



March 16, 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,

On March 15, 2018, Scott Bergmann and Kara Romagnino Graves of CTIA spoke by phone with Will Adams of the Office of Commissioner Brendan Carr to discuss the above-captioned proceeding. During the discussion, CTIA reiterated its support for 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").<sup>1</sup> The reforms the Commission proposes will bring much-needed clarity to the Tribal Consultation Process under Section 106 of the NHPA ("Tribal Consultation Process"), benefitting industry, the Commission, and Tribal Nations and Native Hawaiian Organizations (jointly "Tribes") alike.

***The Commission's Proposals Reflect Years of Engagement with Tribal Representatives.*** Contrary to recent filings asserting that the *Draft Second Order* does not properly reflect the Commission's trust responsibility to Tribal Nations, the Commission's proposals reflect years of discussions between industry, Tribes, and the Commission<sup>2</sup> and will advance the goal of facilitating broadband deployment without diminishing Tribes' ability to protect historic sites of cultural or religious significance. The Commission details in the *Draft Second Order* various conversations and in-person meetings with Tribes and Tribal representatives regarding the proposals in this proceeding.<sup>3</sup> In addition, and as noted previously in the record, the Commission convened industry and Tribes for more than a year to discuss potential reforms

---

<sup>1</sup> 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*").

<sup>2</sup> See *Ex Parte* Letter from Scott K. Bergmann, FCC, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Mar. 15, 2018).

<sup>3</sup> *Draft Second Order* ¶¶ 16-32.



to the Tribal Consultation Process.<sup>4</sup> During these meetings, industry representatives engaged in multiple discussions regarding a variety of issues relating to the Tribal Consultation Process. Despite assertions from the National Congress of American Indians and the United South and Eastern Tribes,<sup>5</sup> this included (but was not limited to) the increasingly high fees charged by Tribes for their engagement in the Section 106 process when acting as consulting parties for projects on non-Tribal lands. The issue of upfront Tribal fees was removed from the discussion list only after the parties agreed that the issue was not likely to result in fruitful engagement. The fact that positive action could not be achieved on this issue—despite longstanding guidance from the Advisory Council on Historic Preservation (“ACHP”) that payment of such fees is not required—is precisely the reason why Commission action is necessary to reform the Tribal Consultation Process.

Substantive objections from Tribes and Tribal representatives to the Commission’s proposal to limit fees Tribes charge in connection with the NHPA Section 106 review process are also unpersuasive. The *Draft Second Order* correctly affirms long-standing ACHP guidance that consulting parties, such as Tribes participating as consulting parties in NHPA Section 106 reviews of wireless infrastructure deployments, are precluded from charging fees.<sup>6</sup> As the Commission notes, these fees are in the nature of “process fee[s]” of the type which guidance by the ACHP makes clear applicants should not be required to pay. The Commission’s own experience and record evidence regarding the dramatic increase in Tribal fees—both in number and amount—that have been assessed in connection with Tribes’ initial review of proposals also supports this determination.<sup>7</sup>

---

<sup>4</sup> *Ex Parte* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, at 1-2 (filed Mar. 15, 2018) (noting that the wireless industry participated in various meetings between January 2016 and February 2017, including a two-day meeting in New Mexico, a Commission-convened meeting in November 2016, several follow-up meetings and conversations in December 2016 and January 2017, and a Tribal association session in February 2017).

<sup>5</sup> See Comments of the National Congress of American Indians and the United South and Eastern Tribes Sovereignty Protection Fund, WT Docket No. 17-79, at 3 (filed Mar. 14, 2018). A discussion document circulated on December 1, 2016 to Tribal representatives, including USET and NCAI, explicitly included industry’s concerns regarding upfront Tribal fees and potential solutions.

<sup>6</sup> *Draft Second Order* ¶ 111.

