

March 14, 2018

Secretary Marlene H. Dortch
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Ute Mountain Ute Tribe's Opposition to draft Report and Order (Docket No. WT 17-79)

Dear Chairman Pai and Members of the Commission:

This letter is respectfully submitted on behalf of the Ute Mountain Ute Tribe, a federally recognized tribe headquartered in Colorado whose reservation extends into New Mexico and Utah (the "Tribe"). The Tribe strongly opposes the Second Report and Order (of the Federal Communications Commission ("Commission")) released on March 1, 2018, pertaining to wireless communications (WT Docket No. 17-79) ("Order").

The Tribe agrees that economic efficiency and streamlined regulation are worthy goals. However, those objectives must not come at the expense of the Commission's most basic responsibilities to consult with Indian tribes on a government-to-government basis as federal law, including both National Environmental Protection Act ("NEPA") and the National Historic Preservation Act, and their corresponding regulations plainly require.

By categorically removing all smaller wireless facility sites from any protection under these statutes, the Order would effectively prohibit Indian tribes from consulting with the Commission even in those relatively infrequent instances where a tribal government seeks to protect a known sacred site or other traditional cultural property ("TCP") of direct concern to that tribe and its citizens. In practice, this is not an Order, but a Gag Order denying tribes their federally protected rights to consult with the federal government as the U.S. Supreme Court has recognized since the days of Chief Justice John Marshall in the early 19th Century, and as every President since Richard M. Nixon has subsequently reaffirmed through executive orders and policy directives. As part of the federal government, the Commission's obligations to consult meaningfully with Indian tribes on a government basis are not optional, nor can they be narrowed to the point of violating the Commission's trust duty toward Native tribes and nations as the Order would do.

Rather than enhancing economic efficiency and streamlining regulation, the Order as drafted would seriously undermine the Commission's stated objectives. In the Tribes' experience, tribal leaders across the United States – individually and collectively – will not stand

idly by and do nothing in those comparatively few but extremely important instances where a tower adversely affects a sacred site or other TCP. Tribes' rights to consultation with the Commission and other federal departments and agencies are judicially enforceable. To give just one example, in *Wyoming v. Jewell*, 136 F. Supp. 3d 1317 (D. Wyo. 2015), the court issued a nationwide injunction preventing the Bureau of Land Management from implementing its proposed rules regulating hydraulic fracturing on BLM and tribal lands after determining that federal officials had failed to engage in meaningful consultation with affected tribes. The Order would undercut tribes' awareness of their own cultural resources by eliminating tribal fees for initial historic/cultural preservation assessments. If anything, this misguided attack on tribal sovereignty – denying tribes the ability to charge fees to cover the cost of identifying cultural resources for projects not of the tribes' own making – will have the opposite effect of making tribal governments more willing to take their concerns directly to federal court as opposed to working collaboratively with the Commission to address them.

By categorically denying tribes their fundamental rights to government-to-government consultation with the Commission, the Order would expose the Commission to an increased risk of litigation in those instances where tribes are forbidden to voice their legitimate concerns about their own cultural resources. Ironically, the Order would turn back the clock on the Commission's successful Tower Construction Notification System ("TCNS"), the more collaborative approach that the Commission wisely pursued with Indian tribes after attempting to minimize or evade its federal consultation obligations in the not-too-distant past. TCNS has been a marked improvement over the Commission's previous practices because it provides earlier project notification to tribes and State Historic Preservation Officers to ensure that consultation occurs. This helps ensure that sacred sites and other TCPs of importance to tribes are addressed more quickly, thereby averting potential litigation.

Given the harm this Order would inflict on the Commission's relationship with Native America – with no corresponding economic benefit, and indeed a very real threat of more project delays to all concerned – the Ute Mountain Ute Tribe urges you to withdraw this Order immediately or agree to modify it after engaging in meaningful tribal consultation, including with the Tribe, addressing the Tribe's specific concerns. Thank you for your attention to this matter.

Sincerely,



Troy A. Eid
Special Counsel to the Ute Mountain Ute Tribe
United States Attorney for the District of Colorado (2006-09)
Chairman, Indian Law and Order Commission (2010-14)

cc: Honorable Harold Cuthair, Chairman, Ute Mountain Ute Tribe

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