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

In the Matter of	)	
	)	
ACCELERATING WIRELESS BROADBAND DEPLOYMENT BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT	)	WT Docket No. 17-79
	)	
	)	
	)	

To: The Commission

MOTION FOR STAY

The CROW CREEK TRIBE OF SOUTH DAKOTA, a federally recognized Indian tribe (hereafter "Crow Creek Tribe") and THE OMAHA TRIBE OF NEBRASKA, also a federally recognized Indian tribe (hereafter the "Omaha Tribe", collectively Crow Creek Tribe and the Omaha Tribe the "Tribes"), through counsel and pursuant to Sections 1.41, 1.43 and 1.44(e) of the Commission's Rules[1], hereby moves for a stay of the effective date of the Commission's Second Report and Order in the above-captioned matter.[2] In support whereof, the following is respectfully set forth.

Background

1. This is not the typical case where the Commission is interpreting the Communications Act of 1934, as amended (the "Act"),[3] the statute for which the FCC is the federal agency that has the primary duty it to administer[4]. In such a case involving interpretation of the Act, the Commission is considered to have substantially broad power to regulate[5] and is granted considerable deference in its interpretation

[1] 47 C.F.R. §§ 1.41, 1.43, 1.44(e).

[2] In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Second Report and Order), 32 FCC Rcd ___, FCC 18-30, released March 30, 2018, 83 Fed. Reg. 19440 (May 3, 2018).

[3] 47 U.S.C. §§ 151 *et seq.* (hereinafter the "Act").

[4] 47 U.S.C. § 151.

[5] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

of the Act.[6] By contrast, the Second Report and Order presents a situation where the Commission has determined to take on itself the interpretation of a statute, the National Historic Preservation Act ("NHPA")[7], for which at best the FCC has an ancillary role to the Advisory Council on Historic Preservation ("ACHP") to interpret and administer. There is no deference accorded the FCC in its interpretation of a statute for which it is not the primary agency responsible for administration of the statute.[8] In the instant case, the Commission's action is arbitrary and capricious and ignores the Commission's obligations under the NHPA.

2. The Tribes participated in the proceedings below. They have filed a timely Petition for Review of the Second Report and Order.[9] In their Petition for Review, the Tribes will prevail in demonstrating that the Commission's conclusion that wireless small cell facilities do not constitute an "undertaking" runs directly counter to the statutory directive in the NHPA that any federally licensed facility is subject to the consultation process. Moreover, in holding that wireless small cell facilities are not "licensed" because there is no requirement for individual station licenses under Section 319(d) of the Act ignores the fact that such wireless small cell facilities are authorized pursuant to a wide-area license under Sections 301 and 309(a) of the Act. In doing so, the Commission has ignored its statutory obligations

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[6] *See generally National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005)

[7] 54 U.S.C. § 300101, *et seq.*

[8] See generally *DeBois v. USDA*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996) (Interpreting the National Environmental Act, "We note that the two-step process articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984), does not apply here, because we are not reviewing an agency's interpretation of the statute that it was directed to enforce"). *See generally Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) ("Congress intended to invest interpretive power in the administrative actor in the best position to develop [policymaking expertise], (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1990)). With respect to issues involving development in historical sites, that is the ACHP.

[9] The Tribes' petition for review has been consolidated with the petitions filed earlier by other tribes, *United Keetoowah Band of Cherokee Indians in Oklahoma, et al. v. F.C.C.*, Case No. 18-1129. See *Order* in Case No. 18-1129, dated June 1, 2018.

to consult under the NHPA, which apply to all cases involving grant of a Federal license or permit.

3. The Tribes will also prevail in demonstrating that the Commission erred and ignored the requirements of the NHPA and the position of the ACHP, the principal agency for the administration and coordination of the NHPA, in allowing the Tribes to charge fees in advance for assisting wireless mobile operators and their agents in meeting their consultation obligations under Section 106 the NHPA.

4. Section 101 (d)(6) of the NHPA requires federal agencies to consult with any Indian Tribe, Nation or Native Hawaiian Organization that attaches religious and cultural significance to a property eligible for inclusion on the National Register of Historic Places that may be affected by their undertakings.[10]

5. One of the first steps a federal agency and by extension in this case the "applicants" – here the mobile operators and their agents -- must take in the Section 106 process is to initiate consultation with Tribal Historical Preservation Officer ("THPO") and the leadership of the Native American tribes that have not designated a THPO. Initial contact and consultation with THPO is critical to ensure that the preservation experts who represent the citizens of a state or members of an Indian tribe have the opportunity to influence federal decision making at the very beginning of the Section 106 process.

