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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 Ms. Dortch:

On March 12, 2018, D. Bambi Kraus of the National Association of Tribal Historic Preservation Officers; Terence Clouthier of Thlopthlocco Tribal Town; Glenna J. Wallace, Chief of the Eastern Shawnee Tribe of Oklahoma; and Jim Graves of the Institute for Public Representation at Georgetown University Law Center (collectively, “NATHPO *et al.*”) met with Kate Black and Jessica Martinez, advisors to Commissioner Rosenworcel, 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 record presented in the Second Report and Order is incomplete and its description of the set of meetings with tribal representatives as tribal consultation is inaccurate. Most of the meetings had no agenda distributed in advance and no notice of who would attend from the FCC. On January 16, the FCC sent an e-mail about four upcoming conference calls with only six days notice.
2. Tribes have access to different information than do outside archaeologists. Mr. Clouthier explained that many people are familiar with the Cherokee Trail of Tears, but not the removal route for members of the Thlopthlocco Tribal Town, a federally recognized Tribal Nation. The Thlopthlocco Tribal Town maintains its own records and oral histories of sacred places and routes; their records are not open to the public for a variety of reasons. Only the Tribe is authorized and qualified to determine which sites represent sites of significance to the Tribe, because only the Tribe possesses that information.
3. The FCC does not have discretion to define an “undertaking” based on the level of federal involvement. The definition of an “undertaking” in 36 C.F.R. § 800.16(y) is based on federal funds or financial assistance, federal approval, or federal licensing. If a project, activity, or

program involves any of those, it is an undertaking. The level of involvement is only listed in § 800.4(b)(1), which relates to the level of effort needed to identify historic properties and is not mentioned at any other location within the regulations.

4. The low percentage of towers that industry claims have shown adverse effects is a positive result of the TCNS process. Often, after an applicant enters a location into TCNS, a THPO or other tribal representative will notify the applicant of an issue or potential effect and the applicant in consultation with the Tribe will choose a new location or resolve that effect. The undertaking will then be determined to have no adverse effect or no effect to historic properties. This is being mischaracterized within the Report and Order and by industry comments as there being no impacts to historic properties on these undertakings. Without the process currently in place, which resolved the potential effect, there would have been an adverse effect. This example of a success story at preserving a site is not recorded as such, but rather is inaccurately described as having no adverse effect. In fact, this lack of an adverse effect is the direct result of the successful TCNS process. The FCC, unfortunately, does not keep track of the many success stories that have resulted in no adverse effect to historic properties even though there are many examples of such cases across the nation.
5. The draft Second Report and Order does not accurately capture the issues Tribal Nations have experienced with the 30-day window for notifications. It is unclear, for example, when the clock starts. Is it when a Tribe receives a TCNS notification, or when a Tribe has all the information they need to review? Different tribes need different materials to begin review, so the draft Second Report and Order's one-size-fits-all approach will not work. The Thlopthlocco Tribal Town, for example, needs surveys and fees for a notification to be complete. The timing claimed by industry does not match up with tribal experience. As an example, Thlopthlocco Tribal Town had one issue where they had just received the materials they needed and the industry applicant said that the 30 days had passed only 16 days later. The "shot clock" issue is also a matter of tribal sovereignty: tribes must be able to determine for themselves on a case-by-case basis what constitutes adequate information to conduct a historical review.
6. Tribal Nations have repeatedly asked to sit down with industry to work out a mutually acceptable solution to some of the issues outlined in the report and order and other issues, but industry has refused to participate without FCC involvement. There needs to be a series of meetings, with agendas, to keep the TCNS process working.

Respectfully Submitted,

/s/ James T. Graves

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