



NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS  
P.O. Box 19189 • Washington, D.C. 20036-9189 • Phone: (202) 628-8476 • Fax: (202) 628-2241 • [www.nathpo.org](http://www.nathpo.org)

---

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

In the Matter of

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

Comments of

The National Association of Tribal Historic Preservation Officers

Janine Ledford, Chair  
NATHPO  
PO Box 19189  
Washington, DC 20036  
(202) 628-THPO

June 15, 2017

## Introduction

The Federal Communication Commission (FCC) has a trust responsibility and duty to recognize Tribal Nations as sovereigns. This trust responsibility is derived from the United States Constitution, federal statutes, and legal decisions which outline the government-to-government relationship between Tribal Nations and the federal government. For the past five decades, every presidential administration has adhered to policies supporting Tribal self-determination. In addition to recognizing Tribal sovereignty and upholding Tribal treaty rights, Federal agencies have a legal duty to fully respect and abide by the Federal trust responsibility to Tribal Nations and Indian people. Critical to this responsibility is acting in the best interests of Tribal Nations, as determined by the Tribal Nations themselves. Obtaining consent for Federal actions that affect tribes is the clearest way to uphold the trust responsibility and Tribal sovereignty. The FCC's Tower Construction Notification System (TCNS) is a visionary process that continues to uphold the Commission's trust responsibility while creating efficiencies when facilitating infrastructure deployment. We underscore its continued utility and urge its preservation.

There is a real need to engage stakeholders on changing technologies and the infrastructure needed to make them a reality, the earlier the better the result will be. However, as the original stewards of the land and as sovereign nations, Tribal Nations insist that infrastructure deployment not be done without first considering the impacts to tribal cultural resources. TCNS was implemented for that very reason and has been a model for how the federal government and Tribal Nations can work together in a way that expedites infrastructure development while respecting tribal sovereignty. TCNS was created as a partnership between the FCC and Tribal Nations to expedite the very process that is being discussed in this docket – to assist the telecommunications industry. Without TCNS and tribal participation, the telecommunications industry<sup>1</sup> was left on its own to identify and contact an Indian Tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties.

There are 567 federally recognized Tribal Nations in the United States, all with distinct governments, cultures, histories, landholdings, and citizenry. The historic preservation priorities of one Tribal Nation cannot be assumed to be the same as those of another. This is why it is imperative for the FCC and applicants to treat individual Tribal Nations as the respective sovereigns they are in all aspects of deploying telecommunications infrastructure. The TCNS process provides an opportunity for each Tribal Nation affected by the deployment of wireless technology to assess proposed sites, and, as an efficiency, work directly with the wireless industry if that is the faster course of action. It provides a thorough, functional solution to the FCC's obligation to consult with Tribal Nations individually.

As the Commission deliberates procedural changes, including but not limited to timeframes, fee schedules and Tribal areas of interest, it is important that these discussions take place within the context of government-to-government consultation with Tribal Nations that includes more than a few conference calls and in-person meetings. It took at least a year to develop TCNS with tribal participation. Proposing major changes via this Notice of Proposed Rulemaking

---

<sup>1</sup> For purposes of this document telecommunications industry includes but is not limited to wireless providers, carriers, cell tower construction companies, and related infrastructure companies and their consultants.

(NPRM or Docket No. 17-79) with only a limited amount of time to comment is an affront to the Tribal Nations that have been honoring the existing FCC systems. Modifications to the overall system need to have the tribal voice and perspective actively involved, in advance of publication and during development, and the comment period needs to be for a much longer period of time.

On April 18, 2017, NATHPO filed joint comments on this docket with the National Congress of American Indians (NCAI) and the United South and Eastern Tribes (USET) while the notice was still a draft and only after days of reading it for the first time on March 30, 2017. The FCC voted on the draft NPRM during the April 20, 2017, Commissioner meeting and released the final NPRM on May 10, 2017. NATHPO will be filing joint comments with NCAI and USET by the June 15, 2017, deadline on the final NPRM. Today's NATHPO comments do not replace any previous comments, rather they are meant to provide additional information and guidance to the FCC on how to best move forward on some of the major points being reviewed.

