

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireless Broadband)	WT Docket No. 17-79
Deployment by Removing Barriers)	
to Infrastructure Investment)	

To: The Commission

**EX PARTE COMMENTS OF THE NAVAJO NATION AND THE NAVAJO NATION
TELECOMMUNICATIONS REGULATORY COMMISSION (NNTRC)**

The Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), through undersigned counsel, submits these Ex Parte Comments in the above-referenced proceeding in response to the Commission’s Draft *Second Report and Order* released March 1, 2018 (the “*Accelerating Deployment Draft Order*” or “*Draft Order*”).

A. The *Draft Order* Highlights Why the FCC’s Trust Responsibilities Require *PRIOR Tribal Consultation*

As the Navajo Nation pointed out in its Comments in this proceeding,¹ the *NPRM* was released by the Commission without any formal Tribal consultation. As such, it reflected only the desires of industry for a vastly different approach to historic preservation than has been the law of the land for well over a decade. This violates the FCC’s trust relationship² with Tribes

¹ Comments of the Navajo Nation and Navajo Nation Telecommunications Regulatory Commission (“Navajo Comments”), filed June 17, 2017.

² The *Draft Order* references this trust relationship in only one place, paragraph 16, and describes its post hoc approach to “develop[] consultation plan goals designed to ensure responsiveness to a potentially large number of consultation requests from various levels of Tribal government.” In other words, the FCC’s position is that it is using its trust relationship with Tribes as a shield against Tribes challenging its decision, as opposed to a relationship where policies are adopted in cooperation in a government-to-government relationship.

wherein the FCC promised to consult with Tribes *prior* to taking a *regulatory action*.³ The issuance of an NPRM is a regulatory action,⁴ and the tenor of the *Accelerating Deployment NPRM*, with its heavy reliance on industry “evidence,” show exactly why *prior* consultation is required, and vital to protect the sovereign interests of Tribes. It is patently unfair for the FCC to listen only to the business interests of carriers before issuing the *NPRM*.

The *Draft Order* does not address this fundamental violation of the trust relationship. Instead, the *Draft Order* lists a number of meetings (which may or may not constitute formal Tribal consultation under federal law) as evidence that the FCC is upholding its promise to Tribes. But this “back and fill” approach to Tribal consultation is an affront to all Tribal sovereign nations. When one compares the *NPRM* to the *Draft Order* and to the over 70 Tribal comments in the proceeding, it is clear that the “die was cast” in drafting the *NPRM* because the *Draft Order* adopts virtually every industry proposal in the *NPRM* and rejects the call from Indian Country to retain the vital precepts of the National Historic Preservation Act (NHPA) that protect culturally sensitive sites.

Sadder still is the fact that the *Draft Order* doesn’t cite to any of the many dozens of examples raised by Tribes where Section 106 and TCNS have allowed Tribes and carriers to work together to protect culturally sensitive lands.⁵ Actual, real world examples. Instead, the

³ See, *Statement of Policy on Establishing Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd. 4078 (2000) (“The Commission, in accordance with the federal government’s trust responsibility, and to the extent practicable, will consult with Tribal governments *prior* to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources”)(emphasis added).

⁴ See Executive Order 12866, § 3(e), published September 30, 1993 (“‘Regulatory action’ means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and *notices of proposed rulemaking*”).

⁵ See, e.g., Navajo Comments, p. 6 (citing four (4) examples of how Section 106 and TCNS was used to cooperatively choose a new tower site that would not disturb a culturally sensitive area); [Additional Cites]

Draft Order relies on industry statistics that show that Section 106 rarely results in a negative impact on culturally sensitive lands,⁶ and raises again the Super Bowl situation as an example of a system allegedly gone wrong.⁷ In short, the rights of Tribes have been bulldozed in this proceeding; the FCC has violated its trust responsibilities to Tribes.

B. The *Draft Order* Places the Economic Burden for Section 106 Compliance on the Shoulders of Tribes

The FCC's entire \$332 million budget is paid for through licensing and regulatory fees.⁸ Carriers willingly pay these fees in exchange for the right to provide telecommunications services and profit from them. It is the height of hypocrisy for the FCC now to turn around and say that carriers shouldn't reimburse Tribes for expenses in participating in the Section 106 process.⁹ The FCC further ignores the statute itself, which clearly indicates that Tribes must have "financial assistance" in order to adequately participate in the process.¹⁰ The *Draft Order* references an ACHP 2001 memorandum and a "handbook last issued in 2012"¹¹ for the proposition that carriers need not reimburse Tribes for the effort necessary to respond to a TCNS notification unless the Tribes "fulfills the role of a consultant or contractor."¹² Yet the ACHP's own website states: "If a Federal agency has the authority to impose the development of such information and analyses on the applicant and chooses to do so, the *legal basis for that*

⁶ *Draft Order*, ¶ 74. The Commission's mindset is clear in that rather than focusing on the 29 real-world examples of Section 106 successfully protecting culturally sensitive areas, the Commission discounts these real world success stories by noting that these 29 instances only represent 0.3% of Verizon's request for Tribal review.

