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

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

Petition for Reconsideration

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Table of Contents

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Summary

This Petition asks the Commission to extend the conclusions it reached in its March 30, 2018 Order to the category of structures between 50 ft. and 199 ft. This tweak to the rules not only implements the analysis of the Court of Appeals in CTIA v. FCC, but also follows logically and necessarily from the Commission's findings.

The Commission did not articulate in the Order why tribes should not be required to identify with more precision the actual areas of historical concern to them, based on verifiable historical facts. To leave the areas of concern grossly overbroad as they are now will simply add weeks or months of unnecessary delay to the review process and waste the time of everyone involved in the review process (SHPOs, federal officials, Commission staff, and tower proponents) except the tribes who have claimed these wide areas. They are the only ones who can simply ignore notices sent to them regarding sites.

The Commission's experience with this Docket should also underscore the need for clarification of when contacts with a tribe on site construction issues must be handled on a sovereign to sovereign basis or as just an information request or commercial arrangement. The

Commission stretched too far to find a basis in Tribal Policy Statement to put these matters on a sovereign to sovereign pedestal.

PTA-FLA's Petition for Reconsideration

PTA-FLA, Inc. ("PTA") hereby petitions the Commission to reconsider its March 30, 2018 *Second Report and Order* in this Docket (the "*Order*") in a few respects. Foremost among these is that the Commission should have extended its "no federal undertaking" conclusion to embrace all tower structures that do not require ASR registrations or environmental assessments. As will be explained below, there is no statutorily relevant distinction between a 50 ft. tower and a 199 ft. tower for purposes of what constitutes a federal undertaking.

At the outset, however, it is important to acknowledge the enormous step forward the Commission's action here represents for the tower construction and deployment industries. PTA was one of the first tower construction entities to alert the Commission to the tribal fee situation which was rapidly spiraling out of control. Without deliberate action by the Commission, a practice of allowing more and more tribes to demand higher and higher fees just for reviewing proposed sites had become a major obstacle to rapid and cost efficient deployment of towers both large and small. By confirming once and for all that consultation with tribes regarding proposed constructions does not obligate the proponent to pay tribes a fee, the Commission at one stroke both eliminated a large and wholly unjustified cost element from the tower construction ledger and sped up the consultation process. This will redound directly to the benefit of the public in lower costs and better service. And the Commission did this in a manner that affirmatively sought out and respected the input of the tribes.

To be sure, some tribes who were misusing the consultation fee process will be incensed by the loss of this revenue stream. At least one such tribe has already taken the position that the mere sending of a TCNS notice to the tribe about a proposed construction constitutes a "contract" with the tribe that obligates the proponent under "tribal law" to pay the tribe a fee. This position, which has no basis in the laws of the United States on the formation of contracts, shows the lengths to which tribes are willing to go to try to perpetuate the windfall revenues that site review fees represented. It took some fortitude for the Commission to stand up here for what is clearly the right call in the face of bitter complaints from heretofore advantaged representatives of a historically disadvantaged group.

The other procedural measures adopted by the Commission in the *Order* will also serve to speed the process significantly, and the exclusion of structures less than 50 ft. tall from the Section 106 review process will help enormously by eliminating wholly unnecessary reviews of the kinds of small structures that will be needed in the tens of thousands to implement 5G service. So the *Order* has much to offer in the way of speeding the creation of the infrastructure needed for next generation spectrum access. But it ignored the equally, if not more, compelling needs of rural tower constructors providing the same network improvements sought by 5G for our country's rural citizens who have been described as being on the other side of the digital divide.

