Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

WT Docket No. 17-79

JOINT REPLY COMMENTS OF CTIA AND THE WIRELESS INFRASTRUCTURE ASSOCIATION

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SUMMARY

There is a broad recognition among stakeholders that the Commission’s Section 106 Tribal consultation process requires updating. Although established with good intentions, the current process has had the unintended consequence that Tribes, which serve as “consulting parties” with respect to projects to be located on non-Tribal lands, can actually serve as de facto “gatekeepers” that determine when and if projects move forward. This provides leverage for a growing number of Tribes to press for inappropriate fees and expanded areas of interest. These actions deter broadband deployment nationwide by resulting in inefficiencies, delays, and additional costs, all without significantly benefiting the preservation of historic sites of religious or cultural significance to Tribes.

These conclusions are supported by substantial record evidence based upon reviews of many thousands of wireless infrastructure projects that have been subject to the Commission’s Section 106 Tribal consultation process. As CTIA and the Wireless Infrastructure Association (“WIA”) (collectively, “the Associations”) have demonstrated, the Tribal consultation process for communications facilities takes an average of 110 days; more than 30% of those required more than 120 days; 11.5% required more than 180 days; and 1.2% required more than 365 days. And, only 0.33% of the Tribal reviews of wireless infrastructure projects resulted in a finding of adverse effects. These figures correspond to and are reinforced by data presented from other commenters. For example, the Association of American Railroads (“AARR”) reports that it takes anywhere between 92 and 225 days on average to clear a deployment not subject to the Positive Train Control (“PTC”) Program Comment and that more than 99 percent of Tribal reviews resulted in a no adverse effect finding.

The Associations also provide data showing that the amount of fees Tribes charge per project have continued to increase and can now range $300 to $500 per site, with at least 12 Tribes charging fees of $1,000 or more. The is corroborated by data offered by several other commenters; AARR states that four of its members report spending at least $2,500 in Tribal fees on average for each site subject to the PTC Program Comment, with one spending as much as $6,300. And the Commission’s own research “suggests that the average cost per Tribal Nation charging fees increased by 30% and the average fee for all collocations increased by almost 50% between 2015 and August 2016.”

With respect to wireless infrastructure projects on non-Tribal lands, the Commission has broad legal authority to address the shortcomings that have given rise to these inefficiencies, delays, and excessive costs in the Section 106 Tribal consultation process. In that context, the Commission has only a general Tribal trust duty because wireless infrastructure siting on non-Tribal lands involves no Tribal money, no property, and no specific statutory trust requirement. As such, the Commission is required to ensure that Tribal consultation is conducted in a manner sensitive to the concerns and needs of the Tribes and that recognizes Tribes as deserving of special respect as a government entity. But, Tribes are not entitled to exercise sovereignty over projects located on non-Tribal lands, and the Commission has authority to make the Section 106 Tribal consultation process more timely, predictable, and efficient, pursuant to its statutory directive to make available rapid, nationwide wireless service. Nothing in the Associations’ reasoning would seek to erode the clear and convincing role of Tribes where a wireless infrastructure project takes place on Tribal land or property itself.
To be clear, parties to this proceeding are not advocating that the Commission should scrap or dismantle the Tower Construction Notification System (“TCNS”) or the Section 106 Tribal consultation process. There is broad agreement among stakeholders that the TCNS and the Commission’s Section 106 Tribal consultation process can and should be reformed and made more transparent to improve and streamline the Tribal consultation process overall. The Wireless Infrastructure NPRM/NOI provides the Commission an important opportunity to improve the TCNS and its Section 106 consultation process by issuing clear guidance on Tribal fees, revising the TCNS to increase efficiencies through transparency and information sharing, and establishing standards and procedures that improve efficiency, accountability, and predictability for all stakeholders.

In this regard, the Associations urge the Commission to:

- Make clear that, for projects located on non-Tribal lands, applicants need not pay fees to Tribes acting as consulting parties.

- Modify the TCNS to make it a more effective and efficient tool by:
  
  o Supporting information sharing such that users with a valid FCC Registration Number can identify sites where both Tribes and SHPOs previously have made findings of “no properties” or “no effect;”
  
  o With respect to projects that are not otherwise excluded from Section 106 generally, or Tribal consultation specifically, encouraging Tribes to specify geographic areas in which no review is required for direct effects on archeological resources and/or no review is required for visual effects;
  
  o To the extent projects are not otherwise excluded, developing a list of wireless infrastructure facility-types that are unlikely to affect Tribal historic properties such that no review, or expedited review, is more appropriate;
  
  o Taking steps to provide applicants with better and timelier information on existing areas, and modifications to areas, in which Tribes have an interest and wish to participate in Section 106 Tribal consultation for proposed projects in those areas; and
  
  o Requiring Tribes to notify the Commission in writing of any prospective changes in their designated areas of interest.

- Establish a rebuttable presumption that information contained in the draft information packet based on the FCC Form 620/621 requirements (the “Preliminary Form 620/621 Submission Packet”) contains sufficient information for Tribes to ascertain whether a historic property of religious or
cultural significance may be affected by the proposed project and, thus, whether further consultation is needed.

- Establish a 30-day response period for Tribes to review Preliminary Form 620/621 Submission Packets, along with procedures that will enable an applicant to proceed with a project if this timeframe is not met.

- Establish a process to allow applicants to submit applications in batches when doing so will be efficient and subject to certain standards.

- Set guideposts for Tribal monitoring of wireless infrastructure construction.

These actions are pro-preservation, as they allow limited preservation resources to be focused where they will have the greatest impact. Further, establishing a formal, universal, and enforceable set of practices in this way will best serve the interests of all stakeholders. Negotiated best practices are not an adequate substitute for a uniform process.

