Wireless Infrastructure Streamlining Report and Order, WT Docket No. 17-79

FCC-CIRC1803-01

Colorado State Historic Preservation Office comments, 15 March 2018 (Part 2)

General comments on the order

In our previous comments, our office addressed our concerns regarding the purpose, need, and usefulness of further exempting small cell antenna deployments beyond what is currently exempted under federal, state, and local laws. In these comments, we wish to address the proposals made by the Commission in its Order regarding changes to the regulatory process as it pertains to Tribal Historic Preservation Offices.

By current estimates, the State of Colorado has been occupied by humans for more than 16,000 years. Colorado is home to two federally-recognized Native American tribes (Southern Ute and Ute Mountain Ute), and many other Tribes have claims on all or part of Colorado’s territory. By our estimates, less than ten percent of the state’s 104,185 square miles have been surveyed for archaeological resources.

Cell towers vary widely in terms of their ability to impact archaeological resources. Large installations in remote areas may require large amounts of earth-moving activity: trucking in heavy tower materials and construction equipment; digging substantial foundations; building and maintaining access roads on (and up) steep, rocky hillsides; etc. Cell tower placement on prominent hills and mountaintops, while good for establishing a clear line of sight between towers, may have a significant impact in Traditional Cultural Places (TCPs). With that in mind, we note that participation and consultation by Tribal Historic Preservation Offices is critical in assuring that culturally-important resources are protected from harm whenever possible.

Historically, Tribal Historic Preservation Offices have been hampered by a lack of funding. We note that the President’s proposed 2019 budget will bring further cuts to these agencies, including a $4.75 million cut in funding from the federal Historic Preservation Fund, and the elimination of $1.6 million in NAGPRA funding grants.[[1]](#footnote-1) To the extent that the fees charged by the THPO offices, which allow them to carry out their federally-mandated responsibilities in the absence of federal funding, are excessive, we note that Verizon Communications’ 2017 net income alone would be sufficient to fund Tribal allotment of the Historic Preservation Fund the next 2,800 years.[[2]](#footnote-2)

Specific commends regarding sections of the Order

Section 6 (and later Sections, as noted below): Here, the Commission proposes to create new regulations “for construction projects located off of Tribal lands and outside reservation boundaries.” We were unable to find clarification, either here or in later Sections (117, 118, 120, etc.) on the meaning of “Tribal lands,” and whether this is meant to mean “areas where a Tribe does not hold an interest” or, more literally, “lands not owned or controlled by a Tribe.” Since Tribes rarely review projects in areas that they do not hold an interest in, we presume that the Commission means the latter definition; “lands not owned or controlled by a Tribe.”

This Section clearly illustrates that the Commission refuses to acknowledge that THPOs and other Tribal entities have interests outside of the geographic boundaries of Reservations, Allotments, or other Native lands, and disenfranchises Tribes from taking part in the consultation process. This is a flagrant disregard for the provisions of the NHPA that federal agencies consult with Tribal governments, and is a violation of their sovereign rights to determine themselves where their interests in cultural resources may lie.  Furthermore, this disregards entire potential indirect effects for properties of interest that lie outside of reservations.

We believe that it would be inadvisable for the Commission to advise proponents not to pay review fees to Tribal governments that request it. Again, Tribal governments are sovereign nations that have the authority to set their own rules and procedures for compliance review. At the very least, complying with such nominal requests will actually ensure that the process can move forward in a timely fashion.

The Commission’s statement in Section 112 that “nothing in the applicable law of the United States… requires applicants (or the Commission for that matter) to pay up-front fees as part of the Section 106 process” is particularly egregious in this regard. We believe that the Commission is, in this Section, and in its role as a representative of the United States of America in government-to-government consultations with Tribes, essentially encouraging applicants to freely disregard the laws and procedures set by other sovereign nations, implying that those that do so will face no penalty or sanction for their actions. We are left to consider how a nation such as France would react to a similar proclamation on fees and tariffs to U.S. corporations from the Secretary of Commerce.

Sections 65-67: Here, the Commission states that applicants have been required to “spend tens of millions of 106 dollars to investigate a minimal likelihood of harm.”

The “minimal likelihood of harm” to historic properties comes from the process encouraging the avoidance or minimization of affects on historic properties through consultation with THPOs, SHPOs and other consulting parties than it is a reflection on the lack of impact by wireless infrastructure. As noted above, the “tens of millions of 106 dollars” noted by the Commission is spread out over “several decades.” If we are to assume “tens of millions” is equal to, say, $50 million total, this works out to a per-year expenditure of $2,500,000. No effort has been made to establish that such an expenditure is an especially burdensome regulatory cost, or that applicants have suffered significantly adverse financial setbacks as a result, or that the costs are sufficiently burdensome as to delay or prevent tower construction individually or in the aggregate.

Section 100: In this Section, the Commission directs applicants who are not filing a standard Form 620/621 to consult with the Tribes using a standard set of documents and materials, as outlined in this Section- constituting “an adequate baseline set of information.”

As we note above, THPOs, Tribal cultural staff, and other consulting parties are often understaffed. Refusing to provide basic historic property identification within a project area for Section 106 compliance review foreshortens the Tribe's ability to comment on a project and foists the labor of conducting basic file searches and identification of properties from the project proponent to the Tribal governments. This is in violation of the National Historic Preservation Act, which requires federal agencies to conduct identification and evaluation of historic resources. This refusal to provide tribes with basic information regarding the presence or absence of historic properties is also in violation of the agency's responsibility to make determinations of effect on properties through their undertakings. In practice, this means that there is no information on which the THPOs or other consulting parties can provide comment.

Sections 119-120: Here, the Commission states that applicants are “not presumed to be required to engage the services of any particular party, including a Tribal Nation or NHO, either to identify historic properties or to monitor efforts to avoid or minimize harm.”  
  
This is problematic on several levels. We note that Tribes are usually the *only* source for information regarding Traditional Cultural Places and sites of religious and spiritual importance. To postulate that this sort of work- particularly the monitoring of such a resource to avoid negative impacts- can be undertaken by just about anyone, and ideally the lowest bidder, denigrates the importance of Tribal resources and reduces THPOs to mere spectators in the handling of their own resources.

Secondly, we note that the Commissions comments here are written so broadly as to allow literally anyone to perform these legally-mandated activities; even someone who is not an archaeologist or historian. Given that other federal, state, and Tribal laws/regulations contradict this proposal, we strongly encourage the Commission to revise this Section to reflect that, at a minimum, applicants

*must* hire a qualified archaeologist to “perform paid consultant services.”

Finally, as noted in previous comments, no cost-benefit analysis has been provided to demonstrate why requiring applicants to engage the services of those agents who know the most about the resources at hand is a *significant* regulatory or financial burden. We are particularly dismayed at the Commission’s comments in Footnote 262: “we in fact expect that where Tribal Nations or NHOs offer services necessary to protect historic properties that they are qualified to provide at competitive rates, our applicants will continue to engage them to perform these services.”

The belief that small, underfunded Tribes must engage in a free market fare war with larger and better-funded private corporations in order to secure the right to safeguard *their own resources* is, for lack of a better word, reprehensible.

1. See “President’s FY19 Budget Request Cuts Tribal Preservation Programs,” 13 February 2018, http://nathpo.org/wp/2018/02/13/presidents-fy19-budget-request-cuts-tribal-preservation-programs/ [↑](#footnote-ref-1)
2. NASDAQ, <https://www.nasdaq.com/symbol/vz/financials?query=income-statement> [↑](#footnote-ref-2)