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Ex Parte Filing

March 14, 2018

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Second Report and Order in the Matter of Accelerating Wireless Broadband  
Deployment by Removing Barriers to Infrastructure Investment (WT Docket No. 17-79)

Dear Ms. Dortch:

The Seneca Cayuga Nation of Oklahoma (Seneca Cayuga Nation) is a federally-recognized Oklahoma. Prior to contact with western colonizers, the Seneca and Cayuga lived throughout the region east of the Mississippi River; stretching as far north as modern-day Canada and as far south as modern-day North Carolina. Through a series of systematic government removal and relocation, the Seneca Cayuga Nation was ultimately displaced to northeastern Oklahoma where we have remained since 1831.

As a sovereign nation, the Seneca Cayuga Nation consists of a democratically-elected government and approximately 5,538 tribal citizens. Our government consists of a Chief and a six-member Business Committee. In addition to elected officials, the administration of the Seneca Cayuga Nation is carried-out by numerous departments, one of which focuses entirely on cultural preservation and encompasses Section 106 of the National Historic Preservation Act of 1966 (NHPA)(16 U.S.C. §470 et seq.). One of the foremost tasks performed under Section 106 is the research and review of all telecommunication projects submitted through the Tower Construction Notification System (TCNS).

On March 1, 2018, the Federal Communications Commission (FCC) released WT Docket No. 17-79, *Wireless Infrastructure Streamlining Report and Order* (Second Report and Order) which proposes to significantly impact tribes and the Section 106 review process. While this Second Report and Order goes to great lengths to outline proposed changes to “streamline the deployment of next-generation wireless facilities,” notably absent is any evidence of meaningful tribal consultations throughout the FCC’s process of composing the Second Report and Order. Having therefore been presented with the Second Report and Order, the Seneca Cayuga Nation now wishes to correct erroneous statements presented by the FCC as fact, as well as to comment on the changes proposed by the Second Report and Order.







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Turning first to the tribal consultation process, paragraphs 19-32 of the Second Report and Order list a number of so-called consultations conducted by the FCC. In particular, the Seneca Cayuga Nation was unaware of any such meetings. Under the guise of consultation, a plethora of approaches have been taken at these meetings to purportedly garner a tribal perspective on the Second Report and Order including listening sessions, in-person meetings, and conference calls. These approaches fall short of the exemptions outlined in 36 CFR Part 800.14, which outlines consultation with tribes and describes the parameters of the exemption to ensure that government-to-government consultation occurs and that any such exemptions consider the views of the State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs).

Specifically, 36 CFR Part 800.14(c)(4) states that “if an exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance” the FCC shall consult with tribes when developing program alternatives as outlines in 36 CFR Part 800.14(f). These consultations are to include appropriate government-to-government consultations. The meetings described in paragraphs 19-32 of the Second Report and Order do not qualify as appropriate government-to-government consultations. To date, the FCC has not provided any evidence to support the veracity of their claims that they consulted with tribes regarding the changes proposed by the Second Report and Order. This is an affront to established regulations and to tribal sovereignty.

Following the FCC’s attempt to establish that consultation occurred, the Second Report and Order addresses the proposal to exclude small wireless facilities from NHPA reviews (*see* paragraphs 33–87). Similar to the points raised on the tribal consultation process, any discussion in the Second Report and Order regarding small wireless facilities is heavily biased toward the industry. Completely absent from the discussion is the potential for ground disturbance, inadvertent discoveries, and effects on sites of tribal religious and/or cultural significance. This is further evidenced by the FCC’s assertion that “small wireless facilities pose little or no risk of adverse environmental or historic preservation effects.” (Paragraph 39).

In determining that small wireless facilities are not undertakings, the FCC is effectively cutting tribes out from the very protections sought by the NHPA, chiefly the preservation of irreplaceable historic properties. (36 CFR Part 800.1(a)). The deployment of cells and towers, regardless of size, presents the opportunity for ground disturbance; which in turn presents the opportunity for inadvertent discoveries. The review of small wireless facilities is as extensive as the review of a new tower, and any costs or delays associated with the deployment of small wireless facilities are nominal in comparison to the potential for irreversible impacts. (*See* paragraphs 65-68). The continued assertion by the FCC that small wireless facilities do not constitute an undertaking disregards the established definition of undertaking and the unique expertise of tribes to identify sites of religious and cultural significance.