### **What are Tribal Historic Preservation Officers (THPOs)?**

Tribal Historic Preservation Officers (THPOs) are federally recognized Tribal Nations that have entered into an agreement with the National Park Service (NPS), on behalf of the Interior Department, to assume the federal compliance role of the State Historic Preservation Officer, as codified in 36 CFR Part 800. They are actively involved with projects receiving federal support, such as improving Indian schools, roads, health clinics, and housing. THPOs are also the first responders when a sacred site is threatened, when an ancestral home is uncovered, and when Native ancestors are disturbed by development. THPOs are also often responsible for their tribe's oral history programs and operating tribal museums and cultural centers. They perform many functions and responsibilities in Indian country and, through their activities, represent an active expression and exercise of tribal sovereignty. For the past 15 years, this program have become increasingly popular and successful with tribal governments. Some THPOs may also serve as the Tribe's TCNS coordinator, but this is not the case for all THPOs.

### **What is the National Association of Tribal Historic Preservation Officers?**

NATHPO is a national not-for-profit membership association of tribal governments that are committed to preserving, rejuvenating, and improving the status of tribal cultures and cultural practices by supporting Native languages, arts, dances, music, oral traditions, cultural properties, tribal museums and cultural centers, and tribal libraries. NATHPO assists tribal communities protect their cultural properties, whether they are naturally occurring in the landscape or are manmade structures. In addition to members who serve as the THPO for their respective tribe, our membership includes Indian tribes that support our mission and goals. NATHPO defers to individual Tribal Nations' comments when considering the specific questions posed in the NPRM. The Commission's relationship is with Tribal Nations. NATHPO developed these comments in collaboration with Tribal Nations.

## **Tribal Representation for Purposes of TCNS**

It is important to note that Tribal Nations have their own unique governing structures. Authorized tribal representatives for purposes of TCNS may be the Tribal Leader, the THPO, a TCNS Tribal Coordinator – who is not the THPO, or another tribal government official who communicates with the FCC who is neither the THPO nor the TCNS Coordinator. It is incorrect to assume that all THPOs serve as TCNS coordinators.

Related to this is the incorrect thinking that THPO annual reports to the NPS provides information on Tribal work using the TCNS process. THPO annual reports only cover the activities of work completed with the federal NPS grants, which at this time average \$60,000 per Tribal Nation per year. Therefore making any assumption about historic properties not being adversely effected by reading a THPO annual report is incorrect and any statements based on THPO annual reports and the TCNS are inaccurate and not helpful to discussing TCNS and Tribal Nations.

## **Updating the FCC Approach to the National Historic Preservation Act**

NATHPO agrees on the timeliness of reviewing how the TCNS system is operating and considering recommendations on how to improve – both from the Tribal Nations perspective, as well as from the industry and the FCC itself. It is our understanding than in the 12 year history of this program, it has not had the benefit of a systemic review. In this regard, however, the FCC seeks comment on the extent of benefits attributable to Tribal participation under the Commission's Section 106 procedures. Industry representatives have stated anecdotally that in their deployment of infrastructure, they have never found or caused damage to tribal cultural and historic properties and use this to argue that this is why the TCNS process needs major overhaul. We believe that this is a major misunderstanding and misrepresentation of both the TCNS process and of the uniqueness of Tribal Nations. It is our understanding that industry has convinced themselves of their harmless behavior based on industry consultants anecdotal information. The fact that there has been so little damage to protected properties in this process is a testament to TCNS being an extremely effective way to avoid irreparable damage to statutorily protected cultural and historic properties. The Commission should recognize this as a success in their efforts to protect cultural and historic properties, not as a means to limit tribal involvement.