Separate and apart from modernizing the Tribal consultation process, the Commission should exempt Twilight Towers from the Section 106 consultation process based upon ambiguities in earlier versions of the Commission’s rules, the 2001 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, and new data documenting the extremely low likelihood that such towers affected historic properties.

Timely Commission action on these matters is critical. The excessive fees being assessed by Tribes, along with the unnecessary and expanded reviews associated with larger geographic areas of interest, inhibit and delay infrastructure buildout. These practices needlessly capture wireless infrastructure projects in the current TCNS process, which is rife with inefficiencies and without enforceable standards; this process often leaves an applicant without the certainty it requires to move forward with a project. As a result, if even one Tribe is unresponsive, there is no existing mechanism outside of Commission intervention to conclude the process. This delay comes as at time when delay can least be tolerated. Wireless providers are aggressively building out next generation networks. Moreover, international and domestic planning efforts around the deployment of 5G technologies have accelerated, with wireless providers already testing next-generation technologies in advance of anticipated commercial deployment in 2019. If the Section 106 Tribal consultation process remains unchanged, regulatory delay could derail the timely introduction of those products and services in the United States.
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The Wireless Infrastructure Association (“WIA”) and CTIA (collectively “the Associations”) jointly submit these reply comments1 with respect to the above-captioned Wireless Infrastructure NPRM/NOI2 as it relates to the process for consulting with Tribal Nations and Native Hawaiian Organizations (hereinafter collectively referred to as “Tribes”) under Section 106 of the National Historic Preservation Act (“NHPA”) (hereinafter referred to as “Tribal consultation”).3

I. INTRODUCTION.

The comments filed in this proceeding show a broad recognition among stakeholders that the Commission’s Section 106 Tribal consultation process requires streamlining and updating. The data presented by the Associations and other industry representatives provide ample evidence that the current Section 106 Tribal consultation process results in inefficiencies, delays,

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1 These Joint Reply Comments complement and are filed in addition to WIA’s and CTIA’s individual reply comments on the remaining aspects of the Wireless Infrastructure NPRM/NOI. See Reply Comments of the Wireless Infrastructure Association, WT Docket No., 17-79 & WC Docket No. 17-84 (filed July 17, 2017); Reply Comments of CTIA, WT Docket No., 17-79 & WC Docket No. 17-84 (filed July 17, 2017). Unless otherwise noted, comments referenced herein refer to filings submitted in WT Docket No. 17-79 on or about June 15, 2017.


3 54 U.S.C. § 306108 (“Section 106”).
and additional costs without significantly safeguarding historic sites of religious or cultural significance to Tribes. These data are compelling and warrant prompt Commission action.

Building off a broad experience with the TCNS and Section 106 Tribal consultation, the Associations are proposing carefully tailored and focused modifications in order to promote predictable, efficient, and effective consultation with Tribes. These proposals are pro-preservation, as they allow limited preservation resources to be focused where they will have the greatest impact.

Put simply, now is the time for the Commission to improve the TCNS and the Section 106 Tribal consultation process by issuing clear and enforceable guidelines on Tribal fees, revising the TCNS to increase efficiencies through transparency and information sharing, and establishing standards and procedures that improve efficiency, accountability, and predictability. Negotiated best practices are not an adequate substitute for a uniform process. The Best Practices negotiated by the United South and Eastern Tribes (“USET”) and the Commission have been in place more than 10 years, and, in part because they have not seen broad subscription by most Tribes, there is no evidence that they have improved the process. Indeed, it is unclear that they are used by more than a few Tribes, or even that they are used by all of USET’s own members. A formal, universal, and enforceable set of practices is needed.

The record demonstrates that the Commission has broad discretion to administer and structure the Section 106 Tribal consultation process for projects located on non-Tribal lands.

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4 See generally Remarks of FCC Chairman Ajit Pai at the National Congress of American Indians Mid-Year Conference (June 14, 2017) (“Our Tower Construction Notification System has been the envy of other federal agencies. It’s uniformly touted by both Tribal Nations and industry as a good model for getting Tribal input. It effectively prevents projects from harming historic properties of religious and cultural significance to Tribes. I believe the basic system remains sound. But some have argued that we need to adapt it to work with the networks of tomorrow. Given the common ground on these issues—namely, promoting broadband for all Americans and preserving Tribes’ heritage—I hope we can reach consensus.”) http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0614/DOC-345347A1.pdf.
Because the modifications proposed by the Associations relate solely to projects on non-Tribal lands, the Commission can take the proposed actions consistent with its Tribal Trust obligations while also respecting Tribal sovereignty.

The record also demonstrates that the time has come to resolve the Twilight Towers issue. Given the ambiguity in the Commission’s rules during the Twilight period, coupled with new data documenting the extremely low likelihood that such towers effected historic properties, the Associations urge the Commission to exempt Twilight Towers from the Section 106 consultation process.

Timely Commission action is essential to ensure that regulatory delay does not impact the expansion of 4G LTE and introduction of 5G in the United States. The unnecessary and expanded reviews associated with larger geographic areas of interest, as well as excessive and growing fee requests, inhibit and delay infrastructure buildout today and needlessly subject more facilities to the TCNS process, which itself is a multi-step process requiring months to complete. Moreover, the lack of enforceable standards means that, if even one Tribe is unresponsive, there is no existing mechanism outside of Commission intervention to conclude the process. Such impediments are inconsistent with the Commission’s mandate of ensuring the timely deployment of communications networks across the country and the Administration’s stated goal of ensuring America’s lead in next-generation 5G deployment. The time is therefore ripe for Commission action on these issues.