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In Section IV of the Second Report and Order, the FCC proposes to “streamline” the Section 106 tribal consultation process. (*See* paragraphs 88-145). Of particular concern to the FCC are the research fees for TCNS projects. Specifically, the FCC asserts that “applicants are not required to pay fees requested by Tribal Nations or NHOs that have been invited to participate in the Section 106 process.” (Paragraph 106). Pursuant to NHPA, tribes are not “invited” but are a consulting party. (36 CFR Part 800.2(c)). The FCC’s attempts to minimize the role of tribes in the Section 106 process is heavily supported by industry (*see* fnnts 228-232), but continually fails to account for the tribal work involved and their expertise exercised during the review process.

The Seneca Cayuga Nation's fee structure has been static since 2011 and is well justified for the work a single review entails. On our end, a staff of 1 works diligently to ensure projects are reviewed within 30-days, despite constant opposition from industry to provide necessary documents to complete reviews. A single review, regardless of size, location, or ultimate findings, consists of the following steps:

1. Open and date-stamp projects;
2. Enter required information into database;
3. Separate projects with missing information (for follow-up with company/project manager);
4. Review project:
  - a. Verify type of project;
  - b. Locate the project site in Google Earth using coordinates or address given. Utilize databases created within Good Earth and ArcGIS to review the proximity of the project to known and documented sites of religious and cultural significance to the Seneca Cayuga Nation;
  - c. Verify site locations with maps provided by the company;
  - d. Review project plans as provided;
  - e. Assess the archaeological survey/cultural resource survey provided, determining field survey techniques and data collection, and verifying test pits including any findings from such surveys;
  - f. Research data provided of historical land use and environmental settings, including the cultural history of the project site;
  - g. Confirm and review for concurrence of SHPO’s response to the project;
  - h. Complete the data fields within the cell tower database;
5. Issue a determination letter.







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The research fee associated with the process described above ensures our staff is able to timely review and respond to all projects. Moreover, under the proposed revisions businesses can impose consultant fees whereas tribes are completely cut from a "consulting" status whilst still owing a duty to consult pursuant to Section 106. Considering the amount of work required and the continued duty to complete reviews, the tribal review fee is not only appropriate, but nominal at best.

Further, as the Second Report and Order points out, the instances of adverse findings is relatively rare. While industry uses this to promote limiting tribal involvement in the review process, what this truly evidences is the effectiveness of the review process and the unique knowledge of tribes in identifying sites of religious and cultural significance. Through the tribal review process, potentially adverse sites can be identified and avoided before any irreversible damage is caused. While tower construction grows exponentially, it is the tribal review process for TCNS projects that continues to prevent damage to religious and culturally significant properties, regardless of the ultimate finding issued. Any changes or eliminations to this process stand to diminish the success rate that has been established and upheld through tribal reviews.

Lastly, the Second Report and Order is an affront to tribal sovereignty. It is a firmly-held that tribes possess the inherent authority to govern themselves. The FCC's attempt to unilaterally change an established process to meet industry demands undermines the role tribes play in contributing to and defining the parameters of changes effecting them. Throughout the Second Report and Order it is clear that the FCC has failed to consult with tribes, has failed to consider the role and responsibility of tribes in the Section 106 process, and has failed to recognize the most basic principles of tribal sovereignty. For these reasons, and the reasons stated above, The Seneca Cayuga Nation opposes the proposed changes as outlined in the Second Report and Order.

The Seneca Cayuga Nation requests that the FCC stop and/or delay the implementation of the Second Report and Order until that have conducted meaningful government-to-government consultations. Such consultations should be conducted in good faith and include adequate advance notification, an agenda of what is to being considered and discussed, time to discuss the relevant issues, and a willingness to actually consider all views. We look forward to consulting with you and thank you for considering our comments.

Sincerely, 

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