



February 27, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

**Re: Ex Parte Presentation, Accelerating Wireless Broadband Deployment by
Removing Barriers to Infrastructure Investment, WT Docket No. 17-79**

Dear Ms. Dortch,

CTIA submits this *ex parte* to reiterate its request that the Commission clarify, based on long-standing guidance, when fees may be appropriate in connection with Tribal Nation participation in the historic preservation process under Section 106 ("Section 106") of the National Historic Preservation Act ("NHPA") for projects *outside of* Tribal lands.

CTIA supports the dual goals of protecting historic sites of religious and cultural significance while also ensuring that wireless services can be rapidly and efficiently deployed for the benefit of consumers and the economy.¹ With those goals in mind, CTIA and other wireless industry representatives have urged the Commission to exercise its discretion to promote a predictable and effective consultation process with Indian Tribes and Native Hawaiian Organizations (collectively, "Tribes"), including by clarifying the agency's policy regarding Tribal fees. CTIA herein reiterates that call for clarity for the process as a whole, but in particular regarding the payment of fees for Tribes' involvement in reviewing wireless infrastructure projects on non-Tribal lands. Specifically, the Commission should (i) confirm that fees are neither required nor appropriate when a Tribe is participating in the Section 106 process as a *consulting party*; (ii) provide guidance on when a Tribe is acting as a *contractor* in the Section 106 process and thus may be

¹ See Comments of CTIA and Wireless Infrastructure Association, WT Docket No. 17-79, at 20-24 (filed June 15, 2017) ("Association Comments"); Reply Comments of CTIA and Wireless Infrastructure Association, WT Docket No. 17-79, at 20-25 (filed July 17, 2017) ("Association Reply Comments").



entitled to fees; and (iii) confirm that the fees charged must be reasonable and consistent with those of other cultural resource contractors of similar education and experience levels, and reflected in a written negotiated agreement between the Tribe and the applicant.²

By taking such steps, the Commission can provide much-needed guidance to all participants in the Section 106 process, thereby better ensuring that the Tribal consultation process can promote wireless deployment while protecting historic sites.

Fees are not appropriate when Tribes are acting as consulting parties on non-Tribal lands. As noted previously in the record, neither the NHPA nor the Advisory Council on Historic Preservation's ("ACHP") rules require agencies to pay, or provide for consulting parties to charge, for participation in the Section 106 process.³ Indeed, long-standing policy confirms that applicants are not required to pay Tribes for their participation in the Section 106 process when such Tribes are serving as consulting parties for projects located on non-Tribal lands:

[N]either [the NHPA nor the Council's regulations] requires Federal agencies to pay for any aspect of tribal nor other consulting party participation in the Section 106 process. . . . When the Federal agency or applicant is seeking the views of an Indian Tribe to fulfill the agency's legal obligation to consult with a Tribe under a specific provision of the Council's regulations, the agency or applicant is not required to pay the Tribe for providing its views. If the agency or applicant has made a reasonable and good faith effort to consult with an Indian Tribe and the Tribe refuses to respond without receiving

² The Tribal consultation process under Section 106 of the NHPA applies only to the extent that actions are federal undertakings. 54 U.S.C. § 306108. The Commission has the authority to determine what actions are federal undertakings. See Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process, § I.B (Sept. 2004), 47 C.F.R. Pt. 1, App. C; see also 36 C.F.R. § 800.3(a).

³ See Association Comments at 20-24; Association Reply Comments at 20-25.



payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.⁴

In short, Tribes acting as consulting parties to projects on non-Tribal lands may have their views considered, but their concurrence in the outcome of the Section 106 process is not required.⁵

Unfortunately, however, a growing number of Tribes are demanding fees when serving in a consulting role for projects on non-Tribal lands—an issue which is exacerbated by the fact that the amount of fees is increasing and many Tribes are expanding their areas of interest.⁶ This has imposed needless delay and expense on wireless infrastructure buildout. The Commission should therefore confirm that Section 106 processes for communications infrastructure projects on non-Tribal lands will be conducted pursuant to the ACHP's long-standing policy quoted above.

Clarification is needed regarding when a Tribe acts as a consulting party, as opposed to as a contractor. The long-standing guidance regarding fees is based upon

⁴ ACHP, Section 106 Assistance for Users, *Fees in the Section 106 Review Process* (updated Apr. 26, 2002), <http://www.achp.gov/regs-fees.html> ("ACHP Fees Statement"). This ACHP policy, dating back to 2001, is quoted with approval in the National Park Service ("NPS") Tribal Historic Preservation Office's Historic Preservation Fund Grant 2016 Quick Guide. See NPS, Tribal Historic Preservation Office Historic Preservation Fund Grant: Quick Guide, Chapter 8 (Fees Charged for Consultation) (2016), <https://www.nps.gov/thpo/downloads/manual/2016THPO-HPF-Quick-Guide.pdf>. Moreover, other federal agencies have developed effective administrative practices that limit Tribal compensation, consistent with this guidance. See Association Comments at 22 (noting policies within the Bureau of Land Management, Forest Service, Department of Housing and Urban Development, and Department of Transportation that discourage payment to Tribes for participation in the Section 106 identification process).

⁵ Association Reply Comments at 21.

