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# INDIAN PUEBLO

ESPANOLA, NEW MEXICO  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Accelerating Wireless Broadband  
Deployment by Removing Barriers to  
Infrastructure Investment

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WT Docket No. 17-79

Comments of

Santa Clara Pueblo, New Mexico

March 14, 2018



### ***Introduction***

Santa Clara Pueblo submits the following comments on the above-referenced Draft Second Report and Order. We understand and appreciate the call for increased deployment of wireless telecommunications infrastructure, but we stress the importance of protecting irreplaceable sites and locations that are of religious and cultural significance to tribal cultures by continuing the successful collaborative processes that have been established by the Federal Communications Commission (FCC). Santa Clara has serious concerns about the effect that the Draft Second Report and Order will have on tribal historic properties. Additionally, we object to the lack of meaningful tribal consultation in the development of the draft.

Santa Clara Pueblo strongly recommends that the FCC refrain from adopting the Draft Second Report and Order. We request that the FCC facilitate meetings between tribes and telecommunications companies in order to best address how to accelerate wireless infrastructure deployment in a way that fulfills the mandate of Section 106 of the National Historic Preservation Act (NHPA).

### ***The FCC Has a Responsibility to Protect Tribal Historic Properties***

The FCC's *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* recognizes that the federal government has a "unique legal relationship" with tribes and that the agency has "its own general trust relationship with, and responsibility to, federally-recognized Indian Tribes." FCC 00-207 (June 23, 2000). The federal trust responsibility includes protecting tribal historic properties and valuing tribal interests in historic and cultural preservation.

One way the federal government fulfills this responsibility is by assessing impacts to tribal historic properties in compliance with Section 106 of the NHPA. The NHPA mandates that an agency assess effects on historic properties any time there is a federal "undertaking." 54 U.S.C. § 306108. A federal undertaking occurs any time a project, activity, or program requires a federal "permit, license, or approval." *Id.* § 300320(3). The NHPA also provides that the FCC "shall consult with any Indian Tribe ... that attaches religious and cultural significance" to a tribal historic property. *Id.* § 302706(b).

The Draft Second Report and Order erroneously concludes that construction of small wireless facilities is exempt from the category of projects that the FCC considers a federal undertaking. But for the FCC providing licenses to the telecommunications companies to transmit federal spectrum from wireless facilities, these facilities would not be constructed. The causal link is so strong and direct that construction of these facilities constitutes a "federal undertaking" and is subject to Section 106 review. Despite the small size of individual 5G wireless facilities, the massive number of deployments makes it entirely appropriate, and indeed necessary, that the FCC retain approval authority over facility construction because it is licensing the deployment of that infrastructure. The FCC is not free to abandon its responsibility to assess



the impacts to tribal historic properties from deployment of small wireless facilities, and to do so would be a grave violation of the trust responsibility.

***Environmental Review is Also Critical to Protecting Tribal Interests***

We also note that while we are most heavily involved in wireless infrastructure deployment approval processes through our historic preservation review activities, compliance with the National Environmental Policy Act (NEPA) is also enormously important to the Pueblo. NEPA requires environmental impact review under NEPA when there is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Second Draft Report and Order erroneously excludes small cell facilities from NEPA review by determining they are not "major Federal actions." However, a major federal action exists when there is federal regulation or approval and where there is "significance," which can include proximity to cultural resources and the degree to which tribal cultural properties could be adversely affected. *See* 40 C.F.R. §§ 1508.18, 1508.27. Current FCC regulations, for instance, require that an Environmental Assessment be prepared whenever a facility "may affect Indian religious sites." 47 C.F.R. § 1.1207.

In addition, courts have found that what constitutes a major federal action is interpreted to be "closely analogous" to a federal "undertaking" under NHPA. *See, e.g., Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001). The FCC traditionally imposes corresponding NHPA and NEPA obligations. *See* Draft Second Report and Order at para. 45. The Pueblo stresses that just as federal licensing and transmission of federal spectrum trigger NHPA review, they also trigger federal obligations to assess environmental impacts under NEPA. Moreover, environmental effects to be considered for NEPA must include cultural, historic, and social effects, whether direct, indirect, or cumulative. *See* 40 C.F.R. § 1508.8.

The small size of wireless facilities does not exempt them from environmental review because, depending on the specifics of the deployment a small wireless facility can still have adverse impacts both to tribal lands and natural resources as well as to tribal cultural properties. Further, the need for the FCC to uphold environmental review requirements is not less merely because numerous, small wireless facilities are being deployed rather than fewer, larger cell towers. We urge the FCC not to issue this blanket exemption from NEPA review for small wireless facilities.

***Protecting Tribal Historic Properties is in the Public Interest***

The FCC, in the Draft Second Report and Order, would find that small wireless facilities are "inherently unlikely to trigger environmental and historic preservation concerns." *See* Draft Second Report and Order at para. 84. Thus, the FCC finds that it is in the public interest to exclude such facilities from historic preservation review, stressing the cost of conducting such review. This might be true for some deployment, such as locating small wireless facilities within a building, and we are willing to discuss such situations; but again this deployment is so massive that it could very easily implicate tribal interests and concerns in many areas around the country.



