

**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 Muscogee (Creek) Nation

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The Muscogee (Creek) Nation since time immemorial has exercised the sovereign rights of self-determination on behalf of the Muscogee (Creek) people and as a federally recognized Indian Nation we have a historic and continual government-to-government relationship with the United States of America. The Muscogee (Creek) Nation represents over 81,000 Muscogee citizens and we are the fourth largest tribe in the United States. The Muscogee (Creek) Nation was forcibly removed to Indian Territory (Oklahoma) on the Trail of Tears from our original ancestral homelands in Alabama, Georgia, and portions of Florida, North Carolina, South Carolina, and Tennessee in the 1830s. Today the Muscogee (Creek) Nation is comprised of 11 counties in east central Oklahoma.

The Muscogee (Creek) Nation works with a variety of federal agencies on small and large projects in compliance with federal preservation laws. Our tribe works to maintain the traditions, cultural, and respect of the Muscogee people by protecting our cultural resources, sacred places, and traditional cultural properties. Cultural resources are non-renewable resources that can only be identified by our Tribe and have religious and cultural significance to our people. Through Section 106 of the National Historic Preservation Act, we have built successful collaborative processes with federal agencies like the FCC (Federal Communications Commission), other Indian tribes, and project developers to protect historic and cultural properties.

The Federal Communications Commission's Tower Construction Notification System (TCNS) system has proven to be a very useful tool to track, monitor, and expedite the placement of cellular technology infrastructure. Over the past seven years, we have worked with and developed quality relationships with the many consultants installing telecommunication infrastructure facilities, including cell tower siting, through the TCNS Program. Our tribe

provides prompt responses to cell tower notifications and is willing to work with the industry on any situation(s) that arise using the TCNS Program. In most cases we have been able to resolve any issues industry consultants may have directly with industry and the FCC in order to expedite resolutions. With the emerging 5G technology by the wireless telecommunications industry we can see the benefits of modernizing the existing TCNS system to meet the needs of all parties involved in the TCNS Program.

The Muscogee (Creek) Nation agrees and supports the acceleration of wireless broadband deployment and wants to work as partners in preserving not only Tribal history but American history. This partnership is part of the specific responsibilities and authorities for FCC to consider, plan for, protect, and enhance historic properties and cultural resources that may be affected by FCC undertakings, pursuant to the National Environmental Policy Act (NEPA), the National Historic Preservation Act of 1966 (NHPA), the Archaeological Resources Protection Act (ARPA), the Native American Graves Protection and Repatriation Act (NAGPRA), the Historic Sites Act of 1935, the Antiquities Act, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, Executive Order (EO) 13007 ("Indian Sacred Sites"), EO 13287 ("Preserve America"), EO 13175 ("Consultation and Coordination with Indian Tribal Governments"), and other federal preservation laws.

The Notice of Proposed Rulemaking (NPRM) (WT Docket No. 17-79) has implications that would undermine our tribal authority to protect our cultural resources and we respectfully urge the FCC to avoid adoption of the proposed rulemaking until government-to-government consultation with Tribal Nations and the FCC can occur with members of industry, and industry consultants. As of yet, there has not been an opportunity to bring all these parties together to

resolve issues with the deployment of microcells. The Tribal issues that FCC are seeking comment on can be addressed best in a face-to-face consultation.

The Muscogee (Creek) Nation understands the need for discussions and streamlining microcell infrastructure, but believes that it is important to remember that both the FCC and Tribal Nations have statutory obligations to protect historic and cultural properties. The TCNS system has helped both partners succeed in these obligations. It is important to keep this system in place and continue to work together to deploy 5G technology. The Tribe would like to make comments on the NRPM and respond to claims made by industry and consultants below.

Timing and Delays of Tribal Review

The NPRM states that the Tribal component of the FCC's Section 106 process is timely and has been described as "cumbersome and costly". Industry consultants report that it takes an average of 110 days for a tribal review to be completed using the TCNS process. This is not the case for the Muscogee (Creek) Nation. Averaging the time for tribal response does not give us useful insight on who is delaying reviews. We would like to know how many and which Tribal Nations take this long to respond. We agree that timelines need to be followed and we strive to meet our 30-day review window on every project.

