

OMAHA TRIBE OF NEBRASKA

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January 26, 2018

Mr. Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, S. W.
Washington, DC 20554

Re: Program Comment Addressing Collocation of Twilight Towers
WT Docket No. 17-79

Dear Chairman Pai,

On behalf of the Omaha Tribe of Nebraska, we submit these comments opposing the draft program comment [or proposed rule change] addressing Collocation on Twilight Towers (WT Docket No. 17-79). The proposed rule changes would allow, collocations on Towers that have been constructed without documentation of Section 106 Review (applying the National Historic Preservation Act, 'NHPA'). The FCC states in its comments there is a "limited likelihood that Section 106 review could identify adverse effects from these towers that are not yet known after 12 years or more." We disagree, without historic preservation review there is no evidence that the towers have had no adverse effect. As the Montana History Society offered in their comments submitted on November 29, 2017, they would be willing to review the Towers in Montana to see if there are any that potentially have had an adverse effects. Without review they protest, "there is no way we, or anyone else, can know if there have been adverse effects, no matter how many years have passed.

These Towers were erected between 1992 and 2005, during a period of time when the FCC failed to provide guidelines for adherence to historic preservations laws and failed to notify tribal entities regarding Section 106 of the National Historic Preservation Act, Public Law 89-665; 80 Stat. 915; 16 U.S.C. 470.¹ Now large wireless companies complain that they cannot "collocate" new antennas on these towers without expensive and time consuming historic preservation review for the underlying tower. These business interests think it is unfair to require compliance since the guidelines for historic review were developed after construction of

¹ National Historic Preservation Act (NHPA) as amended October 30, 1992 (Public Law 102-575, 106 Stat. 4669, 16 U.S.C. 470 et seq.), which included federally recognized tribes within Section 106 mandates.

these towers, hence the name “Twilight Towers”. They make a “no harm no foul” argument, to advance their interest, exaggerating the time and cost, against the growing need from wireless communication in underserved communities. They want a fast, cheap means for expanding their business interest. Historic Preservation values, cannot not compete with their financial bottom-line. Thus the proposed change, does not allow for historic preservation review on the underlying tower, and where the exclusions do not apply, the historic review will be only on the proposed collocation, where review will be minimal. The bottom line is that these towers were erected in violation of federal law, irrelevant of the fact no guidelines were allegedly published at the time of their construction.

There exists over 30,000 Twilight Towers. It is inconceivable that so many Towers would have no impact on historic properties, no impact on tribal cultural and historic properties, including burial sites. As Commissioner Jessica Rosenworcel, commented at the Public Notice hearing on December 14, 2017, “we still have a long way to go to honor our federal trust responsibility to Tribal communities impacted by towers constructed during the Twilight Period.” She goes on to concur with the draft comment, contingent on a review of the FCC’s Statement of Policy on establishing a government to government relationship between the agency and federally recognized tribes. She states “it is time to take on this task and do it in conjunction with resolving these longstanding issues of tower construction.”

Other comments from Tribal Nations and Native organizations such as the National Congress of American Indians have emphasized that the very existence of Twilight Towers, is a failure of the FCC to uphold its trust responsibility to Tribal Nations and is in violation of federal law. Now for the FCC to use the long years of neglect of sacred and cultural sights as a reason to exclude Twilight Towers from the rules, adds further injury. It betrays the intention of the Historic Preservation laws, and diminishes the government to government relationship the Commission holds with Tribes.

Tribal Nations should have the right to 106 review of collocation on Twilight Towers, as well as the original Tower. Merely, granting the right to ask for consultation on Towers on aboriginal lands, or the “right to complain” is not enough. Everyone has the right to protest in this country, the right to speak to consult. Tribal consultation used to avoid compliance with law, is a convenience for the Federal Government, but not a protection of Tribal rights and culture. Tribes are still seeking data on the location of Twilight Towers. Without data, the right to complain or consult has no meaning. There is nothing in the draft comments that addresses notice to the Tribes. How will the Twilight Tower be identified? How will the tribe be notified of the collocation that is aboriginal lands? Who will be allowed to perform the 106 review, certainly not the industry or the states?

The Tower Construction Notification System (TCNS) was implemented to protect Tribal cultural resources.² The FCC could implement an option in TCNS to allow for Tribal Nations to review Twilight Towers. After historic preservation review, these towers would then be

² The Tower Construction Notification System (TCNS) was not established until September, 2008, some fifteen (15) years after the NHPA was first amended to include Tribal Historic Preservation Offices within the Section 106 consultation process. Some eleven (11) years after the Advisory Council on Historic Preservation (ACHP) developed their first draft that included the requirements relating tribal consultation.

approved, and eligible for collocations. The new proposal turns the process upside down, approving first the collocation that expands the use of Tower that may violate the Historic Preservation Act, and cause further harm to the location.

We feel the apparent compromise the FCC is making to Tribes provides no protection for Tribal sacred and cultural sights. The compromise, violates the intention of the National Historic Preservation Act, and deceives the public, by pretending that time alone, not review, reveals if the Tower causes harm to a location.

It is apparent that the change in the process, that fails to protect Tribal cultural sights, was the result of business interest, intent on using the neglect of Twilight Towers for their business gain. We therefore oppose the change, and do not feel the compromise offered to allow Tribal Consultation is sufficient to protect cultural sights. The Twilight Towers collocations will have no historic preservation review unless they fail to meet certain exclusion standards. Tribes have not known the location of many Twilight Towers and will unlikely know of collocations on Twilight Towers that may affect their lands. Tribes will have no opportunity to seek consultation on unknown locations.

Therefore, we urge the FCC to uphold the TCNS Process by identifying all Twilight Towers and antennas that were erected and constructed in violation of federal law from 1992-2008. This will allow Tribal Nations to review and protect their cultural heritage at Twilight Tower locations and furthermore, uphold the government-to-government relationship that was and is the policy of the federal government in relationship to federally recognized Indian tribes.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. Wolfe", written over a horizontal line.

Michael Wolfe
Chairman Omaha Tribe of Nebraska

CC: Senator(s) Fischer, Sasse
Senate Committee on Indian Affairs