6. Under the applicable rules and regulations of the ACHP, applicants in the NHPA consultation process "shall consult with the THPO … regarding undertakings occurring on or affecting historic properties on tribal lands."[11] The Tribes and similarly situated tribes act through their designated THPO. To meet their responsibilities in the consultation process, Crow Creek and Omaha employ and

[10] 54 U.S.C. § 306107.

[11] 36 C.F.R. § 800.2(c)(2)

contract personnel, including archaeologists, to review applicants' proposals, which include archeological surveys, site documentation, maps and NEPA review documents[12]. In the last year alone, Native American tribes (including the Crow Creek and Omaha Tribes) have received and reviewed thousands of applications from mobile operators and their agents. Thousands of sites have thus far been protected through mitigation of FCC applicant sites based upon the current rules.[13]

7. As a result of the Second Report and Order, the Tribes and similarly situated Native American Tribes will suffer immediate and irreparable harm by not being able to pay personnel needed to process the literally hundreds of applications that the Tribes receive each year for communications facilities reviews. In turn, the non-participation of tribes like the Crow Creek and Omaha in the consultation process threatens that each such tribe's cultural landscape will be irreparably damaged when historic sites such as burial grounds, prayer sites and other religious areas can be made subject to construction and development because the Tribes will not be able to pay for professional consultants and support staff needed to review the wireless facilities applications. [14]

Legal Basis Compelling Grant of Stay

8. The review of a request for stay is governed generally by the standard enunciated by the U.S. Court of Appeals for the D.C. Circuit in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*.[15] The

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[12] The Commission has acknowledged that Tribal Nations rely upon up-front fees to fund their Section 106 activities or to eliminate the administrative burden of calculating actual costs incurred in reviewing each facilities submission. Second Report and Order, at ¶ 121. The Commission has also acknowledged that most tribal nations have not engaged in charging exorbitant fees, but rather fees consistent with their costs. Id. at fn. 304.

[13] See attached "Declaration of Gary J. Montana".

[14] *Id.*

[15] 259 F.2d 921 (D.C. Cir. 1958). *See also Washington Metropolitan Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

Commission has incorporated this four-part test in reviewing requests for stay.[16] This standard requires the party seeking the stay to show (a) the likelihood that the movant will prevail on the merits; (b) the potential that the movant would be irreparably harmed absent a stay; (c) the potential that the issuance of a stay would substantially harm others; and (d) the effect the issuance of a stay would have on the public interest.[17] The Tribes submit that their request meets the *Virginia Petroleum Jobbers* standard.

Likelihood of Success on the Merits

9. As noted above, this case presents an agency seeking to ride roughshod over a statute – the NHPA – for which it has only shared responsibility to administer at best. ACHP, not the Commission, has primary responsibility for the statute's interpretation and administration. The D.C. Circuit has affirmed ACHP's primary responsibility for the interpretation of the NHPA.[18] The D.C. Circuit has also affirmed this primary responsibility relating to the FCC's interactions with the ACHP.[19]

10. In its Comments submitted in this proceeding, ACHP has stated that it disagreed with the Commission's to amend Section 1.1312 of its regulations "which effectively revises the definition of federal undertaking."[20] Further, in removing wireless small cell facilities from the NHPA consultation process because they purportedly do not constitute an "undertaking," the Commission ignores the plain meaning of the NHPA and the ACHP's regulations. Moreover, the Commission's rhetorical sleight of hand in stating that small wireless cells do not require individual licenses and, therefore, can be removed

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[16] *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring (Memorandum Opinion and Order)*, 2 FCC Rcd 349 (1987)

[17] Id., at 350, *citing Comart Cable Fund III*, 104 FCC 2d 451 (1985).

[18] *McMillan Park Commission v. National Capital Planning Commission*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992).

[19] *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 116 (D.C. Cir. 2006)

[20] ACHP Letter dated March 18, 2018, at 1.

from the NHPA consultation process, ignores the demonstrable fact that no wireless operator could build and operate its system without grant of an FCC authorization.[21]

11. In enacting the current definition of an "undertaking," as the D.C. Circuit has previously noted, "Congress intended to expand the definition of an "undertaking" -- formerly limited to federally funded or licensed projects –to include any federal permit[22]. Such federal permits clearly include the geographic area licenses granted to commercial mobile operators by the Commission. No wireless mobile carrier can construct and operate a wireless mobile facility without a proper authorization issued by the Commission.[23] There is no ambiguity in this requirement[24].