By allowing for Tribes to map out their areas of interest, and stay involved in the TCNS process, Tribes are able to give the most credible advice on the proposed infrastructure's impact to cultural and historic properties. For example, because of TCNS many tribes have worked with industry to slightly change construction plans to avoid tribal historic properties. Often times, moving a proposed site by several feet can avoid disruption of historic and cultural properties. Avoiding impacts to historic and cultural properties upholds the FCC's trust responsibility, allows for tribes to protect their culture and history, and helps industry avoid extremely costly and legally challenging situations. The costs of a functioning TCNS system outweigh the costs to both Tribes and industry if cultural and historic properties are harmed. The FCC has an

obligation to Tribal Nations to make the TCNS system a functional one – with an understanding of industry’s interests – and we urge a national discussion and deliberation on improving the process, which includes Tribal Nations and is commensurate with the significance and scope of this national process.

### **Remedies and Dispute Resolution**

Given the FCC’s responsibilities under federal law and the trust responsibility, the FCC must work with Tribal Nations on a government-to-government basis to understand a particular Tribe’s position when a dispute arises between the Tribal Nation and industry, including when the dispute involves fees. Additionally, the FCC, as trustee to all Tribal Nations, must work to resolve such disputes in a manner that reflects the FCC’s trust responsibility and considers a particular Tribe’s unique expertise, status as a government providing services to an applicant, and interests in protecting cultural resources. NATHPO developed a Dispute Resolution Process in consideration of the interests, at the time, to assist in the identification and evaluation process that could serve as a model for resolving disputes on a variety of topics. Attached is a copy of that process, for your consideration.

### **Collocations on Twilight Towers and Non-Compliant Towers**

The existence of Twilight Towers and non-compliant towers is an example of the FCC failing to uphold its trust responsibility to Tribal Nations. We understand the history that allowed for Twilight Towers and understand why the Commission seeks comment regarding collocations on these structures. These towers, whether they were built between 2001 and 2005, or before or after that period, have the same probability as other towers to impact, disturb, and affect tribal cultural and historic properties. In fact, it is well known throughout the FCC and with Tribal Nations that non-compliant and Twilight Towers have affected Tribal Nations.

In several national meetings over the past couple of years to discuss Twilight Towers and non-compliant towers, Tribal Nations have requested the locations of these towers prior to recommending how to move forward with a process to resolve the outstanding nature of their compliance with federal laws. Tribal Nations have made repeated requests for the locations of said towers, but have been rebuffed by industry with the statement that they either do not know where these towers are located or cannot say. The reluctance of industry to work with Tribal Nations and share information on the locations of Twilight Towers and non-compliant towers has been the root of the problem in moving forward.

Thus, the FCC’s statement that they are seeking comment on allowing collocations without review because “... the vast majority of towers that have been reviewed under the NPA have had no adverse effects on historic properties, and we are aware of no reason to believe Twilight Towers are any different in that regard. Moreover, these towers have been standing for 12 years or more and in the vast majority of the cases, no adverse effects have been brought to our attention,” is not accurate.

Tribal Nations should be allowed to review all non-compliant towers, including Twilight, for impacts to historic and cultural properties. If collocations are to disturb ground, we believe that Tribal Nations should be consulted. Allowing for Tribal Nations to review collocations on Twilight Towers is an opportunity for the FCC to make up for its failure in upholding the trust responsibility. The FCC could implement an option in TCNS to allow for Tribal Nations to review Twilight Towers. After thorough historic preservation review, these towers could be considered approved and eligible for collocation.

### **Proposed Process to Increase Efficiencies with FCC and Industry**

There is near consensus of Tribal Nations that they want to meet with industry and the FCC at least annually, either in-person or via technology to discuss:

1. upcoming FCC notices or regulatory changes being considered
2. projects of mutual interest, including technology deployment in Indian country (e.g., new or better service)
3. Tribal Nation changes, including updating points-of-contact
4. industry's short- and long-term plans for growth and placement (in other words, bring in the tribes early in the process)
5. unique governing structures of Tribal Nations and diversity of cultures
6. industry differences in interests and scope

### **Additional Issues**

In addition to the issues above, NATHPO has identified the following areas that individual Tribal Nations have expressed great concern:

- Tribal consultation was not conducted in the process of developing this NPRM and Tribal Nations are now in a reactive posture to respond to major, proposed changes being considered and without adequate time to do so. The majority of Tribal Nations active with the TCNS process work diligently to meet timeframes and responsibilities and their experiences and perspectives should have been included in this NPRM.
- Industry needs to submit adequate information in the TCNS system in a timely manner to avoid costly delays.
- Tribes are not increasing their areas of interest, as stated in the NPRM (paragraph 53), "... within the TCNS as they have improved their understanding of their history and cultural heritage." Rather, some Tribal Nations have expanded their areas of interest as their work capacity allows them to responsibly monitor and review their aboriginal homelands and places of significance.
- Remedies to the Twilight Tower collocation issue has to include the option to remove harmful towers. The FCC is aware of at least one such tower. Removal remedy should also be available to other harmful towers identified in the future.
- There has been inadequate, short notice of tribal "consultation" or informational meetings with FCC commissions and staff on this NPRM.

Dispute Resolution Working Group Report

January 4, 2017

Members:

Linda Langley, Coushatta Tribe of LA THPO (Chair)

Robin Dushane, Eastern Shawnee THPO

Dr. Andrea Hunter, Osage Nation THPO

Alina Shively, Jena Choctaw THPO

Bambi Kraus, NATHPO President

- I. **BACKGROUND:** The working group noted that a common theme in many FCC-related discussions is the apparent failure of industry to understand the depth, variety and complexity of tribal histories, cultures, governmental structures, etc. and the unique nature of working in Indian Country. University and public libraries are full of treatises on the unique characteristics of Native American socio-cultural characteristics, tribal legal systems, etc. Two short, recently published pieces summarize this topic:
- Nancy Appleby's 2011 article appearing in the Niche Report, "Doing Business in Indian Country: Know the Rules or Suffer the Consequences." ([www.applebylawpllc.com/pdf/NicheReport112011.pdf](http://www.applebylawpllc.com/pdf/NicheReport112011.pdf)). This article provides an overview of the legal complexities of working with Tribes, and specifically addresses such issues as Sovereignty and Jurisdiction.
  - The ACHP's November 2016 webinar providing an overview of the U.N. Declaration on the Right's of Indigenous Peoples and the Section 106 process. One of the key concepts in this webinar is that consultation is not only an integral part of Section 106 but is an internationally recognized right (<http://www.achp.gov/sec106webinar.html>).

## II. **WORKING GROUP METHODOLOGY:**

The working group identified a number of organizations working or doing business in Indian Country that have developed effective models for conducting dispute resolutions. The groups identified include:

- Indian Dispute Resolution Services, Inc. (IDRS, Inc.). This non-profit group was founded in 1989 by five well-known national and regional Indian organizations: California Indian Legal Services, First Nations Development Institute, the Seventh Generation Fund, Northern Circle Indian Housing Authority, and Round Valley Indian Reservation. IDRS has successfully worked with a number of federal agencies and Tribes on a wide range of issues including legal, governmental, environmental, health, and policy concerns. See [www.idrsinc.org/](http://www.idrsinc.org/).
- The Native Dispute Resolution Network is organized under the U.S. Institute for Environmental Conflict Resolution, organized by the U.S. Congress with support from the Morris K. Udall Foundation. This Network currently contains fifty-one individuals, including American Indian, Native Hawaiian, and other practitioners who work with Native peoples, as well as suggested practices and dispute resolution procedures. See [www.ecr.gov/naan.html](http://www.ecr.gov/naan.html).
- The National NAGPRA Review Committee has a 20-year track record of conducting dispute resolution among Tribes, federal agencies, public and private museums, etc. Information about NAGPRA may be found on the National Park Service website at: <https://www.nps.gov/nagpra>; the Committee's Dispute Resolution procedures are located at: [https://www.nps.gov/nagpra/review/Dispute\\_Procedures.html](https://www.nps.gov/nagpra/review/Dispute_Procedures.html).