I. Construction of Medium Sized Structures is Not a Federal Undertaking

The Commission undertook a lengthy analysis in the *Order* of why the building of tower structures no taller than 50 ft. (small towers) does not qualify as a "federal undertaking" in the parlance of Section 106 of the National Historic Preservation Act or a "major environmental action" under the National Environmental Protections Act. The Commission correctly observed that the standards applicable to the two acts have been interpreted to be generally coextensive in the context of the historic review process. (*Order* at Para.86). There are three critical difficulties with the Commission's analysis. First, the Commission did not correctly read the D.C. Circuit's key 2005 interpretation of the meaning of a "federal undertaking" in *CTIA-The Wireless Association v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (hereafter, "*CTIA*"). Second, there is no reasoned basis to distinguish a 199 ft. tower[1] from a 50 ft. tower with respect to its federal undertaking status; neither tower requires any more or less federal involvement than the other. And finally, the Commission did not acknowledge the pressing need for taller towers in the provision of service to rural communities. While 5G roll-outs are certainly important, the availability of any service *at all* in rural areas often depends on the construction of taller towers. Those towers are typically more delayed than smaller structures by the Section 106 review process, so there are pressing practical grounds for including such under-200-feet towers in the category of non-federal undertakings.

[1] For purposes of this discussion, we will deem any tower that requires ASR registration because of proximity to an airport in the same category as a 200 ft. tower – presumptively a federal undertaking because of the ASR process. There could obviously be some argument regarding whether the mere registering of a tower by a tower constructor (which requires nothing more from the FCC than the computerized assignment of a registration number) constitutes any sort of "undertaking" by the government.

A. The Court's Analysis of Federal Undertakings.

In *CTIA*, the Commission articulated the same two-pronged bases for its treatment of tower construction as a federal undertaking as it followed in the *Order*: for non-site specific licenses, (i) is ASR registration required for the construction and (ii) does the FCC exercise its "limited approval authority" for a site when an environmental assessment must be submitted in connection with a construction activity? The Court addressed this analysis directly. It had no trouble finding that where a tower registration is required, there is a federal approval. *CTIA* at pp 113-114. The Commission had suggested that an undertaking occurs "at least" where a registration is required, but, in a footnote, the Court made it clear that a federal undertaking under the ASR prong is present *only* when tower registration is actually required. *Id.* at footnote 4. The Court plainly based its decision on the assumption that the "vast majority of towers" are not covered by tower registrations, do not involve federal undertakings, and therefore are not covered by the National Programmatic Agreement. *CTIA* at footnote 4. In the ensuing years the Commission proceeded to ignore the Court's analysis which had severely limited the scope of FCC actions that constitute a federal undertaking.

Similarly, the Court found that FCC review and approval of environmental "assessments" is indeed a federal undertaking. But environmental "assessments" requiring FCC review and approval of a site are undertaken in only a very small handful of situations. Most often, the tower proponent is required itself to determine whether there is any potential adverse impact on the environment, and if there is not, the FCC conducts no environmental review whatsoever. Under Section 1308 of the rules, the FCC reviews an environmental assessment only when the proponent has identified circumstances that raise the potential that there could be a significant effect on the environment. The process that the proponent goes through to determine that there

is (or is not) a potential significant effect cannot itself be an "environmental assessment" since, under Section 1.1308 of the rules, the FCC's review of an environmental assessment begins *after* a proponent has identified characteristics of a site that require such a review. Prior to that, the analysis of any environmental/historical considerations is all done by the proponent – not the agency.

The Court explicitly considered the Commission's "limited approval authority" in the environmental realm to be exercised only in the context of reviewing environmental assessments submitted by a proponent that provide a detailed analysis of potential environmental effects. *CTIA, supra,* at 114. The *Order* failed entirely to acknowledge that Court assumed a narrow scope of FCC approval limited to these situations. The Commission articulated no reason why mid-sized towers (50 – 199 ft.) should be deemed to require any more environmental assessment than smaller towers, and none appears.

B. There Is No Legal Distinction Between 50 Ft. and 200 Ft. Towers for Federal Undertaking Purposes.

At Paragraph 45 of the *Order*, the Commission indicated that it was not revisiting its earlier analyses regarding the federal undertaking status of structures which are taller than 50 feet. The Commission seemed to indicate that because it was considering only smaller structures in the *Order*, the Section 106 requirements would continue to apply to structures between 50 and 200 feet until the Commission determines otherwise. But this straddle cannot be logically sustained, nor should it be. The Commission's well-articulated analysis of why 50 ft. towers built to support geographically licensed structures cannot possibly be "federal undertakings" applies with equal force to 199 ft. towers built for the same purpose. And such a tower raises neither more nor less environmental concerns than 50 ft. ones. Accordingly, while the

Commission indicated that the treatment of 50 – 200 ft. towers remains an open issue, it has in fact been resolved by the Commission's own thorough analysis of what constitutes a federal undertaking, a concept that the Commission was found to be, if anything, *more* expansive than a "major environmental action." Given the Commission's articulation of the pertinent standards, there remains no sustainable basis for treating medium-sized towers any differently than small ones. Not to do so imposes significant burdens without any attendant benefits.

