



## United Keetoowah Band Of Cherokee Indians in Oklahoma

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Federally Recognized  
October 3, 1950

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March 13, 2018

Ex Parte Filing

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

RE: Second Report and Order in the matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT 17-79) (Hereinafter, Second Report and Order) (Docket 17-79).

Dear Ms. Dortch,

Thank you for providing the United Keetoowah Band of Cherokee Indians in Oklahoma (Hereinafter, United Keetoowah Band) a federally recognized Indian tribe located in Tahlequah, Ok, the opportunity to comment on the WT Docket No. 17-79.

#### Tribal Areas of Interest

The United Keetoowah Band is a tribe that has taken seriously the preservation of our sacred sites, potential burial sites, village sites and a plethora of cultural resources that span across migration routes and the removal routes from our aboriginal lands in the Southeast Regions during the Indian Removal period. A devastating chapter in American history documents that an estimated 4,000 Cherokees died along the Trail of Tears, our Cherokee ancestors that perished due to exposure, malnutrition and disease remain interred along many of those routes.

While Congress designated the Trail of Tears as a National Historic Trail in 1987, honoring the memory of those who had suffered and died during the removal, the United Keetoowah Band, Historic Preservation Office, also has

a responsibility to consult with all federal and state agencies on and off Federal property. [These] resources are in our current territory and in our aboriginal lands, that form a band across the middle of America, in the Southeast Region of the United States and six National Forest.

### **Federal Trust relationship with the United Keetoowah Band**

THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, is a federally recognized Band of Indians, organized and incorporated pursuant to the Oklahoma Indian Welfare Act (49 § 976), and the Indian Reorganization Act (48 § 984), insofar as that Act applies to Oklahoma Indians and is a Self-Government tribe.

### **Existing Relationship with the FCC**

The United Keetoowah Band has had and currently maintains a strong working relationship with the FCC and would note that the current Tower Construction Notification System (TCNS) has been a successful program in the form of project notification and notes that the FCC has had a lead in Section 106 consultation.

While the United Keetoowah Band stands in agreement with the FCC and need for reform, many of the aspects of the existing program and the overall effectiveness of the TCNS program has great potential to be strengthened and standardized with proper mitigation through official Government-to-Government consultation.

### **Concerns with the Docket 17-79**

Upon receipt of the *Second Report and Order*, reading the Notice of Proposed Rule Making (NPRM) in Docket 17-79, there are alarming components of this proposal that impedes on the Trust Responsibility with Indian tribes, a statutory policy that governs Federal-Indian relationships and has been reaffirmed by Congress.

To propose a change in FCC policy that would alter the definition of a “Federal Undertaking” and “Major Federal Action” terms that have already been defined (*see 36 CFR Part 800.16 (y)*) and (*see 40 CFR 1508.18(a)*), therefore the FCC has no legal authority to alter or change this definition, without proper consultation.

While the United Keetoowah Band agrees that a level of standardization regarding “review fees” stand in need of a revised fee structure, the contents of Docket 17-79 in [it’s] entirety cannot be addressed without going through the formal process of an official Government-to-Government consultation with the Tribal Nations.

The United Keetoowah Band stands ready to fully engage with the FCC in Meaningful Government-to-Government consultation per the guidelines that have been published by the Advisory Council on Historic Properties (ACHP) “*Consultation with Indian Tribes In The Section 106 Review Process: Handbook*” and Executive Order 13175.

### **Executive Order 13175**

Executive Order 13175 which reaffirms the Federal government's commitment to tribal sovereignty, self-determination, and self-government to ensure that all Executive departments



and agencies consult with Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities.

As stated in Section 3 of Executive Order 13175: *Policy Making Criteria*

“In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications....”

“in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.”

As stated in Section 5 of Executive Order 13175: *Consultation*

“(a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications”

### **National Historic Preservation Act (NHPA)**

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties. The review process mandated by Section 106 is outlined in regulations “Protection of Historic Properties” 36 CFR Part 800 was issued by the ACHP and became effective in 2004.

### **36 CFR Part 800 “Protection of Historic Properties”**

“Section 101(d)(6)(b) states of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be effected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribes or Native Hawaiian shall be a consulting party.”

“800.2 (c) Consultation with an Indian tribe must recognize the government to government relationship between the Federal Government and Indian tribes.”