5 The White House Hosts American Leadership in Emerging Technology Event, Whitehouse.gov (June 29, 2017, 6:36 PM ET) (“By encouraging the advancement of emerging technologies, and by ensuring that our scientists and tech entrepreneurs can build their greatest innovations here at home, we can continue to drive American prosperity for decades to come.”) https://www.whitehouse.gov/blog/2017/06/29/whitehouse-hosts-american-leadership-emerging-technology-event.
II. THE RECORD PRESENTS THE COMMISSION WITH A STRONG BODY OF DATA DEMONSTRATING SIGNIFICANT FLAWS IN THE SECTION 106 TRIBAL CONSULTATION PROCESS.

The comments filed in this proceeding provide compelling evidence that the Section 106 Tribal consultation process, as it currently functions, has significant flaws, and enables Tribes to serve as *de facto* “gatekeepers” that determine when and if projects move forward. This process provides leverage for a growing number of Tribes to press for inappropriate fees and expanded areas of interest, leading to unnecessary reviews and expense and ultimately deterring broadband deployment.

A. Data Show That Section 106 Tribal Consultation Results in Significant Project Delay Without Offering Meaningful Safeguards for Historic Sites of Religious or Cultural Significance to Tribes.

In the Joint Association Comments, the Associations presented evidence demonstrating that the Tribal consultation process for communications facilities takes an average of 110 days; more than 30% of those required more than 120 days; 11.5% required more than 180 days; and 1.2% required more than 365 days.\(^6\) The Associations also found that only 0.33% of the Tribal reviews of wireless infrastructure projects resulted in a finding of adverse effect.\(^7\)

These findings were based on the Associations’ analysis of more than 8,000 wireless infrastructure projects that were undertaken during the period from January 2014 through March 2016. The analysis included not only projects that completed Tribal consultation, but also those projects that were abandoned or modified to address Tribal findings.

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\(^6\) *See* Joint Comments of CTIA and the Wireless Infrastructure Association at 11 (“Joint Association Comments”).

\(^7\) *Id.* at 6, 39.
Further, these findings correspond to and are reinforced by data presented from other commenters. The Association of American Railroads (“AARR”) reports that it takes anywhere between 92 and 225 days on average to clear a deployment not subject to the Positive Train Control (“PTC”) Program Comment.8 AARR also shows that more than 99 percent of Tribal reviews resulted in a no adverse effect finding.9 AARR’s findings were based on an analysis of more than 17,000 infrastructure projects.

In short, these data are well-founded and should be given significant weight. No party submitted contrary evidence and the criticisms levied against this information are without merit, as discussed in Section II.E below.

B. Data Show That Tribal Fees for Section 106 Tribal Consultation Are Excessive and Increasing.

The comments also provide strong evidence revealing that applicants are experiencing more Tribes requesting TCNS notification per project and routinely requiring applicants to pay fees before responding to the TCNS notification and before any potentially eligible property has been identified.10 And, the amount of fees Tribes charge per project have continued to increase11 and now can range anywhere from $300 to $500 per site and in some cases $1,000 or more.12

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8 See Comments of the Association of American Railroads at iii (“AARR Comments”).
9 Id. at 15.
10 The Commission itself acknowledges that at least 95 Tribes are known to charge fees for new construction of wireless infrastructure projects. Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3343-44 ¶ 35.
11 The Commission’s research further “suggests that the average cost per Tribal Nation charging fees increased by 30% and the average fee for collocations increased by almost 50% between 2015 and August 2016.” Id.
12 Joint Association Comments at 17. As of 2016, the Associations found that the following Tribes charged fees of $1,000 or more per site: Caddo Nation of Oklahoma; Citizen Potawatomi Nation (Oklahoma); Delaware Tribe of Indians; Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona; Kialegee Tribal Town; Kiowa Indian Tribe of Oklahoma; Little Traverse Bay Bands of Odawa Indians, Michigan; Narragansett Indian Tribe; Pawnee Nation of Oklahoma; The Osage Nation; United
Again, the Associations’ data is corroborated by other commenters. AARR states that four of its members report spending at least $2,500 in Tribal fees on average for each site subject to the PTC Program Comment, with one spending as much as $6,300.\textsuperscript{13} And, many other commenters recount similar experiences.\textsuperscript{14} This is not solely an industry perception, as even a few of the Tribes have acknowledged that other Tribes may be assessing fees in an especially abusive fashion.\textsuperscript{15}

C. Tribes Are Expanding Their Areas of Interest, Potentially at the Expense of the Overall Quality of Review.

Rather than actually benefiting historic resources, however, it appears that the excessive Tribal fees have become an incentive for some Tribes to participate or expand participation in the TCNS process. The Commission cites 19 Tribes claiming 10 or more states in their entirety and three Tribes claiming 20 or more full states in addition to select counties.\textsuperscript{16} Further, and by way of example, the Little Traverse Bay Band of Odawa Indians significantly expanded the Tribe’s areas of geographic interest in 2015 from 29 to 154 counties of interest in the TCNS – an

\end{itemize}

\textsuperscript{13} AARR Comments at iii.