It is important to note that the NPRM only mentions examples and footnotes from industry and this document lacks tribal input on our experience with the TCNS review process. It is our experience that delays in review come from consultants who do not send critical information needed for us to complete the review. For example, 63 out of 75 small cell projects we received in February 2017 from Mobilitie were incomplete. We could not complete a review because we did not receive the address, city, county, zip code, poll height, poll type, or a combination of these variables were missing from the projects we received. The maps were

insufficient and did not provide enough information to let us know where the APE (area of potential of effect) was located. Missing information and poor organization by consultants is the number one reason projects get delayed, it is not the batching of small cells, like some consultants have stated. As the work load increased for consultants rolling out 5G/Small Cells/DAS, they rushed incomplete projects to us that could not be reviewed. We can manage the influx of projects as long as they are complete packets that contain all the information we need to process the review. We are fortunate to have a dedicated TCNS Coordinator position within the Tribe to help us complete FCC reviews. In fiscal year 2016, 46% of all the Section 106 projects the Muscogee (Creek) Nation received were from the FCC's TCNS program. This statistic gives insight into our level of experience, involvement, and commitment to the TCNS program.

In a survey completed by the National Association of Tribal Historic Preservation Officers (NATHPO) in January of 2017, they found that 85% of Tribal Nations do not receive adequate information in the initial submission to understand if the proposed development would harm a cultural property. This survey also found that 69% of tribes reported that the FCC should have a 30 day period of time to seek a response from a tribe that has not responded to an industry or FCC's request for an update on their progress in identifying and evaluating an undertaking and that if a tribe does not respond to the FCC at the end of the 30 day period than the process can move along. We concur with these findings and support a "deemed granted" remedy for missing shot clock deadlines. We also support shortening the reasonable period of time currently at 90-days for collocations and 150-days for new sites to be 60-days for all facility deployments not covered by the Spectrum Act. The shot clock should start running when complete project packets are received by tribal and state localities in their preferred method (Mailed projects or

emailed projects). However, it is important for FCC to make contact with the Tribe when the 30-day time period and 60-day time period expires.

We also have issues with consultants issuing premature “Proposed Construction of Communications Facilities Final Request for Indication of Interest” emails to us. The 30-day review period is often a few days off among consulting parties. To us, it is clear under the NHPA that the 30-day review period starts when the project is received by the reviewer, not when it is shipped by the applicant. However, we receive calls on a weekly basis from industry consultants about the 30-day review period. They will say they sent a project on a given date and when we check the package, the envelope is actually postmarked at a later date than the consultant claimed. After receiving inquiries about 30-day deadlines we let the consultants know the date we received the project and we give them an update on the status of their project. One consultant told us that they have an internal database and reporting system that sends out auto notifications (FCC TCNS Consultations Timeline email) after being active in their database for 30 days, and not necessarily meaning the project information was received by the Tribe. They agreed to be more careful on sending unnecessary notices to Tribes. When we take time to respond to premature “Final Notice” emails it delays our time to review projects. We do not have a problem with FCC sending the “Final Notice” emails but the majority of the time they are sent in error and there could be better protocols implemented by industry consultants to simply give us a call to check on the status of their project and check on the 30-day timeline.

Placing blame and penalizing Tribal Nations for supposedly impeding small cell deployments is misguided and offensive. Implementing new technology to all Americans will require all parties involved to work together to provide streamlined deployment. The barriers are bigger than tribal review time and fees alone. The Sprint Corporation’s comments on WT

Docket No. 16-421 clearly state that the three barriers to small cell deployment are 1) access to rights of way 2) excessive fees 3) long delays. We do not see how Tribes can be held responsible for causing these three barriers. For barrier number one, Tribes are typically not involved with industry's access to rights of way and this does not apply to Tribes. It is important to point out that the second barrier Sprint mentions in their comments, excessive fees, is related to excessive application fees, annual fees, Right-Of-Way usage fees, or franchise fees charged by city governments and DOT's (Department of Transportation entities), not Tribes. The third barrier Sprint mentions is excessive delays, and they give examples of city governments who refuse to consider small cell applications until there is a master agreement with the city, again, not siting the Tribes as being the entity that is causing long delays.