As noted above, the Court identified a "federal undertaking" by reference to the requirement to file an ASR and the need for the FCC to conduct an environmental assessment. Although the Court did not rely on another distinct ground in its analysis of federal undertakings, the Commission, at Para. 85 of the *Order*, did. Section 106 of the NHPA requires a Federal "independent agency having authority to license any undertaking" to take into account the effects of the undertaking on historical sites "prior to the issuance of any license." 16 U.S.C. Section 470f. (emph., added). Congress could not possibly have intended Section 106 to apply to geographically defined, non-site specific licenses because the Commission cannot even know where the proposed sites are until long *after* the licenses have been granted. Because the Section 106 process must be tied to a licensing activity that occurs prior to, and thus specific to, a given construction project, the mere fact that a site is constructed or used under the authority of a geographic area license does not, and could not constitute the federal "approval" which Section 106 encompasses. Rather, the Court's narrower view of what constitutes a federal approval – one which is related to a specific site – is the only view that makes sense under the "prior approval" language of the statute. The Commission agreed. This important point applies equally to towers of any size constructed pursuant to a geographic area license, not just small towers.

In the *Order*, the Commission detailed at length the relatively modest or negligible impact that towers 50 ft. and under could have on the environment as a justification for exempt treatment. The Commission has previously taken the position that it can exempt from Section 106 review certain categories of radio facilities that would otherwise fall under its duty to evaluate federal undertakings, as broadly defined, for adverse effects. The Commission has, under this exemption authority, exempted mobile phones, unlicensed radio stations, and unintentional radiators. National Programmatic Agreement at Section II.A. The FCC has not thoroughly articulated the basis on which such exemptions would be permissible if the use of such a radio transmitter on a structure was otherwise deemed a federal undertaking by virtue of it being "authorized" by the FCC. At Footnote 170 of the *Order*, however, the Commission indicated that it has never treated deployments of signal boosters or Wi-Fi facilities as federal undertakings because in those cases the authorizations are "for the use of spectrum -- not the deployment of infrastructure." However, all geographically licenses are *also* authorizations for "the use of spectrum" – the licenses say nothing at all about the infrastructure necessary to actually utilize the spectrum. In both cases the facilities used in transmission are typically built at sites unknown to, and unapproved by, the Commission. And there is, of course, no difference in the electromagnetic transmissions: Wi-Fi can be deployed campus wide on poles or towers and licensed spectrum can be deployed in plastic boxes in the home (Femtocells).

PTA agrees that erection or use of structures under 50 feet in height and construction of facilities on which unlicensed operations or white spaces operations are mounted should not be deemed to be federal undertakings. But the same reasoning which exempts those structures applies with equal force to structures intended for geographically licensed spectrum use which are less than 200 feet tall and are not near airports. In those cases, there is exactly the same

degree of federal involvement as with Wi-Fi installations and structures shorter than 50 ft.: none. The FCC simply authorizes the use of the spectrum and takes no part whatsoever in the approval of the particulars of where or on what structures the spectrum is put to use. The only difference between a 199 ft. tower and a 50 ft. tower is height; there is no difference at all in the degree of federal involvement which might render one a federal undertaking and one not an undertaking.

In sum, there is and should be no distinction between smaller towers and towers over 200 ft. for purposes of determining whether a federal undertaking or major environmental action is involved. Because there is no difference at law between the two, the Commission should have accorded non-federal undertaking treatment to all towers that do not require ASR registration or an environmental assessment by the Commission under Section 1308.