<sup>7</sup> *Id.* ¶ 109 (noting that, when the 2004 Nationwide Programmatic Agreement was adopted and the Tower Construction Notification System was implemented, “Tribal Nations generally did not request fees to review proposed constructions upon receiving notification,” but that requests for fees “gradually [ ] became a more common practice” and “the amounts of these fees have increased significantly over the years”) (internal citations omitted); see also *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3344, ¶ 35 (“In 2015, 50 Tribal Nations noted fees associated with their review process in TCNS; by March 2017, Commission staff was aware of at least 95 Tribal Nations routinely charging fees, including 85 with fees noted in TCNS and 10 that staff was aware of from other sources. This data further suggests that the average cost per Tribal Nation charging fees increased by 30% and the average fee for collocations



***The Draft Second Order Does Not Alter Tribes' Rights Regarding the NHPA Process.***

Recent comments suggesting that the Commission is inappropriately limiting Tribes' rights in the preservation process are unfounded. The Commission's reasoned finding that small wireless facilities by private parties are not "federal undertakings" or "major federal actions" for purposes of NHPA Section 106 and NEPA does not change, alter, or limit the rights of Tribes, or indeed any party, under these statutes. It is simply a threshold legal judgment—one the Commission is required to make—regarding whether the federal involvement in the deployment of small wireless facilities by private parties is of such a degree that the Commission must review such actions under NHPA and NEPA.<sup>8</sup> The Commission has both the authority and the obligation to make such a determination,<sup>9</sup> and it concludes in the *Draft Second Order* that the deployment of small wireless facilities does not require review under NHPA Section 106 and NEPA.

Once the Commission makes the determination that the deployment of small wireless facilities by private parties is not a "federal undertaking" or "major federal action," there is no legal basis for applying these statutes and review frameworks to these types of deployments. This, however, does not affect or limit Tribes' rights with regard to those wireless infrastructure deployments to which NEPA and NHPA continue to apply. Nor does it mean that small wireless facilities can be deployed by private parties without environmental and historic protections; state and local zoning, environmental, and historic preservation requirements will continue to apply.

***Further Clarity Could Alleviate Concerns Regarding the Selection of Non-Tribal Contractors.*** The *Draft Second Order* makes clear that, when a Tribe establishes a likelihood that a historic property of cultural or religious significance to the Tribe is likely to be in the vicinity of a proposed undertaking, the applicant, at its discretion, "may generally hire any properly qualified consultant or contractor when expert services are required, whether in the course of identifying historic properties, assessing effects, or mitigation."<sup>10</sup> Such a process is triggered only *after* the initial determination that historic properties are likely to be located within the projects Area of Potential Effects ("APE").<sup>11</sup> The *Draft Second Order* also makes

---

increased by almost 50% between 2015 and August 2016."); *Ex Parte* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Feb. 27, 2018).

<sup>8</sup> *Draft Second Order* ¶¶ 43-56.

<sup>9</sup> See *Ex Parte* Letter from Scott K. Bergmann, FCC, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Mar. 13, 2018).

<sup>10</sup> *Draft Second Order* ¶ 120; see also *Ex Parte* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Mar. 15, 2018).

<sup>11</sup> *Draft Second Order* ¶ 116. CTIA has separately urged the Commission to clarify that there must be evidence of a specific site that may be affected by the proposed project for additional investigation to be warranted. See *Ex Parte* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No.



clear that an applicant does not have to hire a Tribe or Tribal representative to investigate actual effects; instead, the applicant has discretion in satisfying a “reasonable and good faith standard” when electing to hire a paid consultant, including whether such services are necessary, what qualifications are required, and whether such qualifications are satisfied.<sup>12</sup> The *Draft Second Order* also establishes that any party may challenge whether the applicant has fulfilled its duty to make reasonable and good faith efforts to identify effects to historic properties.<sup>13</sup>

Counsel for the National Association of Tribal Historic Preservation Officers recently raised concerns that the lack of a defined process regarding challenges to the selection of contractor “leaves the issue of qualifications open to interpretation on a case-by-case basis,” which is “likely to create a massive case load at the FCC.”<sup>14</sup> Guidance on this issue would thus benefit all parties to the process, including Tribes, Commission staff, and industry applicants. To that end, CTIA recommends that, in instances where a challenge may be invoked—e.g., where the applicant chooses to not hire a Tribe or Tribal representative to investigate actual effects or where multiple Tribes indicate the likelihood of an effect and the applicant hires one Tribe as a consultant but not others—the Commission clarify the agency’s own process for resolving the dispute. Specifically, the Commission should provide guidance as follows:

*First*, the applicant conducts its own investigation using whatever means it deems appropriate—including, but not limited to, hiring qualified archaeological consultants, if necessary—to investigate any actual effects the undertaking may have on historic properties.