\textsuperscript{14} See Clearing the Path for America’s Wireless Future: Addressing Hurdles to Meet the Pressing Need for Our Nation’s Wireless Infrastructure, COMPETITIVE CARRIERS ASSOCIATION, at 2 (June 8, 2017) (“CCA White Paper”), attached to Letter from Rebecca Murphy Thompson, EVP & General Counsel, CCA, to Marlene Dortch, Secretary, FCC, WT Docket Nos. 17-79 & 15-180, WC Docket No. 17-84 (filed June 8, 2017) (“CCA Comments”); Comments of Crown Castle International Corp. at 34 (“Crown Castle Comments”); Comments of Monte R. Lee and Company at 2; Comments of PTA-FLA, Inc. at 12-14; Comments of Sprint Corporation at 14-15 (“Sprint Comments”); Comments of Triangle Communications System, Inc. at 10-12; Comments of Verizon at 47-49 (“Verizon Comments”).

\textsuperscript{15} See Comments of the Northern Cheyenne Tribe Tribal Historic Preservation Office at 2; Comments of Seminole Nation of Oklahoma at 10, 21 (“Seminole Nation of Oklahoma Comments”).

\textsuperscript{16} Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3334 ¶ 35.
increase of 125 counties, or more than 400 percent.\textsuperscript{17} The Tribe’s Tribal Historic Preservation Officer (“THPO”) stated that the decision to significantly expand areas of interest was related to income generation:

4 May 2015: Telephoned Giiwegiizhickokwe Martin, THPO for the Lac Vieux Desert Band of Lake Superior Chippewa. I inquired about the system they use for doing research for 106 consultations through the FCC. She was helpful with describing how they have organized the process and that she has been able to generate $500,000.00 annually which pays for all their culture related programs with the rest being able to provide funds for general tribal government needs. I asked her to provide me with an example of one the reviews she does as an example.\textsuperscript{18}

Expanding the areas of interest can potentially result in Tribes reviewing more projects than they have resources to credibly perform. For instance, the Iowa Tribe of Kansas and Nebraska THPO reported that the Tribe only provided a “triage” approach for Commission Section 106 reviews. But, rather than applying fees to improve its capacity to provide more meaningful reviews, the fees generated from these triage reviews were applied to community center needs and supplies, mitigation needs, and garden requirements.\textsuperscript{19}

Comparison of statistical data with available descriptions of THPO office staff numbers and qualifications also raise potential questions as to the credibility of some THPO reviews. For example, the Keweenaw Bay Indian Community THPO reported that it produced 9,411 Section


\textsuperscript{18} Little Traverse Bay 2Q2015 Work Log.

\textsuperscript{19} See Lance Foster, THPO, Iowa Tribe of Kansas and Nebraska, \textit{FY 2013 Annual Accomplishments Narrative, Iowa Tribe of Kansas and Nebraska} (June 15, 2015).
106 reviews in 2014 (all finding “no effect”) with a staff of three (who were also tasked with several other non-Section 106 duties). This translates to each staff member producing 12.4 findings per day. In comparison, State Historic Preservation Office (“SHPO”) staff dedicated full-time to Section 106 review average fewer than three reviews per day. Further, the Associations found instances where the THPO and/or their staff lack the necessary qualifications.

Nevertheless, it bears emphasizing that other Tribes have voluntarily undertaken efforts to streamline their reviews. Some Tribes have excluded certain areas or facility types unlikely to impact Tribal historic properties from Section 106 review. For example, the Southern Ute Tribe narrowed the tower types it reviews, voluntarily excluding collocations, structures on rooftops, structures on previously disturbed ground, and height increases for existing towers. The Seminole Tribe reduced its areas of interest because it determined that other Tribes may be better qualified to assess projects in some of the areas. By reducing the list of facilities, they must review and the scope of their areas of interest, these Tribes can better focus their efforts on the projects most likely to affect potential properties, and in turn reduce the regulatory burden for all stakeholders. The Associations commend those efforts and encourage other Tribes to more

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narrowly target their reviews. Notwithstanding these two examples of positive steps, Commission action remains essential.

D. Data Presented in the Record Confirms the Need to Modernize the Section 106 Tribal Consultation Process.

The data compiled by the Associations allow comparison of the level of adverse effect findings for wireless infrastructure projects (0.33%) to the overall level of adverse effect findings for other agencies and confirm that wireless infrastructure projects are inherently less likely to have an adverse effect on Tribal properties. Only 13% of the reviews required under the NHPA found any historic properties at all, and, of that 13%, only two percent of the federal undertakings had an adverse effect.\footnote{Kristina Alexander, U.S. Congressional Research Service, \textit{A Section 106 Review Under the National Historic Preservation Act (NHPA): How it Works}, at 3, R42538 (May 16, 2012), \url{https://digital.library.unt.edu/ark:/67531/metadc808663/m2/1/high_res_d/R42538_2012May16.pdf}.}

Likewise, the 0.33% rate of adverse effect findings with respect to wireless communications infrastructure is dramatically lower than the level of adverse effect findings from THPO reviews of other federal agencies’ undertakings. Of 160,176 THPO reviews of all federal agency undertakings between 2012 and 2014, 3.05 percent found an adverse effect.\footnote{Atchley Hardin Lane, LLC, \textit{Analysis of Historic Preservation Fund THPO Section 106 Reviews, FYs 2006 – 2014} (July 2, 2015).} These data confirm that wireless siting is extremely unlikely to have adverse impacts on historic properties of religious or cultural significance to Tribes, which underscores the opportunity for modernization of the TCNS process.

E. Comments by Preservationists and Tribal Interests Do Not Undermine the Data Presented by the Associations and Other Industry Commenters.

Confronted with the undeniable evidence that wireless infrastructure projects are inherently less likely to have an adverse effect on historic properties of religious or cultural
significance to Tribes, some commenters assert that the low rate of adverse effects show only that the Section 106 Tribal consultation process is working well.\textsuperscript{25} However, commenters provide no evidence to support this speculation. And, this speculation is belied by the fact that the Associations’ own analysis \textit{included} projects where Tribal findings led to the abandonment or modification of the project.