C. There are Compelling Public Interest Reasons to Exempt Structures Between 50 and 200 Ft.

The Commission detailed in the *Order* the several reasons why removing structures lower than 50 ft. from Section 106 review was in the public interest. It relied primarily, however, on the need to remove barriers to construction necessary to deploy 5G facilities speedily. *Order* at 14 and ff. While the roll out of 5g facilities in urban areas is clearly important, the Commission flatly ignored the equally compelling case for rolling out not only 5G but 4G and even 3G service in many parts of rural America. The Commission has regularly acknowledged the critical need for significant build-out of infrastructure in rural America in order to ensure not only basic wireless broadband deployment but also, in some cases, a first wireless voice service. *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 18 FCC Rcd 20802 (2003); *Bringing Broadband to Rural America: Report on A Rural Broadband Strategy*,

24 FCC Rcd 12791 (2009). Various make-ups of the Commission over the last twenty years have all espoused prioritizing the delivery of service to rural areas, both by licensing policies and by distribution of USF funding to support build-outs for which there is no commercial business case. The *Order* here represents a step back from that long and consistent policy.

In rural America, the wide spaces and broadly dispersed populations absolutely call for towers that are taller than 50 feet. They must be that tall in order to deliver a signal to the widest possible areas which include only small pockets of population. This is an economic necessity if service of *any* kind is to be provided to these communities, much less high speed broadband and 5G wireless service. In the same way that 5G requires densification of the network in urban America to meet data-driven capacity needs, densification in rural America is needed for the same reasons – it's just that densification there involves cell splits with large towers rather than microsites on streetlights and telephone poles. By focusing on mostly urban, small tower 5G build-out requirements in the five years ahead, the Commission turned its back on the history of poor or non-existent wireless service to *rural* America – a deficit which can only be remedied by the rapid deployment of taller towers.

As PTA noted in its comments in the first phase of this proceeding, the application of Section 106 procedures to towers under 200 ft. is a major impediment to construction. The exorbitant fees charged by tribes and the delays attendant on tribal review have been one major problem which the Commission has thankfully addressed. But rural tower constructors face all of the other impediments faced by 5G constructors. The historical and environmental review process is often time-consuming and expensive and more than 99% of the time results in no findings of potential adverse effects. This process also involves an unfunded state burden on State Historical Preservation Officers who must devote precious time and resources to reviewing

proposed structures which should not be deemed federal undertakings. Federal officials such as Fish and Wildlife personnel are similarly routinely called upon needlessly to comment on proposed sites which will have no more impact than a 50 ft. site. If towers under 200 ft. tall serving non-geographically licensed operators were deemed not to be "federal undertakings," tower constructors would be heavily incentivized to build towers limited to that level rather than erecting much taller towers. It is, of course, the very tall towers that create the greatest hazards to birds (due to the need to light them), to air traffic, and to rural sight lines. By putting under-200 ft. towers on the same non-federal undertaking footing as 50 ft. towers, the Commission would be speeding much needed service to rural America just as much as it will speed service to urban areas. It should revise its rule to deem structures built pursuant to non-site-specific licenses that do not require ASR registrations, are not on Tribal lands, and do not cause excessive human exposure to radiation the same way it treats the smaller towers – as not a federal undertaking and therefore not subject to Section 106 review.

To be sure, rural tower construction will still face unnecessary delays and expenses attendant on the local permitting process, just as small tower constructors do. But the Commission is taking steps to remediate that situation as well. It just needs to recognize that the needs and problems of rural populations and the companies who are trying to serve them must not be forgotten in the rush to deliver 5G service to urban areas.

II. The Areas Designated by Tribes as Being of Interest Must Rationalized

PTA pointed out to the Commission that the current tribal review process permits tribes almost unlimited discretion as to which territories they declare an interest in. As the Commission itself noted, some tribes assert an interest in entire states or regions, in most of

which the tribes have neither settled nor even passed through historically. Allowing the tribes such broad leeway, coupled with the implicit obligation to pay them fees for review of proposed constructions within their "areas of interest," virtually guaranteed that their declared areas of interest would expand to be as large as possible, unconstrained by any historical or factual predicates. We expect that the tribes' desire to review proposed constructions in areas where they have had no significant contacts will diminish quickly in the absence of fees being paid for such reviews, but there remains the obligation to seek input from tribes who very likely have no true connection with a particular site whatsoever.