12. The Commission cites the D.C. Circuit's holding in *CTIA v. F.C.C.* in an attempt to claim the discretion to "clarify that the deployment of small wireless facilities does not qualify as a federal undertaking or major federal action."[25] However, the Commission ignores the specific reference by the *CTIA* Court to *McMillan* and its holding there that ACHP's interpretations of its regulations command substantial deference.[26]

13. In construing a statute, its plain meaning must be given priority.[27] An "undertaking" under the NHPA includes any federal permit. Accordingly, commercial wireless operators must also meet the consultation requirement of NHPA because they are in receipt of a federal permit, as broadly defined

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[21] 47 U.S.C. §§ 301, 309.

[22] *Sheridan Kalorama Historical Assn'n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995) (emphasis supplied).

[23] 47 U.S.C. §§ 301, 309(a).

[24] *Contrast Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997) (statute was ambiguous and could not support plain meaning advanced by petitioner, so that the Commission's interpretation reasonable, thus the court was required to defer to the Commission's judgment).

[25] *Second Report and Order* at ¶ 58.

[26] *CTIA v. F.C.C.*, supra, 466 F.3d at 116.

[27] *Western Union Tel. Co. v. Federal Communications Com.*, 665 F.2d 1126, 1137 (D.C. Cir. 1981).

under the NHPA. The Commission's elimination of wireless small cell facilities from the NHPA consultation process constitutes arbitrary and capricious action and is counter to the requirements of NHPA and the rules promulgated by the ACHP.

14. In sum, the Commission's interpretation of "undertaking" in the NHPA is plainly erroneous and does not merit deference. The Tribes have a substantial likelihood of prevailing in arguing on judicial review that the Commission's action is arbitrary and capricious and does not constitute reasoned decision-making.[28] Accordingly, a stay is warranted.[29]

The Tribes Will Suffer Irreparable Harm if Stay Not Granted

15. To demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.[30] The Tribes will suffer such harm immediately unless a stay is granted.

16. The Tribes rely on up-front application fees to fund their review of communications facility applications. Such funds are needed to supply archeological, historic and cartological expertise necessary to complete the review of the applications, which as noted above, process thousands of applications.

17. The Second Report and Order creates a "Catch-22" situation: Tribal Nations nominally remain free to request upfront fees. Mobile operators and their consultants may, if they choose, voluntarily pay such fees. If, however, a Tribal Nation opts not to provide its views without an up-front payment, and the applicant does not voluntarily agree to provide the payment, under the new rules as long as an

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[28] The court is not required to find that ultimate success by the movant is a mathematical probability. *Washington Metropolitan Transit, supra*, 559 F.2d at 843.

[29] *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 424 (8th Cir. 1996).

[30] *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 673-74 (D.C. Cir. 1985).

application is filed by a mobile operator or its consultant/agent, even if the Tribal Nation is unable to process it, the mobile operator can proceed with its project after the 45-day period.[31] Moreover, although mobile providers and their agents may enter into a contract with the Tribes, the wireless operator or agent is not required to accede to the payment of fees to the Tribes.[32] This presents the obvious question: Who will pay fees if they are not allowed to be charged or if the applicant party is not required to accept?

18. The Tribes are among the poorest Indian tribes in the U.S. They do not have the resources to meet their obligations under the NHPA consultation process without being able to charge up-front fees. If there are no fees, there will be no meaningful review of the facilities applications. This risks irreparable damage to historic sites such as burial grounds, prayer sites and other religious areas that might be caused by communications facilities constructions. This is the type of harm specifically intended to be avoided by the NHPA, including loss or damage of sites with historic, archeological and religious importance to Native Americans.[33] As noted above, in their reviews, thousands of sites have thus far been protected through mitigation of FCC applicant sites based upon the current rules.[34] Once such sites are damaged or destroyed, there is no remedy for such injury.

19. The Commission has as of today already begun implementation of the Second Report and Order.[35] It is effectively telling pending applicants to dismiss their pending applications to allow for

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[31] *Second Report & Order*, ¶ 120.

[32] Id., at ¶ 46.

[33] 54 U.S.C. § 306102.

