into TCNS, a THPO or other tribal representatives will notify the applicant of an issue and the applicant will choose a new location or resolve that effect. That gets counted as having no adverse effect. The lack of an adverse effect is the result of the successful TCNS process and is being misrepresented to indicate that there are no historic properties affected by tower construction, which, if the current system were not in place, would be factually inaccurate.

Respectfully Submitted,

/s/ James T. Graves

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¹ *Draft Second Report and Order* at para. 120, p. 46.