PTA's May 3, 1917 Petition asked the Commission to require tribes to justify their declared areas of interest by some verifiable demonstration of actual connections of the tribe with those areas. If tower constructors just knew in advance what specific sites or particular areas are of legitimate concern to tribes, they could simply plan around those sites or areas and thus avoid problems from the outset. The Commission rejected this common sense suggestion in footnote 225 of the Order rather cursorily "in light of both the concerns raised by Tribal Nations and the other reforms we are making here." We assume that the "other reforms" are the clarification that fees are not payable for tribal reviews, but the Commission did not state what tribal "concerns" would justify continuation of unsupported claims to vast areas of interest. PTA suggested in its comment that concerns about specific sites sacred to tribes whose disclosure might compromise the site's integrity could be handled as special cases, but certainly no tribe could assert that entire states or counties covering thousands of square miles are so sacred that that the basis for their concern cannot be disclosed or narrowed.

The current practice of requiring consultation with tribes for patently over-broad areas of interest simply adds unnecessary work, delay, and expense for all concerned. And now that fees

are no longer being paid, one can anticipate that tribes will have no incentive to respond at all to requests for unpaid consultation about projects in areas of interest where they have no real stake. This will nevertheless require under the Commission's procedures a delay, followed by a follow up, followed by a Commission follow up to verify that they have no concerns with a site that should never have been designated as an area of interest in the first place. This makes no sense.

Similarly, the federal government's official register of tribes recognized as such reflects a number of tribes that have numerous branches or small sub-divisions. We assume that other than for matters pertaining to current reservations of these micro branches of major tribes like the Sioux or the Pueblos, the historical circumstance of tribes which relocated from settlements in the Eastern U.S. are unitary. The Commission should require there to be a single point of contact for tribes where the site involved would potentially impact all branches of the tribe. There is no reason to have five or ten different tribes separately express concern over a site which might affect a common ancestor.

III. Clarification of Sovereign Status of Tribes

The Commission stressed in the *Order* that it went to great lengths to communicate and receive input from American tribal nations on the matters in the *Order* that would directly affect them. The Commission cited the *Tribal Policy Statement*, 16 FCC Rcd 4078 (2000) as the basis for these consultations. However, the *Policy Statement* is actually not implicated by the Commission's clarification of the mandatory payment of fees for tribal consultations. The *Policy Statement* primarily applies to telecommunications-related activities that uniquely affect tribal lands. The only principle adopted in the Statement cited by the *Order* as applicable here is No. 2, which requires the Commission, to the extent practicable, to "consult with Tribal governments

prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources." Id. at 4081. Tribal "resources" are normally considered to include things like access to water and hunting and fishing rights. Certainly land underneath a parking lot, on a privately owned farm, or in a municipal waste facility hundreds or thousands of miles from a tribe's reservation can hardly be deemed a tribal "resource."

There is nothing wrong, of course, with the Commission explaining the process to the tribes and facilitating their input, but it need not be on a government-to-government basis. This distinction is important for constructors who deal with tribes as part of the mandatory consultative process. Tribes sometimes demand fees or other extraordinary accommodations from the constructors on a purely commercial basis like any service provider demanding payment. However, when an issue or a dispute arises, the tribes then sometimes don the mantle of a "sovereign nation" who does not deign to talk to mere commercial operators. This has happened, for example, when a constructor tries to negotiate a lower fee or a fee that has not been "approved" by the tribal council. Then the matter must suddenly be escalated to the highest levels of the U.S. government for sovereign-to-sovereign resolution.

To avoid this kind of whipsawing, the Commission should clarify that fees paid to tribes in the context of mutually agreed to contracts with tower erectors outside of a tribes own lands need not be negotiated as solemn matters of state but are simply commercial agreements between the tribes and private parties.

Conclusion

The Commission's Order was a major step forward in rationalizing the historical and environmental review process as it applies to structures where there is no substantive federal involvement. The Commission should extend its reasoning to 50 – 200 ft. towers so that the benefits of accelerated access to 5G services can be enjoyed by rural as well as urban Americans.

Respectfully submitted,

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