“800.3 (a) *establish undertaking*. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16 (y) and if so, whether it is a type of activity that has the potential to cause effects on historic properties.”

“800.16 (y) *Undertaking* means a project, activity, or program in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”

“800.14 (c) *Exempted Categories (3) Consultation with SHPOs/THPOs*. The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.”

*“800.14 (F) Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives. Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.”*

#### **40 CFR 1508.18 Major Federal action**

*“(a) Actions include new and continuing activities, including project and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; **new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals**” (emphasized).*

*“(b) Federal action tend to fail within one of the following categories; (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq. (2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon future agency actions will be based.”*

#### **Tribal Listening Sessions**

Per the guidance and statutory requirements that have been cited, the meeting held in various locations including a listening session held at a public event (NCAI), I attended the listening Sessions hosted by the Rosebud Sioux Tribe in South Dakota, and attended by Chairman Pai, the second Session that I attended was held in Broken Arrow, Oklahoma. At both gatherings, a member of the attending tribes confirmed with the FCC that those sessions were not an Official Government-to-Government consultation, to which tribal leadership would have received a formal invitation and an agenda that had the intent to produce an agreement/results, nonetheless these meetings served as an inadequate source of tribal views in the proposed NPRM.

The United Keetoowah Band would like to go on record that Docket 17-79 lacks balance for tribal views and Industry, and that the opinions based on the results of these listening sessions are not reflected in this illegal document under the terms and labeled as Tribal Consultation.

#### **Anecdotal Complaints from the Cell Tower Industry**

Streamlining includes all parties. The statistics and results used to caliber the industry complaint against the tribes do not provide a clear analysis for a quantitative process to view all of the variables that are available. For example, what were the types of projects used to determine these percentages and how many small cell projects were calculated in the numbers. How many projects were used in this analysis that were in an area with less the likelihood of cultural resources (existing structures, metro areas etc.). There is not enough information nor is there a balance between both the Tribal Nation and the Industry to have an accurate accounting.

#### **Discriminatory components**

The Tribal Nations' views and issues that were stated in the listening sessions were not presented in this document, and to eliminate the tribal review process while maintaining the current state zoning and the SHPOs historic property review goes without saying and is broadly discriminatory.



## **FCC Meeting in Washington D.C.**

First, after receiving a copy of the *Second Report and Order* on March 1, 2018, and having time to review Docket 17-79, the United Keetoowah Band has never been formally invited to an official Government-to-Government consultation to discuss the NPRM.

Second, with the notice that the FCC Commission would be voting to adopt the policy changes on March 22, 2018, as the Tribal Historic Preservation Officer, I am commissioned by confirmation of the United Keetoowah Band of Cherokee Indians In Oklahoma Tribal Council to manage matters that involve the NHPA, NEPA and NAGPRA.

Being that there had not been an adequate amount of time between the issuance of the *Second Report and Order* and the time that [it] will be voted on. The FCC abrogated the existing laws that would have ensured proper consultation. The United Keetoowah Band THPO and Executive Officer immediately responded and arranged a meeting at the FCC building in Washington, D.C.

### **March 14<sup>th</sup>, 2018- Meeting with Commission Carr**

Myself, Sean Nordwall, Executive Director for the United Keetoowah Band, representatives from the Pawnee Nation of Oklahoma and the Fort Belknap Indian Reservation met with Commission Carr. I can only speak on behalf of the United Keetoowah Band.

The first point of order was the timeline that has been allowed for the vote on the NPRM, and the lack of Tribal Consultation. The point was made that the tribes have had a long-standing relationship with the United States and have followed the guidelines that have been established to ensure a working relationship with the FCC as a federal agency.

The difference of interpretation regarding Tribal Consultation was discussed in detail, as well as the listening sessions that were labeled as Tribal Consultation. A declaration was made that we stand ready to work with the FCC through formal Government-to-Government consultation.

The tribes requested that the vote on the "*Second Report and Order*" be postponed until the Tribal Nations have been had the opportunity to properly consult.

According to Commission Carr, his understanding was that the new rules would only apply to the Small Cell (pizza box) and that the normal review process would remain the same. Even though I reiterated his understanding on how the tribes would be affected, further consultation with a different branch of the FCC would reveal a different understanding of the proposal (*see Meeting with ONAP and Wireless Bureau*).

Commission Carr chose to stand on the FCC's interpretation of Tribal Consultation.