- III. **PROPOSED PROCESS** for FCC-related Industry-Tribal Dispute Resolution:
- a. The FCC should ratify dispute resolution processes, designate an officer in charge of dispute resolution, appoint a Dispute Resolution committee comprised of 3 Tribes and 3 Industry representatives, and notify all Tribes and industry partners of these particulars.
  - b. Interested parties involved in potential disputes would write to the designated FCC Officer to request application of dispute resolution methods. Requests should include a brief summary of the nature of the dispute, including timeline, identify all interested parties, and provide a brief history of attempts to resolve the situation.
  - c. The FCC official will then contact the other interested parties and provide a list of dispute resolution professionals to facilitate the resolution of disputes.
  - d. At a minimum, all parties to the dispute would be required to submit the following written documentation to the FCC officer and mediator:
    - (i) A statement outlining the relevant facts of the dispute, including citations of applicable portions of FCC agreements or other relevant regulations;
    - (ii) Copies of any primary documents that are directly relevant to the issues in dispute, including but not limited to maps, site forms, relevant ethnographic or environmental studies, and other pertinent data;
    - (iii) A statement describing the requesting party's interpretation of the facts;
    - (iv) A summary of the consultation record;
    - (v) A statement of previous efforts to resolve the dispute, including the results of alternative dispute resolution efforts, if applicable; and
    - (vi) Proposed solutions.
  - e. The FCC Officer in charge of dispute resolution would provide the written request and supporting information to the Dispute Resolution Committee members and set the schedule for Committee deliberations. If situations arise in which individual Committee members have or even appear to have a conflict of interest regarding a particular dispute, the individual member will recuse themselves from the Committee's consideration of the dispute.
  - f. If the FCC Officer and Committee members decide jointly that additional information is needed to issue a determination on the dispute, the FCC will notify all interested parties in writing. Failure by the requesting party to respond to the request for additional information within 30 days of the date of the request will indicate that the proposed dispute is no longer active.
  - g. At the meeting to consider a dispute, the Committee will consider the facts of the dispute, listen to presentations by representatives of the interested parties, question the interested parties' representatives, and make a statement of opinion regarding the optimal resolution to the dispute. When

a consensus opinion is not possible, majority and minority reports may be part of the Committee's findings and recommendations.

- h. If the interested parties fail to reach resolution following notification of the Committee's findings and recommendation, any interested party may resubmit the dispute to the Dispute Resolution Committee provided that they have substantial new information to offer for the Review Committee's consideration. The procedure for requesting reconsideration is the same as the procedure for the original request, with an additional 30 day timeframe.

#### IV. **POTENTIAL APPLICATIONS** of this Model

- a. The following six major categories of potential disputes have been identified by industry, Tribes, and the FCC:
  - i. **Response Period** – this category would include disputes arising from differing perceptions of when the response in question was due, when a particular response period started, stopped, re-started, etc., if - or when - a time extension was granted, should have been granted, etc. For example, one issue is whether the review period clock begins when Tribe's receive all required information (as Tribes assert), or when the documents are first submitted to the FCC (as industry asserts).
  - ii. **Failure to Consult** – this category would include disputes over industry's application of categorical exclusions, failure to consult based on interpretations of tribal areas of interest, types of facilities, issues related to right-of-way, etc.
  - iii. **Information Submission** - this category would include disputes over information provided (e.g. nature, content and timing of document transmittal, validity of request for additional information, etc.). **Note:** disputes over length of time required to obtain a tribe's response frequently involve disagreements over nature and/or timeliness of information provided.
  - iv. **Tribal Monitoring** – this category would include disputes over requests for monitoring, time frame or costs of monitoring, etc.
  - v. **Areas of Interest** – this category would include disputes over tribally-identified areas of interest, changes in area of interest, etc.
  - vi. **Tribal Fees** - this category would include disputes over amount of fees, method and timing of payment, etc.
- b. Additional categories of concern are **disputes** that arise **between tribes, or between tribes and the FCC** – this category would include, for example, instances when two or more tribes have differing findings, requirements, or procedures, and cases where tribes identify circumstances of potential grievance against the FCC. In cases of disputes between tribes and the FCC, a special Dispute Resolution Committee would be convened.