



March 15, 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 supports the Commission's efforts to clarify its procedures for reviewing proposed infrastructure deployments under the National Historic Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA").¹ As noted in the record, CTIA supports the finding that small wireless facilities are neither "undertakings" under NHPA nor "major federal actions" under NEPA, a reform that could lower the cost to deploy 5G networks by \$1.56 billion.²

CTIA also supports the proposals that will bring meaningful improvements to the regulatory landscape for all wireless facilities. The reforms the Commission proposes follow substantial consultation with Tribal Nations and Native Hawaiian Organizations (jointly "Tribes") spanning several years. In addition to the consultations outlined in the *Draft Second Order*,³ the Commission convened Tribes and industry in Washington D.C. and in New Mexico in 2015, 2016, and early 2017 to discuss Section 106 issues.⁴ Such meetings reflect the

¹ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, FCC-CIRC1803-01 (draft rel. Mar. 1, 2018) ("Draft Second Order").

² See *Impact of Federal Regulatory Reviews on Small Cell Deployment*, ACCENTURE STRATEGY (Mar. 12, 2018) (finding that, attached to Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Mar. 13, 2018)).

³ *Draft Second Order* ¶¶ 16-32. As the Commission states, "Section 101(d)(6) of the NHPA requires federal agencies to consult with any Tribal Nation or NHO that attaches religious and cultural significance to a property eligible for inclusion on the National Register of Historic Places that may be affected by their undertakings. The ACHP rules implement that provision by requiring that agencies make a reasonable and good faith effort to identify such Tribal Nations or NHOs and invite them to be consulting parties." *Id.* ¶ 89. As detailed in the *Draft Second Order*, the Commission went well beyond "reasonable and good faith effort[s]" to consult with Tribes and to hear and recognize their concerns.

⁴ For example, the wireless industry participated in a two-day meeting hosted by Commission staff at the Isleta Resort and Casino in Albuquerque, New Mexico in January 2016. Wireless industry representatives also participated in a meeting convened at the Commission on November 21, 2016—at which former



Commission's long-standing and bipartisan desire to improve its Tribal Consultation Process under Section 106 of the NHPA (the "Tribal Consultation Process"). These reforms are thus based on longstanding precedent from the Commission and the Advisory Council on Historic Preservation, as well as on the Commission's and applicants' own experiences with increasing costs and delays associated with the Tribal Consultation Process.⁵

In order to provide even greater clarity to industry, Tribes, and Commission staff, CTIA suggests that the Commission clarify the evidentiary showing that a Tribe must make before an applicant can be required to hire a professional contractor for purposes of identifying historic sites or assessing effects or mitigation for proposed projects on non-Tribal lands.⁶ Such clarification will provide certainty to all parties, thereby facilitating 4G LTE and 5G deployment and ushering in new and enhanced wireless services that will spur economic growth.⁷

The Commission Should Clarify the Process and Standard of Evidence Required to Support a Demand for Use of a Professional Contractor. The *Draft Second Order* suggests that, in certain circumstances, Tribes may be entitled to payment if they serve as professional contractors in connection with activities undertaken *after* the initial determination that historic properties are likely to be located in a site vicinity.⁸ The *Draft Second Order*, however, does not require applicants to hire Tribes as professional contractors, but instead proposes a good faith standard for determining whether an applicant should employ a qualified professional contractor to assist in identifying historic sites or assessing effects or mitigation.⁹ A Tribe has the opportunity to raise with the Commission the question of whether the

Chairman Tom Wheeler provided welcoming remarks and urged industry and Tribal representatives to work together in good faith to propose shared general principles for Section 106 reforms within 45 days from the first meeting. Wireless industry representatives, along with Tribal representatives, attended and/or participated via teleconference additional meetings hosted by the Commission on December 6, 2016, December 21, 2016, and January 10, 2017. At the recommendation and organization of Commission staff, wireless industry representatives also discussed principles for reforming the Tribal Consultation Process at the National Congress of American Indians' Executive Council Winter Session on February 15, 2017.