However, the NRPM seems to point the blame at Tribes and their involvement in the TCNS Process. The claims against Tribes in the NRPM are one-sided and they portray all 567 Tribal Nations in a negative light. The FCC needs to investigate industry claims further and should not blame all 567 Tribal Nations for the actions of a few. Complaints from industry need to be addressed by the FCC and the individual Tribes who are not reviewing projects in a timely manner or are charging exorbitant fees. The Muscogee (Creek) Nation can only speak for our Tribe and our Historic and Cultural Preservation Department who works to review projects in a timely manner and work diligently with TCNS consultants to preserve and protect Muscogee cultural resources, sacred sites, historic properties, and traditional cultural properties in our area of interest.

Tribal Fees

We are aware that the actions of a few Tribal Nations may be driving the NPRM's request for comments on Tribal fees. It is the responsibility of the FCC and Industry to work

with Tribal Nations who are charging exorbitant fees to remedy the situation. We do not support changing policy in reaction to a small number of Tribal Nations, for the detriment of all Tribal Nations. Adopting new regulations for all Tribes would be a harmful precedent and would interfere with the FCC's trust responsibility to work in the best interest of all Tribal Nations.

We see the Muscogee (Creek) Nation as fulfilling the role of consultant when asked for specific information and documentation by the applicant through Tribal interest discussions. The flat fee approach is used by our office and we see it as being consistent with the ACHP guidance and it ensures that we are compensated for the work we completed. The Muscogee (Creek) Nation is open and willing to negotiate reduced tribal fees on small cell deployments and collocations. We are also willing to keep the same review fee for an extended amount of time to stabilize site location costs. We will also waive fees for emergency 911 towers and telecommunication facilities that are needed for safety purposes. We will not, however negotiate our right to protect our cultural resources through the section 106 review process. Tribes possess unique expertise in identifying traditional cultural properties, view sheds, landscapes, and sacred places and that determination can never be made solely by an archaeological consultant in the place of a tribe. We strive to hold on to every piece of culture we have left, and one of the ways we do that is to preserve and protect the cultural resources in our current and aboriginal homelands. The Muscogee (Creek) Nation is not charging exorbitant fees and we are not delinquent in our allotted review response time. We are willing to share our fee justification and reasons for our area of interest, but this is something that has not been asked of us.

Batching Possible Sites

The Muscogee (Creek) Nation is receptive to the idea of batching small cell applications as long as we determine the guidelines. Some consultants have attempted to "batch" sites that

are too far apart, which takes away from the benefit of batching facilities located near one another. We need to discuss factors and guidelines for batching. For example, the maximum number of poles per batch, geographic proximity to one another, size of poles, reduced fees associated for batching, and conditions on batching with ground disturbance. One example of a batching application could incorporate small cells that are uniform, all within 500 horizontal feet of one center point that does not include any ground disturbance whatsoever. Also any sort of batching of applications must allow for Tribes to have the option to look into or separate one or multiple sites out of the “batch,” as one site may be more concerning than others in the same application. We request that any actions taken by the FCC on batching applications for small cells should be reasonable, consider similar localities and be limited to less than 20 sites in one batch. Review periods for all types of infrastructure, whether batched, small cell, collocation or large tower, should be consistent and rely on existing FCC rules and procedures.

