Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

Submitted By: Dated: June 4, 2018

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## PETITION FOR RECONSIDERATION

The Apache Tribe of Oklahoma (the "Apache Tribe") respectfully requests that the Federal Communication Commission ("FCC" or the "Commission") reconsider its May 3, 2018 Order entitled Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment ("May 3 Order"). The Petition is filed pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"), 47 USC § 405, and Section 1.429 of the FCC's rules. The Tribe has reviewed all the comments of other Native American tribes (collectively "Tribes") presented to the Commission, and agrees with, and incorporates, those comments in this Petition, but wishes to emphasize certain critical issues presented by the May 3 Order.

The Apache Tribe is not opposed to important technological developments. Nothing in the record or May 3 Order suggests that the Apache Tribe, or the other Native American tribes generally, have impeded the economic development of the United States or would prevent effective implementation of a 5G cellular network. Nevertheless, the May 3 Order undermines an important national interest --- preservation of historic lands and places --- purportedly to serve the national economic benefit. In doing so through the May 3 Order, the Commission has stripped the relevant statutes and policies of all meaning.

Through this Petition, the Apache Tribe respectfully requests that the Commission reconsider the May 3 Order for two principal reasons. First, the order suffers from fundamental contradictions. For example, the Commission assumes that a perceived lack of conflict regarding site locations means that the consultation process is unnecessary. To the contrary, limited conflict demonstrates that the consultation system is working well. Second, the order resulted from a flawed procedural process, in which the Commission eschewed actual, meaningful consultation with the Tribes in favor of "listening sessions," conference calls, and other gatherings in which the Tribes were told what was going to happen rather than having an opportunity to voice their

concerns with the Commission's proposed course of action. This Petition is not brought in violation of any of the grounds for dismissal set forth in 47 CFR 1.429(l)(1)-(9).

Accordingly, and for the reasons set forth more fully below, the Commission should vacate the May 3 Order or, at a minimum, limit any rule change to just those specific and limited alleged abuses identified by the Commission.

## I. SUMMARY

The Apache Tribe is a small tribe in southwestern Oklahoma forcibly removed from its historic home lands. For half a century, the Apache Tribe has relied on United States laws and policy that protect tribal sovereignty and culturally and spiritually significant sites on existing and former tribal lands. Until now, those federal laws and policies required applicants for federal licenses for telecommunications facilities to consult with Tribes to ensure that any construction both respects and preserves historic and cultural lands whether on or off existing tribal reservations.

The May 3 Order will inflict serious injury on the Apache Tribe because it undermines those protections. The Order is flawed because the Commission has no authority to exempt 5G networks from traditional and statutory consultation procedures. The National Historic Preservation Act ("NHPA"), 54 USC § 300101 *et seq.*, is definitive as to the consultation requirement for federal undertakings. It does not authorize the carve-outs defined by the Commission or allow the Commission to redefine unambiguous statutory terms. The Commission's analytical structure is indefensible. It balances the purported burden of the NHPA on applicants for federal licenses against the benefits of a 5G network to those same applicants. It ignores the impact upon Tribes.

The Commission is wholly incorrect, however, that this statutorily-defined burden is a problem that needs to be minimized. The consultation requirement is, in fact, a central *benefit* of

the NHPA, allowing impacted tribes to communicate directly with businesses at the outset of planned cellular infrastructure development, before a dispute arises. To the extent any balancing of interests is required under the NHPA, it has already been done. The consultation obligation is limited to those lands that are subject to the NHPA.

The Commission rests its decision primarily on the size of 5G components. While individual 5G network elements may be smaller than analogous components in the older cellular infrastructure, the 5G network will, according the Commission itself, be "dense", and promises to constitute an extensive, intrusive, constantly expanding infrastructure, wherever located. The limited statutory burden of consultation on sites subject to the Act is not material to the rollout of a communications network serving the entire country. Moreover, the fact that a small fraction of the consultations became more expensive than budgeted for a private actor, or that an even smaller fraction might become unexpectedly delayed, is also not material to the economic investment and benefit of the 5G network.