*Second*, the applicant submits its proposed findings (i.e., a proposed finding of no effect or no adverse effect) together with any supporting documentation (e.g., a consultant’s report) electronically to the Commission and each Tribe that established a likelihood that historic properties will be affected (the “Interested Tribe”).<sup>15</sup>

---

17-79 (filed Mar. 15, 2018); see also *Ex Parte* Letter from Andre Lachance, Verizon, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Mar. 15, 2018); *Ex Parte* Letter from Keith C. Buell, Sprint, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Mar. 14, 2018).

<sup>12</sup> *Draft Second Order* ¶¶ 116-122.

<sup>13</sup> *Id.* ¶ 122.

<sup>14</sup> See *Ex Parte* Letter from James T. Graves, Georgetown University Law Center Institute for Public Representation, Counsel for the National Association of Tribal Historic Preservation Officers, to Marlene H. Dortch, FCC, WT Docket No. 17-79, at 2 (filed Mar. 12, 2018).

<sup>15</sup> To the extent an Interested Tribe does not participate in e-106 (and they should be encouraged to do so), the proposed finding and supporting information would be provided to the Interested Tribe by overnight mail with tracking receipt.



*Third*, the applicant's proposed findings will be deemed preliminarily accepted by the Commission, unless the Commission rejects the proposed finding as insufficient (e.g., based on a finding of insufficient evidence or failure to use a qualified consultant). In the event the Commission rejects the proposed finding, it will notify the applicant and the Interested Tribe(s) of its decision. If the proposed finding is rejected, and the applicant wishes to continue the Section 106 process at the current site location and parameters, the applicant must conduct further investigation and re-file. Otherwise, the proposed finding is deemed preliminarily accepted by the Commission. Preliminary acceptance by the Commission gives rise to a presumption that the applicant's proposed finding is appropriate and correct.

*Fourth*, if the proposed finding is deemed preliminarily accepted, the date on which each Interested Tribe is reasonably expected to have received the proposed finding and supporting information triggers a 15-day period for any Interested Tribe to challenge the proposed finding. If an Interested Tribe fails to challenge the proposed finding during that period, the applicant's proposed finding becomes final as to each such Interested Tribe. If any Interested Tribe responds during the 15-day period that historic properties will be affected by the undertaking, such a response will be deemed a challenge to the applicant's proposed finding.

*Fifth*, challenges are conducted through government-to-government consultation as set forth in Section IV.G. of the Nationwide Programmatic Agreement between the challenging Tribe(s) and the Commission.<sup>16</sup> During the consultation, the Tribe must overcome by any appropriate means the presumption that the applicant's proposed finding is correct and satisfy to the Commission that historic properties will be affected. If, at the end of the consultation, the Commission determines that no challenging Tribe has overcome the presumption, the preliminary finding will become final as to all challenging Tribe(s). This determination will be made within 30 days of the date on which the challenge is communicated to the Commission.

*Sixth*, if any Tribe overcomes the presumption, the Commission can either (1) find that the undertaking will have an adverse effect on one or more historic properties; or (2) ask the applicant to conduct further investigation based on its consultations with one or more Interested Tribes. If an adverse effect is found, the applicant can either abandon the project,

---

<sup>16</sup> CTIA expects that requests for government-to-government consultation would be based on substantiated concerns regarding the potential effects of a proposed project on a specific site of religious or cultural significance to the Tribe and not—as indicated by some commenters—as a foregone conclusion in the instance of every application. As the wireless industry continues to deploy new infrastructure while continuing to work with Tribal Nations and State Historic Preservation Officers in good faith to protect historic properties, CTIA is hopeful that Tribes will likewise work in good faith and avoid these tactics. Taking steps such as demanding government-to-government consultation on every wireless deployment will not meaningfully increase protection to historic properties, and will only serve to delay wireless deployments and constrain the resources of Tribes and the Commission.



or work with the Interested Tribe(s) to change the proposed project or mitigate the effect to Tribal properties.

\* \* \*

The *Draft Second Order* is a carefully crafted proposal based on substantial record support and engagement from interested parties that properly reflects the Commission's trust responsibility and does not diminish the ability of Tribes to protect historic sites of cultural or religious significance. Adoption of the proposal will advance the Commission's and the Administration's goal of facilitating broadband deployment across the country while simultaneously fulfilling the Commission's obligations under NEPA and NHPA and affording Tribes the opportunity to protect their historic properties.

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 and provided to the Commission participant. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Scott K. Bergmann

Scott K. Bergmann  
Senior Vice President, Regulatory Affairs