Confidentiality of Cultural and Historic Properties

The Muscogee (Creek) Nation is concerned about the confidentiality of our cultural and historic properties. The FCC, as the Federal Trustee, has an obligation to protect the confidentiality of these sites. Because Industry does not have this same obligation to protect the confidentiality of tribal historic and cultural properties, there is nothing stopping them from sharing this information, even inadvertently, with bad actors who might take up the practice of grave robbing and looting tribal historic and cultural objects and sites. This is a very serious concern and the Commission should not take confidentiality lightly. The National Historic Preservation Act, the Antiquities Act, and the Native American Graves Protection and Repatriation Act were enacted to protect tribal cultural and historic properties from looters and thieves. Unless it has secured specific Tribal consent, the FCC should not share with Industry

the location of sacred sites or protected properties. It is not only morally wrong; it could open up the possibility for lawsuits against the Commission.

Applicant Self-Certification

The Muscogee (Creek) Nation strongly opposes revisions that would allow applicants to self-certify Section 106 compliance. This would violate our rights under the National Historic Preservation Act. The FCC should acknowledge that Tribes possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to us as provided in 36 CFR § 800.4(c)(4). The Commission has a trust responsibility between the federal government and Tribal Nations, not with industry. Industry should not be allowed to dictate what qualifies as a Muscogee cultural resource or if our tribal citizens are qualified to assess eligibility of archaeological or cultural sites.

Exclusions for Small Facilities

The purpose of the TCNS program and the National Historic Preservation Act is to protect historic properties by consulting with Tribes on the effects of federal undertakings. Ground disturbance is one of our biggest concerns with new construction. Considering that many installations of small facilities will not disturb the ground at all, these exclusions may be well received by the Muscogee (Creek) Nation. However, if the ground is to be disturbed, whether it is replacing a pole, in a right of way or collocating with ground disturbance, we need the opportunity to identify effects on historic properties. Tribal consultation is needed to discuss what actions can be excluded.

Collocations

Collocations are considered a federal undertaking because they require licensing in order to transmit communications. The nature of collocations is different than other exclusions noted in the NPRM. Collocations can significantly affect Tribal cultural and historical properties by disturbing ground as a consequence of deploying a new collocation. We are most concerned with collocations and the possibility of ground disturbance when installing new wiring through the ground. However, the Commission still has an obligation to consult with Tribal Nations on collocations and on any exclusion regarding collocations. Of the 567 Tribal Nations in the US, there are may be 567 opinions on the potential effects of collocations on historic and cultural properties. This is why it is so important for the Commission to consult on major changes in policy directly with Tribal Nations. One Tribal Nation may view collocation exclusion favorably while another may not. Another concern when considering collocations is the impact on traditional viewsheds. Collocations could disrupt important cultural features and viewsheds on mounds in the southeast. Mounds are sacred to the Muscogee (Creek) Nation and we do not want these sites to be disturbed.

Collocations on Twilight Towers

The existence of Twilight Towers is an example of the FCC failing to uphold its trust responsibility to Tribal Nations. These towers, whether they were built between 2001 and 2005 or after 2005, have the same probability as other towers to impact, disturb, and affect tribal cultural and historic properties. The FCC needs to inform us on how many towers are non-compliant and also let us know the locations. Tribal Nations request 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. The reluctance of industry and the tower

companies to work together and share information on the locations of Twilight Towers and non-compliant towers is in stark contrast to statements in the NPRM, such as the FCC seeks comment on allowing collocations with NHPA review because “the vast majority of towers under the NPA have had no adverse effects and no reason to believe Twilight Towers any different.” (paragraph 82) The NPRM also includes the statement, “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 the attention of the FCC.” 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 an approved tower and no longer a Twilight Tower and be eligible for collocation.

Conclusion

The Muscogee (Creek) Nation respectfully requests a face-to-face meeting under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments for actions the FCC may take on the NPRM, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79. We encourage the FCC to avoid adoption of proposed policy changes that may impact Tribal rights under federal law to protect cultural resources. The protection and preservation of our cultural resources is one of the most important responsibilities we have as a Nation. Our cultural resources are irreplaceable and they are a part of who we are as Muscogee people.

Respectfully submitted,

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