Even acknowledging that some isolated instances of abuse may have occurred, this does not support wholesale limitations on the Tribes' ability to be compensated for the burden imposed by an applicant. The Commission's description of the expected benefit and size of the 5G network undercuts its position. Imposing the burden of this expansion on all Tribes, instead of on the beneficiaries of this multi-billion dollar project.

Finally, the rule-making process that yielded the May 3 Order violated standing executive orders, the FCC's own policies, and historically established respect for tribal sovereignty. The Tribes were not actually consulted on this rule change; instead, they were just told what would happen. The Order does not even reflect the Tribes' position on these radical proposed changes,

to which they uniformly objected. For these reasons, explained more fully below, the Commission should reconsider the May 3 Order.

## II. STATEMENT OF INTEREST

Under the FCC rules, "any interested person" may petition the Commission for reconsideration of a final order, such as the May 3 Order. 47 CFR 1.429. The Apache Tribe is an interested person because the order specifically changes the regulatory scheme applicable to its interests, including flatly eliminating long-standing consultation obligations for construction of a dense national 5G network and otherwise changing the time periods and rights even for those structures still deemed subject to consultation. The Tribe is specifically injured because, as a small tribe forced off of its historic Tribal lands, it is entirely dependent upon the consultation requirement to protect its legacy land and history. Even apart from these substantive flaws, the FCC failed to follow its own procedures in obtaining tribal input during the notice and comment period, creating a flawed and incomplete record for judicial review.

## III. RELEVANT FACTS

The Apache Tribe of Oklahoma is a small Tribe with limited financial resources. Its aboriginal lands once included a great expanse of territory covering much of the Southern Plains of North America. After the U.S. Congress passed the Indian Removal Act of 1830, the federal government initiated a systematic government policy of conquest and division, forcing Tribal people off of their ancestral homes and into confined areas patrolled by the military. The Apache Tribe of Oklahoma was forced onto a parcel of land located in southwestern Oklahoma, and today their home base is in Anadarko, Oklahoma.

Although the people of the Apache Tribe of Oklahoma were forcibly removed from the lands where their ancestors had lived for thousands of years, they still retain deep religious, historic and cultural ties to those lands. After all, it is the soil where hundreds of generations of their

ancestors sleep. It is also the soil upon which they established their relationship with God and where their culture was given life.

It is often difficult to identify and gauge the long-term consequences that an adverse government order has upon the religious, historic and cultural identity of a minority people. So much has been taken from them, and all they have left are the religious, historic and cultural ties with the land.

The Apache Tribe of Oklahoma retains connections to its aboriginal lands and respectfully requests meaningful consultation with the federal government concerning anything, great or small, that may affect these lands. Congress has mandated protection of those interests if private parties, licensed by the federal government, seek to build on former tribal lands.

Throughout the May 3 Order, the FCC radically changes the procedure for approval and installation of cellular telephone infrastructure by amending FCC Rule § 1.1312. Prior to the May 3 Order, in order to construct wireless infrastructure on non-Tribal lands, the FCC, as mandated by the NHPA and the National Environmental Policy Act ("NEPA"), 42 USC § 4321 *et seq.*, required consultation with Tribes, regardless of size, regardless of whether the structure required a site specific license, or regardless of whether the structure needed to be registered pursuant to Section 303(q) of the Communications Act. 54 USC § 306108; 36 CFR 800, *et seq*. Over time, the Tribal right of consultation has acquired a specific meaning and is of great value to the Tribes. For its part, the Apache Tribe has always exercised those rights in good faith and has never impeded in any fashion the construction of the nation's cell phone infrastructure.