### **March 14<sup>th</sup>, 2018 – Meeting with Chairman Pai**

Myself, Sean Nordwall, Executive Director for the United Keetoowah Band, representatives from the Pawnee Nation of Oklahoma and the Fort Belknap Indian Reservation met with Chairman Pai. I can only speak on behalf of the United Keetoowah Band.

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relationship with the United States and have followed the guidelines that have been established to ensure a working relationship with the FCC as a federal agency.

The difference of interpretation regarding Tribal Consultation was discussed in detail, as well as the listening sessions that were labeled as Tribal Consultation. A declaration was made that we stand ready to work with the FCC through formal Government-to-Government consultation.

The tribes requested that the vote on the NRPM be postponed until the Tribal Nations have been had the opportunity to properly consult.

Chairman Pai did not have enough time to remit any significant statements, due to the time restraint and being rushed to another meeting, however, for the record, the verbal message was relayed and well received (politely).

### **March 14<sup>th</sup>, 2018 – Meeting with Commissioner Clyburn**

Myself, Sean Nordwall, Executive Director for the United Keetoowah Band, representatives from the Pawnee Nation of Oklahoma and the Fort Belknap Indian Reservation met with Chairman Clyburn. I can only speak on behalf of the United Keetoowah Band.

In the meeting with Commissioner Clyburn, the tribes were well received and the same statements that were made in the previous two meetings were made, however, Commissioner Clyburn agreed that the process of Government-to-Government consultation was not practiced, which gave the delegation the opportunity to answer her in detail of what a proper the tribes in attendance considered a Government-to-Government consultation when she asked.

Commissioner Clyburn did make us aware that the adoption of the proposals in Docket 17-79 would be voted on at the Committee meeting on March 22<sup>nd</sup>, 2018.

The Candor was great, and the dialogue was very informative for both parties. All information was well received.

### **March 15<sup>th</sup> – Meeting with the ACHP**

Myself and Sean Nordwall met with representatives of the ACHP Office of Native American Affairs Valerie Hauser (Director) and William Dancing Feather (Native American Program Analyst). Our concerns were well received and our understanding of the existing statutes that apply to the *Proposed Rule Making* and *Government-to-Government consultation* were reaffirmed.

### **March 16<sup>th</sup>, 2018 – Conference Call with ONAP and Wireless Bureau**

Myself, Sean Nordwall and representatives from two other Tribal Nations engaged in a conference call with the Office of Native Affairs and Policy (ONAP) and the Wireless Bureau.

On the call, the same inquiry was made by the new tribal delegation regarding the FCCs interpretation of *Tribal Consultation*. The majority of those on call attended the “listening sessions” and instrumental in the development of Docket 17-79.

We were also seeking confirmation from this branch of the FCC, who were instrumental in the development of the “*Second Report and Order*”.



The tribal delegation was advised that the new proposal would also apply to new construction of towers under 50' with the potential to be extended an additional 10%, which would make it 55' and would involve ground disturbance. With the Regional permitting that *Industry* would be using would eliminate reporting to the TCNS system and would require "*self-permitting*" to the FCC, which would then begin an investigation, should any of the tower construction by *Industry* break the rules, the honor code has a risk of being avoided.

The tribal delegation was also informed that the FCC stands by the existing Tribal Consultation policy, and I asked if this policy was formally established and posted on their website for review and was advised that no "formal" policy existed, which further supports Commissioner Clyburn's statement.

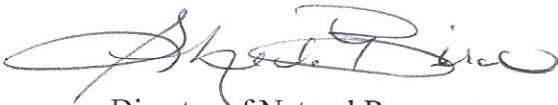
The tribal delegation was also advised that the "*Industry*" would be the ones to determine if the Tribal Nations would meet the criteria established and qualify to review a project in the case that posed risk to a cultural resource yet did not know how the determination would be made on who would consult on these individual projects. Clearly the *Industry* nor the SHPO have a true cultural perspective to make those determinations.

### **In Closing**

The United Keetoowah submits this comment with great concern. As we have cited all of the federal regulations to substantiate our concerns for lack of consultation, we have also established that break in communication within the FCC pose detrimental results to our cultural resources protections on our sacred sites and the resting places of our ancestors.

We thank you for the opportunity to submit this comment on behalf of the United Keetoowah Band of Cherokee Indians In Oklahoma.

Sheila Bird,



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