Commenters also argue that delays in the Tribal consultation process are caused by applicants submitting inadequate information for review;\textsuperscript{26} this claim is likewise unsupported by any empirical evidence. This assertion is disproven both by the fact that applicants have every incentive to expedite the review process by providing complete information in the first instance and by the fact that SHPO’s who receive the same information typically respond within 30 days. More important, however, the Associations’ proposal to establish the Preliminary Form 620/621 Submission Packet as the presumptive standard for the information that should be required for Tribal review should remedy any such concern.

Finally, while the Associations are requesting that the Commission set clear and enforceable standards and provide better oversight, any implication that the Commission is at

\textsuperscript{25} \textit{See} Comments of the Chippewa Cree Tribe at 5-9 (“Chippewa Cree Tribe Comments”); Comments of the Nez Perce Tribe at 4 (“Nez Perce Tribe Comments”); Seminole Nation of Oklahoma Comments at 3; Comments of the Seminole Tribe of Florida at 10 (“Seminole Tribe of Florida Comments”); Comments of the Eastern Shawnee Tribe of Oklahoma at 4 (“Eastern Shawnee Tribe of Oklahoma Comments”); Comments of Kialegee Tribal Town at 11 (“Kialegee Tribal Town Comments”); Comments of the Sisseton Wahpeton Oyate THPO at 1-2 (“Sisseton Wahpeton Oyate THPO Comments”).

\textsuperscript{26} Chippewa Cree Tribe Comments at 8; Comments of the Fond du Lac Band of Lake Superior Chippewa at 3 (“Fond du Lac Band of Lake Superior Chippewa Comments”); Comments of the Muscogee (Creek) Nation at 4-5 (“Muscogee (Creek) Nation Comments”); Comments of the National Association of Tribal Historic Preservation Officers at 6 (“NATHPO Comments”); Comments of the National Congress of American Indians, \textit{et al.}, at 18 (“NCAI Comments”); Comments of the Sault Tribe of Chippewa Indians at 6 (“Sault Tribe of Chippewa Indians Comments”); Seminole Nation of Oklahoma Comments at 20; Seminole Tribe of Florida Comments at 11; Comments of the Standing Rock Sioux Tribe at 6 (“Standing Rock Sioux Comments”).
fault for inadequate services or attention to Tribal needs fails to comprehend the true problem. In fact, the Commission is expending significant resources and allowing Tribes far greater latitude than other agencies despite the fact that its projects have a far lower probability of impacting Tribal properties than do projects undertaken by other federal agencies. By way of example, the Bureau of Land Management, the Department of Housing and Urban Development, and the Department of Transportation all discourage payment to Tribes for participation in the Section 106 identification process.\(^{27}\)

The Commission is a clear outlier regarding how it administers the Section 106 Tribal consultation process. In developing the TCNS approach, the Commission has, by all accounts, and to a degree unmatched by other agencies, opened undertakings to Tribal comment and participation. That the Commission has gone above and beyond other agencies is attested to by the number of Tribal commenters that demanded the TCNS be retained. However, after a decade of implementation, it is clear that the Commission’s laudable efforts have led to unintended consequences. By establishing enforceable standards and providing clear guidance and oversight, the Commission can preserve the positive aspects of the TCNS and its Section 106 Tribal consultation process while remedying the inefficiencies, delay, and additional costs that plague the process.

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III. THE COMMISSION HAS BROAD DISCRETION TO ADMINISTER, STRUCTURE, AND MODERNIZE THE SECTION 106 TRIBAL CONSULTATION PROCESS.

Several Tribal commenters reference their rights as sovereign entities and the Commission’s Tribal trust obligations as a fundamental basis for resisting any changes to the TCNS or Section 106 Tribal consultation process.\(^\text{28}\) As discussed below, these arguments are misplaced. The Commission is responsible for compliance with Section 106 of the NHPA as it applies to wireless infrastructure siting and has the authority it needs to make the Section 106 Tribal consultation process timely, predictable, and efficient, pursuant to the agency’s statutory directive to promote the rapid deployment of nationwide wireless service.\(^\text{29}\)

A. The Commission Has a General Tribal Trust Responsibility When Administering the Section 106 Tribal Consultation Process.

As the Associations discussed in the Joint Association Comments, the modifications to the TCNS and the Section 106 Tribal consultation process discussed in this proceeding relate to projects located on non-Tribal lands.\(^\text{30}\) As such, the Commission has a general Tribal trust responsibility that is fulfilled by “compliance with general regulations and statutes”\(^\text{31}\) and thus

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\(^{28}\) See NCAI Comments at 20; Comments of the National Tribal Telecommunications Association at 5-6 (“NTTA Comments”); Comments of the Kaw Nation at 3-4 (“Kaw Nation Comments”); Comments of the Gila River Indian Community at 4-6; Comments of the Mashantucket (Western) Pequot Tribe at 1 (Mashantucket (Western Pequot Tribe Comments”); Comments of the Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission at 13 (“Navajo Nation Comments”); Seminole Nation of Oklahoma Comments at 4, 20-22; Comments of the Swinomish Indian Tribal Community at 2; Comments of the Twenty-Nine Palms Band of Mission Indians at 1; Comments of the Central California Yokuts NAGPRA Coalition at 2-3; Sault Tribe of Chippewa Indians Comments at 9.

\(^{29}\) 47 U.S.C. § 151.

\(^{30}\) Joint Association Comments at 9-10.

the Commission can take steps to administer, structure, and modernize the TCNS and the Section 106 Tribal consultation process within the scope of its Tribal trust obligations and without impinging upon Tribal sovereignty.