And, as the NHPA sets out, the Tribal consultation right is limited to properties that have already cleared substantial hurdles. Only those properties that have already been vetted as historic sites are subject to the consultation requirement. While the record has no indication of the

percentage of United States land that falls within that category, it is certainly not a substantial portion of that part of the United States that will host the 5G infrastructure. Through the May 3 Order, the Commission has now stated that, absent a site-specific license or a requirement that such a structure be registered pursuant to Section 303(q), the consultation requirements are waived unless the structures are an arbitrary size. May 3 Order, ¶¶ 37-41.

In implementing the May 3 Order, the Commission placed great weight on the fact that 5G towers are "smaller" without also analyzing whether the requisite "densification" of such "smaller" installations results in an equal or more intrusive imposition on historically protected land as compared to existing cellular network infrastructure. For the Commission's purposes, "small" is not tiny or minuscule. The Commission defines "small" as towers that are fifty feet high or even higher. The Commission further acknowledges that these towers will be placed in a dense and ever increasing web of infrastructure. May 3 Order at ¶¶ 38, 58. The May 3 Order nowhere explains how or why this web of fifty foot towers is less intrusive then macro towers, when it is obviously a greater burden on historic sites or land of great Tribal significance.

Even as to those structures that the Commission agrees must go through the consultation process, the Commission has stripped the process of its meaning. To begin with, the Commission has flatly barred any follow-up questions arising from the initial notice provision. May 3 Order at ¶ 70. Instead, the choice of information Tribes require is dictated by either the government rules or by the applicant. *Id*. Further, the Commission has shortened the time period for follow-up in the event that a Tribe is unable to promptly respond. Third, relying upon inaccurate and anecdotal information, the Commission has circumscribed the ability of Tribes to request reasonable compensation for the burdens imposed upon them by applicants. And the Commission has done so based on loosely supported findings to the effect that allowing Tribes to continue to have

consultation will somehow so burden a multi-billion dollar industry that the implementation of the 5G network will be impaired. Yet, these factual conclusions are unsupported and illogical.

Finally, the Commission's distinction between properties which require consultation and those that do not also defies logic. "Non-tribal" lands, although not located within a particular tribe's current geographic borders, still have deep importance. Tribal relocation was initiated by government decree and force, not volition on the tribes' part. Many tribes have sacred burial grounds and other sites of critical cultural importance that are located far away from the land to which they were forced to relocate. The ancestors of current tribe members are, in many instances, buried hundreds of miles away, but geographical remoteness in no way lessens the role that such sites play in a tribe's very identity. The fact that a sacred site is located on "non-tribal" land is not a proper delineating factor in whether or not consultation is required before the site is absorbed into the wireless infrastructure.

## IV. THE APACHE TRIBE STRONGLY URGES THE COMMISSION TO RECONSIDER ITS POSITION

### A. The Commission Has No Rational Basis To Exempt Dense 5G Network Construction from the Consultation Requirements of Federal Law

The May 3 Order effects a radical change in protections in the name of economic benefit. Not only is the supposed balancing of great economic benefit versus the rights of a Tribe not permissible, it is not even logical. The entire purpose of the NHPA is to prohibit such balancing.

#### (1) The Commission's Distinctions Supporting the Blanket Exemption Are Not Found in the Relevant Statute

The regulation implementing the statute reads: "The Section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the

undertaking on historic properties, commencing at the early stages of project planning." 36 CFR 800.1(a). It provides no room for determining different types of "undertakings" or federal projects.

Here, the Commission makes three primary findings to support its reading of the NHPA:

First, the most important factor to the Commission is apparently the size of the components of the 5G network. The Commission places inordinate weight, in fact the core of its reasoning, on the fact that components of the 5G infrastructure are likely to be smaller than macro towers. At the same time, it admits that the newer infrastructure will necessarily be quite dense. May 3 Order at ¶ 28. According to the Commission in the balance of the May 3 Order, this dense network of installation will almost certainly be more intrusive than the macro towers. In parts of the Order the Commission predicts a vast influx of towers, as tall or taller than fifty feet, in ever more dense clusters. *Id.* The Commission nonetheless, without analysis, asserts that these smaller components, no matter how dense or how distributed, will be of nominal impact on historic lands. *See, e.g.*, May 3 Order at ¶ 41 ("The FCC is skeptical that even in scenarios involving multiple small wireless facilities deployed on a single structure or pole, the resulting aggregate deployment would resemble macrocells or towers of the sort the Commission generally envisioned in its past public interest analysis.").