[34] Montana Declaration, *supra.*

[35] *Public Notice*, "Change and Updates to Tower Construction Notification and E-106 Systems on July 2, 2018," DA 18-675, released July 2, 2018.

processing under the new rules of the Second Report and Order.[36]

Harm to Third Parties

20. A stay would have minimal impact on third parties pending the resolution of the Petitions for Review that the Tribes and other parties have pending. The Tribes and other Native American tribes and NHOs have charged upfront fees for at least the last 12 years, without any significant impact on the wireless companies. There has been no showing that the fees have slowed down in any significant manner the growth of mobile wireless operators' systems. Thus, there is little likelihood of harm to third parties. Moreover, any short-term inconvenience to the mobile system operators and their agents in completing the consultation process is more than outweighed by the potential damage to sites of historical, cultural and religious import to the Tribes. Harm that other parties may endure because of imposing a stay is outweighed by the irreparable injury that the Tribes would sustain absent a stay tilts the balance in favor of granting the stay.[37]

Harm to the Public Interest

21. There is tension between the Commission's view of the public interest – which it believes supports drastically curtailing the NHPA review process – and the view of the Tribes and the ACHP. The latter, which also has a duty to act in the public interest and which has the primary statutory responsibility for the enforcement of the NHPA[38], has stated that it clearly disagrees with the

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[36] *Id.*, at p. 5 ("Applicants may abandon pending applications (by updating the Status of the notification to "Abandoned") and re-submit them on or after July 2, 2018, in which case the 2018 Infrastructure Second Report and Order and changes discussed in this Public Notice would apply to the resubmissions.")

[37] *Iowa Utilities Board, supra*, 109 F.3d at 46.

[38] *McMillan v. NCPC, supra.*

Commission's action as "effectively [revising the definition of federal undertaking]."[39] Given the deference that should be ceded to the ACHP in matters of interpretation of the NHPA, ACHP's position tips the balance in favor of grant of the stay as being in the public interest.

Conclusion

22. The Tribes have demonstrated that they meet the four-part *Virginia Petroleum Jobbers* test to grant a stay. Accordingly, a stay is merited pending the outcome of judicial review.

WHEREFORE, in light of the foregoing, Crow Creek Tribe and Omaha Tribe respectfully request that the Commission grant the instant Motion and stay the effectiveness of the Second Report and Order pending completion of judicial review.

Respectfully submitted,

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Dated: July 2, 2018

[39] ACHP Comments, March 18, 2018.

Declaration of Gary J. Montana

I, Gary J. Montana, do hereby state the following:

1. I am a practicing attorney and have practiced federal Indian law for just over thirty (30) years.

2. I am presently Senior Attorney at Montana & Associates, LLC, as well as Senior Instructor of nearly fifty (50) subjects relating to federal recognized Indian tribal issues regarding various matters of concern. i.e. Historic Preservation, Treaty Rights, Enrollment etc.

3. I have taught a course on Tribal Historic Preservation for nearly ten (10) years, including, but not limited to, instructing and certifying tribal historic preservation monitors for site review in the field.

4. I estimate that I have taught nearly 250 tribal employees on the legal mechanics of the National Historic Preservation Act, 54 U.S.C. §300101 *et seq.* (the "NHPA"), Section 106 specifically.

5. Montana & Associates has certified at a minimum of 170 tribal historic preservation field monitors to review sites relating to FCC applicants as part of the Section 106 consultation process.

6. There are presently approximately 562 total federally recognized tribes, Native villages, communities, bands and pueblos.

7. Each tribal entity is registered on the Tower Construction Notice System (hereinafter referred to as "TCNS"), in which FCC applicants register their sites to comply with the NHPA requirements and Section 106.

8. Site review through Section 106 of the National Historic Preservation Act of Federal Communications Commission (hereinafter referred to as "FCC") applicants on the TCNS have proved vital to the protection of tribal cultural landscape.

9. Each year, the tribes that I consult receive thousands of applications through the TCNS.

10. Presently I estimate that there are approximately 4000 to 5000 employees associated with Tribal Historic Preservation Offices throughout the United States and Alaska;

11. If the FCC's Second Report and Order in Docket No. WT 17-79 is implemented, as a direct result of the FCC's decision that tribes can no longer charge upfront fees to applicants to cover the costs of personnel and resources to review the applications, approximately 4000 – 5000 tribal employees or more will have their employment terminated; including, but limited to numerous archeological consulting firms that work hand and hand with the tribal entities and their Tribal Historic Preservation Officers (THPO).

12. My office alone will be laying off approximately six (6) employees.

13. It is vital in my opinion that the Second Report and Order not be implemented if tribal entities and their THPOs are to continue to protect the cultural landscape – which includes, burial grounds, prayer sites, religious sites and more.

14. Thousands of sites have thus far been protected through mitigation of FCC applicant sites based upon the current rules.

15. Further, the extent of the financial devastation that the Second Report and Order will cause hard working tribal members and others who work for tribal historic preservation offices cannot be accurately estimated. However, it certainly will increase the already high unemployment of tribal reservation to new heights.

I declare under penalty of perjury that the above is true and accurate to best of my knowledge.[1]

Dated: July 2, 2018

Gary J. Montana

[1] A majority of tribes currently suffer between unemployment levels of between 60 and 90%.