There are generally three types of government trust duties, which are described in descending order: (1) a “full fiduciary” obligation arises when the federal government manages Tribal money or property; (2) a “limited trust,” which is created and bounded by a legal authorizing document that creates a federal fiduciary or managerial duty to the Tribe for a specific purpose; and (3) a “general duty,” which applies to agencies interacting with Tribes when carrying out laws without specific fiduciary or managerial duties over Tribal property, based on the historic relationship between the federal government and Tribes.32

When administering Section 106 for wireless infrastructure projects located on non-Tribal lands, the Commission is operating on this third level of a general Tribal trust duty because the federal undertaking in question (wireless infrastructure siting) involves no Tribal moneys, property, or statutory trust requirement.33 As a federal Court of Appeals explained,  

While . . . the NHPA’s implementing regulations “recognize the government-to-government relationship between the Federal Government and Indian tribes,” they do so to ensure that consultation “be conducted in a manner sensitive to the concerns and needs of the Indian tribe . . . .”34

relation an agency should not afford a tribe “greater rights than they otherwise have under the [governing statute] and its implementing regulations”).


33 See, e.g., Morongo Band of Mission Indians v. F.A.A., 161 F.3d at 574; see also Nance v. EPA, 645 F.2d 701, 710 (9th Cir. 1981) (compliance with statutory procedures fulfills the government’s fiduciary responsibilities).

34 Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of the Interior, 608 F.3d 592, 610 (9th Cir. 2010) (citing 36 C.F.R. § 800.2(c)(2)(ii)(C)).
In other words, agencies administering the NHPA are carrying out their general trust responsibilities and are required to ensure that Tribal consultation is conducted in a manner sensitive to the concerns and needs of the Tribes and recognizing the Tribes as deserving of respect as a government entity. But, Tribes are not entitled to exercise sovereignty over projects located on non-Tribal lands.

Consistent with this conclusion, the Advisory Council on Historic Preservation (“ACHP”) makes clear that each federal agency must determine how to fulfill its own Tribal trust responsibilities and the implications of government-to-government consultation. “Each agency defines the scope of its trust responsibility to Indian tribes. . . . The ACHP neither defines such scope for others nor advises agencies on this issue.” The ACHP also has concluded that “[t]he agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement.” As recently as last year, the ACHP stated, “[t]he opportunity to assist agencies in tailoring their efforts to the ‘size of the federal handle’ lies primarily in how the agency defines the Area of Potential Effects (“APE”) and in determining what constitutes a ‘reasonable and good faith effort’ to identify historic properties within that APE.” These conclusions also align with National Park Service (“NPS”) guidance stating that federal agencies that merely license or permit non-federal entities on non-federally owned lands have a lower historic preservation obligation than those owning or managing actual historic sites.

35 ACHP Handbook at 2-3 § II.B.


In short, provided that the Commission ensures the Tribe’s role as a consulting party, the agency has broad legal authority to establish reasonable requirements for Section 106 Tribal consultation consistent with its general Tribal trust obligations, particularly with regard to matters such as Tribal fees, timelines for completing review, and the process for designating areas of interest.

B. **The Limited Scale of the Undertaking and the Scope of Federal Involvement in Wireless Facilities Siting Further Support the Commission’s Authority to Establish Reasonable Requirements for Tribal Consultation.**

The Commission’s Section 106 Tribal Consultation processes should be appropriate to the scale of the federal undertaking and the scope of the Commission’s involvement. The consultation procedures should also be designed to reflect the limited impact wireless infrastructure is likely to have on Tribal resources. Because the Association’s data show the almost nonexistent possibility that wireless infrastructure will affect Tribal historic resources, the Commission may limit the scope of requirements for Tribal consultation consistent with both ACHP requirements and the Commission’s policy on government-to-government consultation. Moreover, in doing so, the Commission should keep in mind that, for projects located on non-Tribal lands, facilitating Tribal participation should not result in ceding control to the Tribes with regard to the Commission’s statutory obligation to promote the rapid deployment of nationwide wireless service. The Department of Veterans Affairs Tribal Consultation Policy is instructive on this point. The policy states “VA retains final decision making authority with respect to actions undertaken by VA and within Federal jurisdiction. In no way should this Policy impede
VA’s ability to manage its operations.” The Commission’s Tribal consultation process should include a similar statement.

IV. COMMISSION ACTION TO MODERNIZE THE TCNS AND THE SECTION 106 TRIBAL CONSULTATION PROCESS WILL IMPROVE AN ALREADY SOUND RECORD OF FACILITATING TRIBAL CONSULTATION.

A. The Wireless Infrastructure NPRM/NOI Provides an Opportunity to Refine the Section 106 Tribal Consultation Processes and Improve Efficiency and Predictability, While Continuing to Meet the Agency’s Historic Preservation Responsibilities.

Several commenters criticize the Commission’s Wireless Infrastructure NPRM/NOI as representing an effort to dismantle the Section 106 compliance mechanism or to strip Tribes of their ability to protect their historic heritage. This claim has no merit. This proceeding grew out of the Commission’s continuing desire to improve its processes and was preceded by significant involvement with Tribal interests—including the Commission’s efforts to bring Tribes and industry together to discuss Section 106 issues in Washington, D.C. and Twilight Tower issues in Albuquerque, New Mexico. Indeed, the Commission has conducted numerous Tribal consultations in the last few months alone, and the Commission’s Office of Native Affairs and Policy created a “spotlight” of forthcoming consultations on its webpage. More to the

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39 See Comments of National Trust for Historic Preservation at 2; Cahuilla Band of Indians Comments at 1; Kialegee Tribal Town Comments at 1; Muscogee (“Creek”) Nation Comments at 3-4; Navajo Nation Comments at 3-4; Standing Rock Sioux Tribe Comments at 2-3.