As such, the very basis of the size distinction is irrational. The cellular network is quite likely the largest engineering structure in the country, a vast interconnected series of towers, antennas and wires. If one measures each component alone, one can always find a small component. For example, the actual antennas on a macro tower are, of course, much smaller than the tower itself. If one measures the impact of each component, a small impact can always be found, just as throwing down one piece of litter will not change the impact on overall city streets. But laws against littering exist to legislate against the overall impact, not just a single piece of

litter. Effectively, an unlimited number of fifty foot (or even higher) towers placed on historic properties will have an even greater impact than isolated macro towers on the same property. And the Commission makes no effort to consider related infrastructure, such as fencing and security, as well as what appears to be ongoing and constant construction and maintenance activities for the 5G network.

Second, the Commission also makes much of the nature of the "new" technology and how that new technology could not have anticipated a 5G network. According to the Commission, the original drafters of the NHPA could not have anticipated the "new" 5G technology, therefore the restrictions they imposed should not apply. *See, e.g.*, May 3 Order at ¶ 41. As a general matter of legal analysis, this approach is unpersuasive. Whether it is the First Amendment as applied to internet, or negligence laws applied to self-driving cars, courts and agencies routinely apply existing laws to new technology. Until now, to the best of the Apache Tribe's knowledge, no court or agency has ever suggested that changes in technology operate to nullify legal requirements. The First Amendment applies to the internet even though the country's founders did not "envision" the internet. Also, as a matter of specific analysis regarding the NHPA consultation requirement, the Commission is wrong to distinguish between old and new technology. The NHPA of course makes no such distinction, and it has been applied since its implementation in 1966 to constantly evolving technology. However, changes in technology are precisely what should be addressed through meaningful consultation. If the new technology requires a dense network of towers on historic land, and this is a new challenge, the right method of addressing that challenge, a method mandated by Congress, is to have the stakeholders creatively address those challenges.

Finally, the Commission offers a legal distinction to justify the blanket exemption. The Commission asserts that the 5G towers are not a federal undertaking because they are licensed by

area and not on a site by site basis and do not need to be registered under Section 303(q). Again, the NHPA offers no authority for distinguishing between and among different types of federal undertakings based on the type of license it grants. The Commission concedes that the 5G network is licensed by the FCC; prior authority and common sense all confirm that the construction of the network is a federal undertaking.

**(2) The Commission's Reservation of the Consultation Requirement for Tribal Land Does Not Save the May 3 Order**

The Commission justifies its position by noting that 5G consultation remains for Tribal land, suggesting that its position is a compromise between extreme positions. The Commission still requires applicants to build 5G structures on Tribal land to engage in consultation. This is a hollow distinction and a sign that the Commission is not addressing the core issue correctly. The Apache Tribe has jurisdiction over its current Tribal land and has tools to address preservation of cultural and historic sites. The consultation requirement is an enhanced method of protection for Tribal land. For non-Tribal land, given the federal government's treatment of Native Americans, consultation is the primary protection. A Tribe that has been forced from its historical home may, for example, still have ancestors buried elsewhere. It is non-Tribal land, land that the Apache inhibited for hundreds if not thousands of years, that requires NHPA protection. If the Tribe demonstrates that specific land is deserving of protection, the fact that it is not Tribal land should not strip the Tribe of the ability to protect its heritage.

