**Comments on the Federal Register Notice Vol. 83, No. 7, Wednesday, January 10, 2018/ Proposed Rules WT Docket No. 17-79; FCC17-165**

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The Choctaw Nation of Oklahoma values its government-to-government relationship with the Federal Communications Commission (FCC). On a day-to-day basis, we honor this relationship by reviewing communications tower construction projects under the National Historic Preservation Act (NHPA). This is done through the Tower Construction Notification System (TCNS), created by the FCC, with the input of both Tribes and Industry. From our perspective, this is perhaps the most efficient system for consultation under NHPA in existence. It is working quite well.

Since 2014, the Choctaw Nation has reviewed 1,318 projects in our 9 state area of historic interest through the TCNS system. Ninety-seven percent (97.4 %) of the TCNS review requests received over the past year have in turn, received substantive responses within 30 days or less. While each of these projects builds important infrastructure, they also have the potential for irreparably damaging the human remains, sacred sites, and historic properties of our ancestors. Far more than bones and stones, these sites are at the very core of the culture and identity of our more than 200,000 Tribal citizens. Last year, we reviewed a project through the TCNS system that would have adversely affected the Choctaw Academy historic site in Kentucky. This site is connected to our treaties with the United States government; it was the home and place of education for dozens of our Tribal leaders from the last century, and has been on the National Register of Historic Places since 1972. Despite all of this, the Choctaw Academy was overlooked by the archaeologists who conducted the historic properties survey for the tower. Choctaw Nation’s involvement brought this issue to light. We worked with the FCC and applicant to change the project design in such a way that the tower could still be constructed, but with minimal impact to this significant historic site (See Letter from Gary D. Batton, Chief of the Choctaw Nation dated February 28, 2017).

Twilight Towers (Non-Compliant Towers)

The “Twilight Towers” should be an opportunity for all parties, FCC, ACHP, Industry and the Tribal Nations to work *cooperatively together* to find a reasonable solution to using these towers for collocations, if they are needed. The industry wants to collocate on towers that the Tribal Nations and the SHPOs in various states don’t even know the locations of because the industry has never provided these locations to either. This should be a first step. Industry should provide maps of where the Twilight Towers are currently located, with specific information (latitude and longitude, topographic information, etc.) about when and where they were erected; along with providing photographs or examples of the type of tower, whether or not the tower is a priority in the scheme of future collocations, what other towers are associated with this one and will be subject to future collocations, and lastly, how this will benefit the mandates of Congress and the role of the FCC.

These non-compliant towers basically were constructed foreclosing the ACHP’s opportunity to comment and negating a “reasonable and good faith effort” to identify and evaluate historic properties. Any affects to historic properties still need to be addressed. What if a tower was placed in an archeological site or historic property of traditional religious and cultural significance? What are the remedies for mitigation? Is industry going to be held accountable for paying for the costs to mitigate these effects?

Which towers need expedited reviews? Which towers are in areas that would be instrumental in protecting the safety and health of American citizens? These are questions that most Tribal Nations have regarding the Twilight Towers. We believe that solutions can be worked out expeditiously but they have to involve consultation with the Tribal Nations, FCC, and industry.

We propose that a small team of knowledgeable experts from Tribal Nations and Industry visit these prioritized locations and provide expedited reviews and recommendations regarding any effects to historic properties and the cultural environment.

In March 2001, the Commission, ACHP and NCSHPO signed an initial Programmatic Agreement that excluded most collocations of antennas on existing structures from routine historic preservation review. Key elements of the Commission action included:

• Describing standards for identifying historic properties that may be affected by an undertaking and assessing effects on those properties, including a streamlined process for identifying eligible properties not listed on the National Register that may incur visual effects;

• Prescribing procedures including enforceable deadlines for SHPO and Commission review;

• Providing forms designed to standardize filings to SHPOs;

• Outlining procedures for communicating with federally recognized Indian Tribal Nations and Native Hawaiian Organizations in order to ensure protection of historic properties to which Tribal Nations and Native Hawaiian Organizations attach religious or cultural significance; and

• Establishing categories of “undertakings” that are excluded from the Section 106 review process. These exclusions include: enhancements to existing towers; replacement and temporary towers; certain towers constructed on industrial and commercial properties or in utility corridor rights-of-way; and construction in areas designated by a SHPO.

Broader Issues Not Addressed by the NPRM

Tribal Nations have no real voice in the Nationwide Programmatic Agreement. To address the issues brought up in the NPRM the Choctaw Nation encourages the FCC to negotiate individualized Programmatic Agreements for each Tribal Nation’s participation in the TCNS process. Such an approach would maintain Tribal sovereignty and provide the FCC with the opportunity to regulate the TCNS process.

The FCC did not request a NPRM when Tribal Nations were being steamrolled by the wireless industry. When the industry did provide information (because of numerous requests for it); they provided their own timelines for review, no evidence for historic properties research or cultural resources surveys on any of the tower locations, and ultimately made every final decision regarding NEPA/106 compliance with the towers. Here we are almost 20 years later and Tribal Nations still cannot even get an estimate of the number of towers that were erected without any FCC oversight. Industry has also not provided maps of these locations. We hope that FCC will actually hear, respond, and implement positive strategies based on the concerns of the Tribal Nations during the review of the NPRM. Lastly, the issuance of a NPRM should not be considered *consultation* with Tribal Nations. If changes are made to the NPRM, Tribal Nations will fully expect government-to-government consultation regarding any and all changes.