40 See Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3351, 3358-59 ¶¶ 59, 80-81.

41 See FCC, Native Nations, https://www.fcc.gov/general/native-nations (last visited July 13, 2017). See also Remarks of FCC Chairman Ajit Pai at the National Congress of American Indians Mid-Year Conference (June 14, 2017) (“I’ve already had constructive meetings with several Tribal leaders and leaders of intertribal organizations. My first Tribal meeting as FCC Chairman was with President Cladoosby, whom I see seated at the head table. Our very first discussion item was about the trust relationship with Federally-recognized Tribes.”)
point, the Commission created the TCNS in order to improve and expedite its Section 106 process and the agency has no incentive to scrap the process whole-cloth.

Further, even a casual review of the comments reveals that the Commission need not scrap or dismantle the TCNS or the Section 106 Tribal consultation process in order to address these issues. Rather, parties are seeking to reform the TCNS so that it can more effectively be used as a planning tool for Tribes and applicants and to improve and streamline the Tribal consultation process overall. Indeed, there is wide agreement that the TCNS can and should be more transparent in order for the Section 106 Tribal consultation process to work more effectively.42

B. The Associations Have Proposed Concrete Steps the Commission Should Take to Streamline and Modernize the Section 106 Tribal Consultation Process.

The Commission should take concrete actions that result in clear and binding procedures that establish a fixed timeline and clear expectations for all stakeholders. To this end, the Associations have proposed targeted measures that are narrowly tailored to strengthen (not dismantle) the process to promote predictable, efficient, and effective consultation with Tribes. The Associations urge the Commission to:

• Re-examine the Commission’s *de facto* policy regarding Tribal fees to make clear that, for projects located on non-Tribal lands, applicants need not pay fees to Tribes acting as consulting parties.43


42 Comments of the Otoe Missouria Tribe at 1; Comments of the Osage Nation at 7; Mashantucket (Western) Pequot Tribe Comments at 1; Eastern Shawnee Tribe of Oklahoma Comments at 2; Comments of the Eastern Shawnee THPO at 2 (“Eastern Shawnee THPO Comments”); Comments of the Citizen Potawatomi Nation at 1; Chippewa Cree Tribe Comments at 5-9; Comments of the Miami Tribe of Oklahoma at 2 (“Miami Tribe of Oklahoma Comments”).

43 Joint Association Comments at 22-24. Issues related to Tribal fees are discussed more fully in Section V below.
• Modify the TCNS to make it a more effective and efficient tool by:

  o Supporting information sharing such that users with a valid FCC Registration Number (“FRN”) can identify sites where both Tribes and SHPOs previously have made findings of “no properties” or “no effect”;\footnote{Id. at 30.}

  o With respect to projects that are not otherwise excluded from Section 106 generally, or Tribal consultation specifically, encouraging Tribes to specify geographic areas in which no review is required for direct effects on archeological resources and/or no review is required for visual effects;\footnote{Id. at 31.}

  o To the extent projects are not otherwise excluded, developing a list of wireless infrastructure facility-types that are unlikely to affect Tribal historic properties such that no review, or expedited review, is more appropriate;\footnote{Id. at 32. The Associations also note that there is agreement even among the ACHP and others that additional exclusions from Section 106 may be warranted. See, e.g., Comments of the Advisory Council on Historic Preservation at 6-7 (“ACHP Comments”); Comments of the Texas Historical Commission at 3. The question of Section 106 exclusions is addressed more specifically in the Associations’ individual comments.}

  o Taking steps to provide applicants with better and timelier information on existing areas, and modifications to areas, in which Tribes have an interest and wish to participate in Section 106 Tribal consultation for proposed projects in those areas;\footnote{Joint Association Comments at 32-33.}

  o Requiring Tribes to notify the Commission in writing of any prospective changes in their designated areas of interest;\footnote{Id. at 33.}

  o Establishing a rebuttable presumption that information contained in the draft information packet based on the FCC Form 620/621 requirements (the “Preliminary Form 620/621 Submission Packet”) contains sufficient information for Tribes to ascertain whether a historic property of religious or cultural significance may be affected by the proposed project and, thus, whether further consultation is needed.\footnote{Id. at 24-26.}
• Establish a 30-day response period for Tribes to review Preliminary Form 620/621 Submission Packets, along with procedures that will enable an applicant to proceed with a project if this timeframe is not met.\textsuperscript{50}

• Establish a process to allow applicants to submit applications in batches when doing so will be efficient and subject to certain standards.\textsuperscript{51}

• Set guideposts for Tribal monitoring of wireless infrastructure construction.\textsuperscript{52}

In contrast to such clear and binding procedures, the National Congress of American Indians (“NCAI”) and certain Tribal Nation commenters argue in favor of individually negotiated best practices.\textsuperscript{53} As noted in the Joint Association Comments, however, such negotiated best practices are not an adequate substitute for a uniform process.\textsuperscript{54} Without establishing a finite procedural timeline, the Commission risks continuing and exacerbating the delays and concerns associated with the current Tribal consultation process. Indeed, the Best Practices developed by USET and the Commission have been in place more than 10 years, and, in part because they are not broadly adhered to by Tribes, there is no evidence that they have improved the process. Indeed, it is unclear that they are used by more than a few Tribes, or even that they are used by all of USET’s own members.

\textsuperscript{50} Id. at 27-28.