**(3) The Commission's Interpretation is Inconsistent with the Remedial Purpose of the NHPA**

The Tribe does not believe that the NHPA is ambiguous. However, even if the Commission was correct that it does in fact have the discretion to interpret the consultation obligation, such interpretation should be done consistently with the stated purpose of the NHPA and the FCC's own policies on Tribal sovereignty. The NHPA was implemented to address the need to protect

our nation's heritage, a key component of which is the culture of its Native American Tribes, from rapidly expanding federal development. The primary focus, therefore, should be on protecting the interests of those whose heritage was endangered, not the interests of those who were driving the developments that threatened that heritage.

The Commission instead is focused on the meaning of the statute for the applicant, *e.g.*, fifty foot, "small", or new technology, or whether or not it is licensed a certain way. However, NHPA and United States and FCC policy is concerned with the impact of the development on the historic property; a small fraction of the United States is carefully designated as protected. If for example, cellular infrastructure infringes upon a burial ground, the size of the installation is not material to evaluating its impact. The Commission's approach misses the mark. It must be concerned with the impact on the Tribe, not simply on the network.

**(4) The Commission is Not Entitled to Chevron Deference**

Nor is there any basis to defer to the Commission's interpretation of the NHPA. The NHPA is not administered by the FCC and, as such, the FCC's view or interpretation of the statute is not entitled to deference.

**(5) The Alleged Burden on the Process from Existing Procedures is Minimal and the Economic Case for Change is Without Serious Support**

The stated driving force behind the rule change is to speed up the rollout of the 5G network. Even if that matters, the May 3 Order does not support the assertion of economic necessity. The NHPA's consultation requirement is portrayed as both unnecessary and burdensome, contradictory assertions unsupported by any actual meaningful citations to the record or reliable factual analysis.

**(a) Historic Absence of Conflict Between the Tribes and Private Industry Does Not Demonstrate A Lack of Effectiveness**

The Commission suggests that consultation is rarely needed, citing to the fact that very few small site installation locations have actually changed as a result of consultation. May 3 Order at ¶¶ 42-43. This conclusion is Kafka-esque for three separate reasons.

First, of course, the massive rollout of a dense network of 5G components has just begun, so the impact will necessarily increase dramatically and result in additional consultation.

Second, and critically, the Commission assumes that the participants in NHPA consultation do not take their obligations seriously. If a carrier is bound to meaningfully consult with a Tribe, it is more likely to be respectful of such historic properties and less likely to enter into a dispute. Analogously, the Commission's reasoning suggests that if few drivers are apprehended exceeding the speed limit on a road, the speed limit is ineffective and may be simply eliminated without impacting road safety. Finally, consultation by its nature is often undocumented and informal. Tribal experience is that the wireless carriers often make informal contact to resolve the issues. The fact that the Commission is aware of limited conflict suggests that the process is working well, not that it is unnecessary.

**(b) <u>Addressing Tribal Concerns will not materially slow the rollout of the 5G network</u>**

While saying that consultation rarely results in relocation, the Commission also asserts, in a contradictory finding, that forced consultation is a tremendous burden on the trillion-dollar telecommunications industry. One cannot logically assert that consultation is unimportant because it has no appreciable impact on the location process, and also assert that it is so burdensome that it must be shoved aside. Leaving aside the central point that the alleged burden of consultation is the entire point of the NHPA, and that the Commission has also noted that the consultation virtually always results in an agreed placement, the claim of burden is not supported.

The Commission cites the alleged longer time period or increased costs, but without any context. Modest delays in consultation and cost are immaterial to the 5G network.

Critically, the examples provided by the Commission are unpersuasive. The Commission highlights alleged delays in setting up temporary antennas as part of a Super Bowl. According to the Commission, given the urgencies of the event, the delays could have resulted in public disruption. With all due respect, this is not a serious argument. First, the Super Bowl is scheduled years in advance. If the carrier was unaware of Super Bowl scheduling, it should be condemned for incompetence rather than scrapping an entire statutory scheme. Second, if ensuring rapid ability to set up at a public event is really a problem, then the Commission can create an expedited process for temporary antennas at major sporting events or concerts. If this is the best example the Commission has, its position is truly irrational.