SHPO’s don’t have Tribal information. Tribal information is not just “archeological” and historic properties are not just “archeological.”

It was disheartening to hear Commissioner O’Rielly, in referring to Tribal Nations state: “Bad actors are ruining it for everyone.” FCC should be wary of reinventing a whole system based on the actions of a few or caving to the pressures of the wireless communications industry. Of course, we all know that “bad actors” exist in the wireless communications industry as well.

For Tribal Nations one of the best things regarding the TCNS is the opportunity for *participation* by Tribal Nations with concerns for protecting historic properties of traditional and religious significance to them. The system works whether Industry wants to agree with this or not. The alternative was the outright exclusion of any tribal concerns in the Section 106/NEPA process which was the standard before the TCNS was created.

The reports by industry consultants that no historic properties were found are wrong. THPO annual reports only report on what THPOs did with Historic Preservation Fund grant funds; not all TCNS Tribal Nations have THPO programs; not all THPOs are the TCNS Coordinators for their Tribe; when Tribal Nations are involved as participants in the TCNS process, only then can there be flexibility in tower siting and Section 106 compliance which has avoided many significant Tribal Nation sites and locations.

The FCC should facilitate annual or bi-annual meetings with Tribal Nations, representatives from the wireless communications industry, and consultants/contractors working for the industry. These meetings should be at the expense of industry with tribal governments reimbursed for their travel related expenses.

There have been numerous times when consultants or contractors working for the wireless communications industry either did not send Tribal Nations notifications at all as required or the 620/621 packets lacked the essential information needed to make any kind of assessment or determination. According to a NATHPO survey from January 2017, *85% of tribes do not receive adequate information in the initial submission to understand if proposed development would harm a cultural property.* When this occurs, Tribal Nations request additional information or request specific information that was lacking from the packet. Also according to the survey, when asked what information was lacking 86% of tribes reported, “All cultural sites, including those already known but not evaluated tribal sites.” From the survey, 59% of the respondents stated that once they received all the information they were able to complete their identification and evaluation work within 30 days or less.

By comparison, the Oklahoma SHPO reported (comments on WT Docket No. 17-79, May 23, 2017) that “the vast majority of FCC projects are reviewed in far less than the 30 days allowed for the Section 106 process.” Of the 454 projects reviewed, (2) would have an adverse effect on historic properties. Forty-six (46) of the projects did not have enough information to make an adequate review. “Thirty-eight (38) of these cases were resolved as either ‘no effects’ or ‘no adverse effects’. The SHPO received no response to seven (7) of its requests for additional information.” One adverse effect remained unresolved.

Also in regard to “Twilight Towers” comments by the NCSHPO should be considered:



It is imperative that the consultants working for the wireless communications industry provide enough information to make a reasonable assessment.

FCC and Industry has a unique opportunity to find collaborative solutions by working directly with all the consulting parties regarding the “Twilight Towers.” FCC wrongly assumes from its comments in the Federal Register notice that the Twilight Towers had little to no effect on historic properties. How can *any* effects be known, when the locations of the towers are *UNKNOWN*? It is also inappropriate for FCC to apply any of the Collocation NPA exclusions for *known tower locations* which have undergone review to those with *unknown locations* (i.e., the “Twilight Towers”) where the very nature of *where they are located* is one of the most important characteristics that may determine affects to historic properties. How can FCC regulate something that they do not even know exists? Specifically for the Twilight Towers we propose:

* FCC and Industry create regional maps providing detailed Global Navigation Satellite Systems (GNSS) information to determine exact locations for all existing “Twilight Towers”
* GNSS locational information, at a minimum should include; topographic, geospatial coordinates, and aerial imagery information
* FCC and Industry create a list of the “highest priority” towers for use
* Priority of importance for use of the tower should be determined by a standard which would provide essential emergency and communication services for areas that need them the most
* Priority of importance for use of the tower should also be determined by a standard of benefit in fulfilling existing Congressional mandates, FCC’s role, and the public need
* The very reason that Industry can say that they have NEVER had an effect on historic properties is because the use of the TCNS has provided a means to avoid adverse effects to historic properties early in the process and TCNS should continue to be used to its fullest extent
* FCC and Industry should use the TCNS for collocations on Twilight Towers once the locational information has been gathered and when a company wants to use the tower for a collocation
* ACHP should be afforded the opportunity to comment on any TCNS findings regarding effects to historic properties that have been identified by and through the TCNS
* The ACHP should also address in their Program Comment exactly the plan of action they have for a continued cooperation and consultation with all parties regarding the Twilight Towers and specifically how FCC and the ACHP will address adverse effects to historic properties and FCC’s role in avoiding, minimizing, and mitigating affects to historic properties, especially those of significance to tribal Nations