The importance of Section 106 review, in addition to review under NEPA, is not diminished by either the small size of the infrastructure or the cost of complying with federal law. The small footprint of infrastructure does not necessarily equate to minimal potential to have adverse impacts on tribal historic properties, particularly when we are talking about tribal sacred sites. In fact, the potential threat to tribal historic properties is quite significant given the sheer number of small wireless facilities that the FCC predicts will be necessary to deploy 5G technology. Any one of those facilities could cause irreparable harm if located on certain Santa Clara sacred sites.

Tribal interests are an integral part of the public interest in the United States, and the value of protecting irreplaceable tribal historical, religious, and cultural sites upon which tribal cultures depend should be weighed heavily. We do not forbid the use of wireless towers or implements, but we have the right under federal law to have a voice in determining whether their deployment will harm our tribal historic properties and advise on how such harm can be avoided or mitigated. Entirely exempting small wireless facilities from historic preservation review only values the profits of industry at considerable expense to tribes and to the public.

#### ***Tribal Fees and Tribal Consulting Contracts Facilitate Review***

For wireless facilities not exempt from Section 106 review, the Draft Second Report and Order provides that tribes should not be paid fees for conducting initial project reviews. *Santa Clara Pueblo does not charge fees for project reviews; yet, the work we have done has greatly benefitted the telecommunications industry, which is a for-profit enterprise. It is entirely appropriate, if Santa Clara so chose, for the Pueblo to ask for fair compensation for the value of our expertise.*

Our Tribal Historic Preservation Office (THPO) was established in 2014, and since that time we have successfully participated in the Tower Construction Notification System (TCNS). On average, we receive approximately 30 to 50 notifications each month. It takes substantial staff time and resources to conduct even a minimal review of these notices, and through this process we provide special expertise in assessing the eligibility of historic properties. Although we do not charge for this service at this time, we have the right to be compensated for our labor and expenditures just as any other consultant or expert would be for their services.

The Draft Second Report and Order indicates that the FCC has serious concerns with the amount that some tribes are charging for review of TCNS notices. The appropriate response to such concern is to address egregious situations on a case-by-case basis and to discuss the overarching issue with both telecommunications companies and tribes at the table. We echo tribal requests that the FCC facilitate dialogue between companies and tribes to the extent that serious problems are arising in the process of working together to expedite tribal historic preservation review.

Additionally, the work that our THPO performs could not be done by other "experts" who are not from our Pueblo because they simply do not know what we have not shared with



them. We are extremely concerned that the Draft Second Report and Order provides that telecommunications companies can contract with anyone to perform consulting work regarding projects that have potential impacts to tribal historic and cultural properties. This position places our history and our culture at serious risk and is disrespectful of the unique knowledge that our Pueblo has about our own peoples, history, religion, and culture.

***Timeframe for Tribal Review Should Remain 60 Days***

We are also very concerned about the shortening of the timeframe for tribal review in the Draft Second Report and Order. It would provide that telecommunications companies only need to attempt to contact a tribe once and that, if a telecommunications company reports to the FCC that a tribe has not responded, the tribe only has 15 days rather than the previous 20 days to respond. This results in an overall shortening of the tribal review timeframe from 60 days to 45 days.

This abbreviated timeframe could cause serious problems for our THPO. Although we always attempt to respond to TCNS notices promptly, there are often cultural reasons for delay. For instance, our THPO is not available for certain periods when our Pueblo has ceremonies or when a member of our community passes away. Between these cultural constraints and our limited staff, shortening the timeframe for tribal responses will impose a significant burden on our ability to be respond to TCNS notices within the given window. We request that the FCC maintain the current 60-day time period for tribal responses.

***The FCC Should Engage in Meaningful Tribal Consultation***

The FCC represents in the Draft Second Report and Order that it has conducted extensive tribal consultation. However, the agency seems to have predetermined the outcome of this particular process. In fact, many companies are already bypassing notifying us and are instead moving ahead with planning and preparing to implement wireless facilities under the impression that the FCC will no longer honor its duty to ensure tribes have a voice in the siting of wireless infrastructure.

FCC meetings and informational calls on potential changes to the agency's policies regarding tribal historic preservation review have not complied with standards for meaningful consultation. Nothing tribes said was entered into the record, and no one attended from the FCC who had the authority to make decisions based on the tribal input received. The FCC, therefore, has not honored the government-to-government relationship nor sought meaningful tribal input.

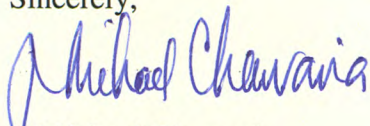
***Conclusion***

Currently, the Tower Construction Notification System (TCNS) allows telecommunications companies and tribes to work together to facilitate and streamline tribal historic preservation review. This voluntary system has helped the FCC avoid the far slower process of site-by-site tribal consultation. It has also been important to protecting our Pueblo's sacred sites. We strongly recommend that the FCC not approve the Draft Second Report and



Order and instead recommit to working with tribes to facilitate wireless infrastructure deployment and to protect vital tribal historic and cultural resources.

Sincerely,



J. Michael Chavarria  
Governor

cc via e-mail only:

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