The Commission also expresses concern over the alleged need to negotiate over what it anticipates to be a vast increase in the volume of infrastructure. It is concerned that actually addressing this vast increase will unnecessarily burden the applicants and the Commission. Yet, this concern is an admission that the consultation is desperately needed. It can't be true that a sizable increase in the cellular infrastructure on historic land means that consultation is less important. Instead, it means that the relevant stakeholders must increase communication, and perhaps find creative methods of addressing this new technology.

### B. The Commission's Alteration of the Consultation Schedule Strips the Tribes of Their Ability to Have Any Role in the Siting Decisions

The Commission revamped the consultation process for those structures that it concedes are still subject to that process. By limiting the flow of information, shortening the time periods, and shifting the burden of applications onto the Tribes, the Commission has effectively eliminated the consultation requirement even for purportedly covered structures.

### (1) Follow Up Requests Are Reasonable

The Commission's new rule limits the ability of Tribes to follow up on information provided in an application. May 3 Order at ¶ 71. Of course, the nature of consultation is a free flow of information. It is entirely inconsistent with the concept of consultation to say that the information provided is a take it or leave it situation.

### (2) Shortening Time Periods Serves No Purpose Except to Limit The Ability of Tribes to Engage in Consultation

The Commission also shortens certain relevant time periods. May 3 Order at ¶ 75. The Commission offers no record support for the assertion that the shortened time periods will materially advance the consultation process. Instead, it results in an additional burden on the Tribe in responding to an application.

## C. The Commission's Attempt to Regulate The Burden of the Consultation Process Places Unfair Costs on Tribes

The Commission appeared to be particularly concerned about fees placed on applicants for Tribes. While acknowledging that the application process imposed costs upon the Tribes, it still acted to lessen or even eliminate any ability of the Tribe to recoup costs imposed by applicants through the process. The Commission concedes it has no ability to regulate Tribal conduct, in light of principles of sovereignty. Yet, it establishes fixed rules on what a Tribe may or may not do in responding to an application. A small or impoverished Tribe asked to evaluate an application may indeed incur fixed or other costs regularly. The Apache Tribe believes that abuses are rare.

The Commission also has not accounted for success and developments in the consultation process. Over time, one of the positive developments in the consultation process is the professionalism of Tribal authorities. Skilled tribal evaluators are able to rapidly resolve disputes and provide applicants important information. Both the Tribes and the industry benefit from that

high level exchange. Yet, laying the groundwork for such effective exchanges costs money. To flatly conclude that investment in such resources is wrongful or abusive is wrong.

### D. The Commission's Fast Track Process Resulted in an Incomplete Record and Procedural Unfairness

In its Tribal Policy Statement, the FCC memorialized its trust relationship with federally-recognized tribes, which "requires the federal government to adhere to certain fiduciary standards in its dealings with Indian tribes." *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078 (2000) ("Tribal Policy Statement"). As part of this Statement, the FCC reaffirmed its commitment to meaningful consultation with tribes concerning matters affecting them:

> 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.

*Id*.

Also, Executive Order 13175, which was issued to "strengthen the United States[']government-to-government relationships with Indian tribes," requires agencies to consult with tribal officials in the course of developing and promulgating any "regulation that has tribal implications." Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments*, 65 Fed. Reg. 67249 (Nov. 6, 2000)[1]; *see also* Executive Order 12875, *Enhancing the Intergovernmental Partnership*, 58 Fed. Reg. 58093 (Oct. 26, 1993) ("[T]o establish regular and meaningful consultation with State, local, and tribal governments on Federal matters that significantly affect their communities"); Executive Order 13007, *Indian Sacred Sites*, 61 Fed. Reg.

[1] "Policies that have tribal implications" are defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." *Id*.

26771 (May 24, 1996) (incorporating April 29, 1994 Executive Memorandum directing federal agencies to establish policies and procedures for dealing with tribal governments on a "government-to-government basis").