⁵ *Draft Second Order* ¶¶ 88-91.

⁶ See *id.* ¶ 115-122; see also Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Feb. 27, 2018) ("CTIA Feb. 27 *Ex Parte*") (urging the Commission to clarify when fees may be appropriate in connection with Tribal participation in the historic preservation process under Section 106 for projects outside of Tribal lands).

⁷ See, e.g., *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY (Jan. 2017), <https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>.

⁸ *Draft Second Order* ¶ 116; see also CTIA Feb. 27 *Ex Parte* at 5 ("[I]f 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.").

⁹ *Draft Second Order* ¶ 119.



applicant should hire the Tribe or a qualified professional contractor for purposes of identifying historic sites or assessing effects or mitigation.¹⁰

CTIA agrees with the Commission that Tribes may assess fees when they are providing professional contracting and that the applicant should be responsible, in the first instance, for determining whether to employ the services of a professional contractor for purposes of identifying historic sites or assessing effects or mitigation.¹¹ The Commission should clarify, however, that applicants are not required to hire a professional contractor in the absence of evidence showing that an intact historic property of religious and cultural significance is likely to be present in the project's area of potential effect.¹²

CTIA recognizes and respects that individual Tribes may have concerns with a requirement to disclose to applicants the location of a specific historic site. CTIA urges the Commission to confirm that, if a Tribe has concerns regarding the confidentiality of the evidence, the Tribe may share the evidence with the Commission on a government-to-government basis and that the Commission will protect such information consistent with Section IV.I of the *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission*, 47 CFR Part 1, App. C.

This clarification will accommodate a Tribe's reasonable desire to protect its historic sites, while also protecting applicants from unsupported claims that they must hire professional contractors for potentially every site.¹³ This process is entirely consistent with the Commission's obligation to resolve questions of whether an applicant has acquired any

¹⁰ *Id.* ¶ 122.

¹¹ See, e.g., *id.* ¶¶ 108, 117, 120, ; see also Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Feb. 27, 2018); see also Joint Comments of CTIA and The Wireless Infrastructure Association, WT Docket No. 17-79, at 22 (filed Jun. 15, 2017); Reply Comments of CTIA and the Wireless Infrastructure Association, WT Docket No. 17-79 (filed July 17, 2017).

¹² *Id.*

¹³ See, e.g., Letter from William Kindle, Chairman of Rosebud Sioux Tribe, to FCC, WT Docket No. 17-79, at 3 (dated Mar. 8, 2018) ("As proposed within your Report and what will potentially become rule made policy, we of the Rosebud Sioux Tribe will exercise our legal right which will include calling for consultation with our Tribal Council on every proposed project as designed on locations within our ten (10) state area of interest. Additionally, we will under Section 106, be requiring physically traveling to locations scheduled for proposed infrastructure projects to assess and identify impacts to cultural properties."); Letter from Benjamin J. Barnes, Second Chief of the Shawnee Tribe, to Marlene Dortch, FCC, WT Docket No. 17-79 (dated Mar. 14, 2018) ("The alternative, which will be the outcome if the current order is approved, is that tribal nations will demand direct consultations with the FCC on potentially hundreds of larger tower sites, a far slower process than the tribal-industry process."); Letter from Skokomish Indian Tribe THPO, to Marlene Dortch, FCC, WT Docket No. 17-79 (dated Mar. 14, 2018) (same).



necessary professional contracting services in the course of identifying historic sites or assessing effects or mitigation of a project.¹⁴ As the Commission states, where a party believes an applicant has failed to meet the good faith standard in connection with the hiring of paid contractors, “the objecting party will then have the burden of providing a complete and detailed explanation of why the reasonable and good faith standard has not been met.”¹⁵

* * *

CTIA strongly supports the Commission’s proposed reforms to the Tribal Consultation Process. By acting expeditiously to implement these reforms, the Commission will help to carry out its mandate to facilitate broadband deployment while also protecting historic preservation and environmental goals.

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

¹⁴ *Draft Second Order* ¶ 122.

¹⁵ *Id.*