⁶ See Association Comments at 15-17, 20; see also, e.g., Letter from Henry Hultquist, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Feb. 23, 2018) ("Standard fees charged by Tribal Nations have increased by 1400% in the Northeast and by 2500% in the Southeast in just the last 7 years."); Letter from Keith Buell, Sprint, to Marlene H. Dortch, FCC, WT Docket No. 17-79, at 2 (noting that Tribal review fees on average exceed 24-40 percent of the total cost of a small cell installation); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, ¶ 35 (2017) ("We observe that TCNS data reveals that, in recent years, the areas of interest claimed by Tribal Nations have increased.").



a critical distinction – when a Tribe is acting as a *consulting party* versus when a Tribe is acting as a *contractor*.⁷ As the ACHP Fees Statement explains, the purpose of the consultation role is to provide the Tribe “an opportunity to get its interests and concerns before the agency,” and requires that the agency “make an effort to solicit a tribe’s opinions and factor them into the decisions that the agency must make on the project.” In other words, Tribes have the right, but not the obligation, to help identify resources potentially affected by projects on non-Tribal lands and to have their views considered in connection with a proposed project. An agency (or applicant) is not required to pay a Tribe for its participation as a consulting party.

In contrast, where an agency “ask[s] for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request[s] that a survey be conducted by the tribe,” the ACHP Fees Statement provides that the agency is “seek[ing] information or documentation that it would normally obtain from a professional contractor or consultant” and the Tribe may be justified in seeking compensation for those services “just as any other contractor.”⁸

It is important, therefore, to differentiate when a Tribe is acting as a “consulting party” versus when it is acting as a “contractor.” The Commission should clarify, based on the guidance above, that when a Tribe is notified of a project through the Tower Construction Notification System (“TCNS”), and is invited to provide its views to the applicant regarding the potential impact of the project on historic properties of cultural or religious significance to the Tribe, the Tribe’s actions in response to that request (including its review of the materials provided and decision regarding whether it will express an opinion as to the potential impact of the project on historic properties) are all part and parcel of the Tribe’s role as a consulting party. In these circumstances, fees are not appropriate, and the Commission should make clear – consistent with the ACHP Fees

⁷ See Association Reply Comments at 21-24; Association Comments at 21-23; ACHP Fees Statement. As previously noted in the record, the distinction between consulting parties and contractors under Section 106 is the critical element for purposes of the fee determination—not whether the fee a Tribe charges when acting as a consulting party is “reasonable.” Because, as demonstrated here and in the record, no fee should be assessed in connection with a Tribe’s participation in the Section 106 process as a consulting party, the “reasonableness” of fees is not relevant. Association Reply Comments at 20.

⁸ ACHP Fees Statement.



Statement – that if the Tribe “refuses to respond [to an application seeking the Tribe’s views on a proposed site] without receiving payment,” and the applicant has otherwise made a reasonable attempt to obtain a response from that Tribe, the applicant “has met its obligation to consult and is free to move to the next step in the Section 106 process.” In other words, the applicant will be deemed to have completed its Section 106 Tribal consultation with respect to that Tribe.

In contrast, if a Tribe produces evidence during the consultation process that an intact historic property of religious and cultural significance exists within the project’s Area of Potential Effects (“APE”), then Tribal contractor services may be needed. In such cases, an applicant may request that a Tribe perform work similar to that of a cultural resource contractor with respect to specific historic sites identified by the Tribe. So, for example, an applicant might request that a Tribe provide specific details regarding intact historic property of religious and cultural significance within the APE so the applicant may further identify historic properties in the APE and assess mitigation approaches. In that circumstance, the Tribe would be eligible for fees provided that the Tribal contractor who renders the service meets the Secretary of the Interior’s Historic Preservation Professional Qualification Standards.⁹

In instances where a Tribe is serving as a contractor, fees may be appropriate, but they should be reasonable and reflected in negotiated, written agreements. The Commission should make clear that professional contracting services from Tribes may be appropriate for specific historic sites, but that automatically requiring applicants to engage a Tribal contractor is unwarranted given the overall lack of impact of wireless projects on historic areas of cultural or religious significance to Tribes. Moreover, to the extent that an applicant requests the contracting services of a Tribal contractor, the Commission also should require that the terms on which Tribal contractors provide service should be negotiated on a case-by-case basis between the applicant and the Tribal contractor and should be reasonable and generally commensurate with other cultural resource contractors of similar education and experience levels engaged by the applicant. Those negotiated terms should be documented in a written contract.¹⁰

⁹ See Association Comments at 24; see also National Park Service, Historic Preservation Professional Qualification Standards, <https://www.nps.gov/history/local-law/gis/html/quals.html>.

¹⁰ See Association Comments at 23-24. In the event that one of the parties considers the negotiations to be stalled, that party should be permitted to request Commission assistance. *Id.*



Clarification regarding the Commission's Tribal fees policy will benefit all parties to the Section 106 process and serve the public interest. Clarifying the circumstances under which fees may be appropriate in the Section 106 process will reduce confusion and expedite the Section 106 process. Increasing the efficiency of the process will help to expedite deployment, which will facilitate network densification and deployment of next-generation technologies. Furthermore, it will benefit all parties to the process – Tribes, the Commission, and applicants – by enabling them to more effectively direct resources toward projects that may have an effect on historic sites of religious and cultural significance.

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As the Commission appropriately continues its efforts to modernize its policies for infrastructure siting, it can and should address the increasing costs and delays associated with the Section 106 consultation process. Guidance regarding when fees may and may not be charged, in addition to other clarifications requested by CTIA in this proceeding, will provide certainty for all participants in the Section 106 process, thereby fostering the deployment of the infrastructure needed to meet consumers' growing wireless demands and facilitate the roll-out of next-generation 5G services.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being electronically submitted into the record of this proceeding. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Scott K. Bergmann

Scott K. Bergmann
Senior Vice President, Regulatory Affairs