⁷ *Id.* at ¶ 75.

⁸ See 2018 FCC Budget at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344998A1.pdf.

⁹ *Draft Order* at ¶ 106 et seq.

¹⁰ See Navajo Comments, p. 7, citing 16 U.S.C. § 470a(d)(4)(A).

¹¹ *Draft Order*, ¶ 107.

¹² *Id.* at ¶ 115.

obligation on the applicant lies in the Federal agency's authorities and does not derive from ACHP's regulations."¹³ In other words, while the FCC seeks to defer to ACHP's "guidance" on fees, ACHP itself does not claim the authority to impose its interpretation of when fees are appropriate. The *Draft Order*, therefore, further abdicates the FCC's trust responsibilities toward Tribes.

If carrier reimbursement over regulatory costs is the proper model for federal regulation of telecommunications carriers, why isn't reimbursement of Tribal expenses proper under the NHPA? The *Draft Order* ignores this logical conclusion, simply because carriers don't want to pay any more fees.¹⁴

C. Allowing Carriers to Circumvent Tribes by Using Their Own "Experts" Will Return Us to the Days When Carriers Regularly Disregarded Tribal Sovereignty

Probably the worst decision in the *Draft Order* is to allow carriers to engage their own independent "experts" for Section 106 compliance.¹⁵ "[W]e expect that competition among experts qualified to perform the services that are needed will generally ensure that the fees charged are commensurate with the work performed."¹⁶ The *Draft Order* makes no effort to define what a "qualified" expert is. Given that culturally sensitive areas (especially burial grounds) are closely kept secrets because of centuries of grave desecrations, by definition, the only way an expert can be "qualified" would be to be a THPO or otherwise have access to this information. The "code" language in the *Draft Order* is clear: The FCC is authorizing carriers to engage the cheapest "expert" it can find, and presumably, one that will give it a go-ahead for

¹³ Emphasis added. <http://www.achp.gov/regs-fees.html> (last visited March 13, 2018).

¹⁴ Maybe if the FCC is so concerned about fees stifling broadband deployment, it should consider reducing its fees to carriers instead of imposing an economic burden on Tribes who represent some of the poorest areas in America.

¹⁵ *Draft Order*, ¶ 120.

¹⁶ *Id.*

construction, regardless of the actual situation. This “race to the bottom” will reinforce the already rampant attitude in the telecommunications sector that protecting culturally sensitive areas is not worth the cost.

The PTA-FLA petition says it all. In arguing that an insurance regime should replace the Section 106 review process, PTA-FLA states:

This would ensure at relatively small cost that tower constructors would not violate the integrity of previously unknown Indian sites. The crews working on such a site and the people they work for would then be incentivized to report any burial ground they came across *as opposed to the current incentive to not report* it since the result would be that they would all get paid the same but not have to complete the work.¹⁷

These so-called experts can read between the lines well enough to know what their marching orders will be – “all clear” might as well be put on huge rubber stamps, because that is what the system will become, especially since the FCC has taken no steps to fine or otherwise penalize carriers who disturb culturally sensitive areas. There is not a single mention of “fines” or “enforcement actions” in the *Draft Order*. Once again, this signals an “all clear” from the FCC to allow carriers to circumvent, ignore, or violate Section 106 with impunity.

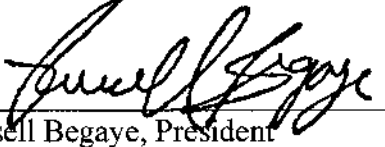
D. CONCLUSION

The *Draft Order* rolls back more than a decade of a cooperative and positive relationship between the FCC and Tribes. The TCNS process, the envy of other agencies subject to the NHPA, will now be ripe for abuse by carriers. The trust relationship between the FCC and Tribes has been damaged, possibly beyond repair. We appear headed back to days when the federal government dictated policies to Tribes, elevating its interests, and the interests of its licensees over the sovereign rights of Tribes. This is indeed a sad day.

¹⁷ PTA-FLA Petition, filed May 3, 2016, p. 16 (emphasis added).

Respectfully submitted,

**THE NAVAJO NATION AND THE NAVAJO
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