The FCC's rulemaking process with respect to the May 3 Order has not complied with the applicable Executive Orders, the FCC's own Tribal Policy Statement, or the historical respect afforded by the federal government to tribal sovereignty. The draft Second Report and Order issued by the FCC on March 1, 2018 ("Second Report and Order"), which was adopted in the May 3 Order, mischaracterizes the nature and extent of the FCC's efforts to fulfill its duty to consult with Indian Tribes before releasing its draft order. In the Second Report and Order, the FCC depicts listening sessions, briefings, conference calls, and delivery of remarks by a Commissioner at a conference attended by members of Indian Tribes as "consultations" within the scope of the FCC's consultative duty. Second Report and Order, ¶¶ 16-32. There are numerous examples of the fact that these instances, however characterized by the FCC, did not constitute meaningful consultation:

- A regional meeting was held in Broken Arrow, Oklahoma on July 24, 2017, at which FCC staff did not take meeting minutes, record the proceedings, or make comments part of the record. The meeting had no agenda or format. *Ex Parte* Filing of Muscogee (Creek) Nation, March 19, 2018, at 2.

- Commissioner Carr's attendance at USET SPF's Impact Week 2018, noted in the Second Report and Order[2], was a listening session and not a formal consultation, as it "did not include any substantive dialogue between the Commissioner and the tribal leaders." Comments of the National Congress of American Indians and the United South and Eastern Tribes Sovereignty Protection Fund, March 14, 2018, at 13-14.

- Neither the Second Report and Order nor the ultimately issued Order acknowledge that every single Tribe present at the FCC's listening sessions stated on the record their belief that the sessions were not consultations within the meaning of the FCC's consultative duty, and that the record of the January 24, 2018 conference call between the FCC and various Tribes reflects the same dissent. *See, e.g.*, March 15, 2018 Letter from Steve Bodnergreg,

[2] Second Report and Order at ¶ 30.

General Counsel of Pechanga Band of Luiseño Indians, to Secretary Marlene Dortch, at 3; *Ex Parte* Filing of Thlopthlocco Tribal Town, March 13, 2018, at 3.

The FCC is bound to conduct meaningful consultation with tribes before promulgating regulations that significantly impact the tribes. That consultation has not taken place in the course of the rulemaking that resulted in the May 3 Order.

A careful read of the Order demonstrates that the failure to meaningfully consult impacted the Commissions decision-making. The Commission alleged support for its decision all derives from the Carriers point of view. The Commission cites industry data for its claim of huge burden. *See, e.g.*, May 3 Order at ¶ 32. And, of course, the rule making process should hear from all interested parties. Yet, references to Tribal point of view are minimal and generalized. *See, e.g.*, May 3 Order at ¶¶ 84-86.

Accordingly, this Petition for Reconsideration should be granted and the Apache Tribe's viewpoint properly considered.

## V. CONCLUSION

With its May 3 Order, the Commission has seriously compromised Tribal rights in order to provide an economic benefit to applicants for federal licenses. In doing so, the Commission has turned the NHPA and principles of tribal sovereignty contained in the FCC's *own policies* upside down. By describing the rights under the NHPA as a burden, rather than a benefit, and dramatically overstating the impact of that benefit on multi-billion dollar corporations, it has stripped the NHPA consultation requirements of all meaning.

The United States of America is a land of laws with the specific intent to protect the rights of all the people. The United States is unique because it protects the rights of the financially weak, as well as its minority populations. Tribal Nations are minority populations. Although they do not have the strength of the majority, they are still entitled to basic rights, starting with meaningful

consultation as guaranteed by the U.S. Constitution, U.S. Treaties, Presidential Executive Orders, and the National Historic Preservation Act.

The Commission should reconsider its position and account for Tribal rights in light of Tribal concerns. Doing so will not impede the development of a 5G network, but will uphold the values of the United States, enshrined in law by Congress and the Commission itself.

Dated: June 4, 2018

Respectfully submitted,