\textsuperscript{51} Id. at 33-34.

\textsuperscript{52} Id. at 35-36.

\textsuperscript{53} NCAI Comments at 5-7; Seminole Nation of Oklahoma Comments at 8; NTTA Comments at 6-7; Sisseton Wahpeton Oyate Comments at 3; Kaw Nation Comments at 3-4.

\textsuperscript{54} See Joint Association Comments at 20.
V. THE COMMISSION SHOULD CONFIRM THAT FEES ARE NOT APPROPRIATE FOR TRIBES PARTICIPATING SOLELY AS CONSULTING PARTIES UNDER SECTION 106.

A. Tribal and Preservationist Interests Deny the Evidence Regarding the Deleterious Effects of Escalating Fees, But the Data Prove Otherwise.

As noted above, the Associations urge the Commission to confirm existing federal policy against paying fees to Tribes for participating solely as consulting parties under Section 106. Nevertheless, Tribal interests continue to deny the evidence of the deleterious effects of escalating fees and insist that they should be permitted to charge “reasonable” fees for participating as “consulting parties” in the Section 106 process.

As an initial matter, it bears emphasizing that the “reasonableness” of fees is not relevant because, as demonstrated below, no fee should be assessed in connection with participating in the Section 106 process as a consulting party. Moreover, cumulatively these Tribal review fees can become exorbitant when multiple Tribes are assessing fees on the same project. In short, given the corresponding trends of increasing numbers of wireless infrastructure projects, increasing numbers of Tribes reviewing these projects, and the increasing fees for such reviews, simple math suggests that, without the modifications proposed in this proceeding, the Commission’s Section 106 Tribal consultation process will deter the build out of 5G networks. The Commission should join other federal agencies and make clear that fees are not appropriate where Tribes are participating in the Section 106 process as consulting parties.

55 Id. at 21-22.
56 See, e.g., NCAI Comments at 15-16; Standing Rock Sioux Tribe Comments at 3-4; Comments of the Choctaw Nation of Oklahoma at 6-7 (“Choctaw Nation of Oklahoma Comments”); Chippewa Cree Tribe Comments at 9-10; Fond du Lac Band of Lake Superior Chippewa Comments at 3.
57 See Joint Association Comments at 21-23; ACHP Comments at 1-2.
58 Joint Association Comments at 21-23.
B. Tribal and Preservationist Interests Improperly Conflate or Mischaracterize “Consulting Party,” “Consultant,” and “Contractor.”

Tribal Nations make several arguments in support of their demand for continued fees, which improperly conflate or mischaracterize “consulting party,” “consultant,” and “government-to-government” consultation. None of these arguments survive scrutiny.

Tribes argue that the ability to charge fees is an attribute of their sovereignty. Essentially, these Tribes, and/or the associations representing Tribal interests, argue that Section 106 consultation is essentially a regulatory process, in which, as a sovereign government, the Tribes must concur in or make a finding of no-effect before consultation can be concluded. Under this construct, the ability to assess fees is a necessary correlate of the Tribe’s role as a sovereign government.59

This argument improperly conflates the Tribes’ role as a sovereign government with its role as a consulting party. As discussed in the Joint Association Comments, for projects located on non-Tribal lands, Tribes are not entitled to exercise the sovereign right of consent, but instead serve as “consulting parties.” As such, they may identify concerns, advise on identification and evaluation, comment on potential effects, and participate in the resolution of any adverse effects.60 Consulting parties are entitled to have their views considered, but their concurrence in the outcome of the Section 106 process is not mandated by law.61

This conclusion is entirely consistent with existing policy as applied broadly across federal agencies. ACHP rules require only that a good faith effort be made to solicit and consider Tribal views. Nowhere do the ACHP rules mandate payment of fees as a condition for

59 See, e.g., NCAI Comments at 19; Mohegan Tribe of Indians of Connecticut Comments at 1-2; NTTA Comments at 5; Seminole Nation of Oklahoma Comments at 21.

60 Joint Association Comments at 9-10.

61 Id.
meeting the good faith standard—to the contrary, the ACHP explicitly says in its July 6, 2001 Memorandum that payment is not necessary for consultation required under Section 106.

[N]either [the NHPA nor the Council’s regulations] requires Federal agencies to pay for any aspect of tribal nor other consulting party participation in the Section 106 process. . . . When the Federal agency or applicant is seeking the views of an Indian Tribe to fulfill the agency’s legal obligation to consult with a Tribe under a specific provision of the Council’s regulations, the agency or applicant is not required to pay the Tribe for providing its views. If the agency or applicant has made a reasonable and good faith effort to consult with an Indian Tribe and the Tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.62

The ACHP confirmed the continued validity of this guidance.63 And, as noted above and in the Joint Association Comments, other federal agencies with higher levels of federal involvement do not routinely pay fees for Tribal participation as consulting parties.64

Several Tribes and representative Tribal associations make sophistic arguments regarding what it means to be a “consultant.” Some Tribes argue that the applicant’s act of offering the Tribe an opportunity to consult is effectively a request for information for which the Tribe has exclusive knowledge. Their reasoning continues that the Tribe, like any contractor or consultant, can charge for this expertise.65


63 See ACHP Comments at 1-2.

64 See supra 11; Joint Association Comments at 22.

65 See NCAI Comments at 15-16; Sault Tribe of Chippewa Indians Comments at 7-8; Chippewa Cree Tribe Comments at 9-10; Seminole Nation of Oklahoma Comments at 3-4; Comments of Wampanoag Tribe of Gay Head (Aquinnah) at 2; Comments of the Catawba Indian Nation at 2; Fond du Lac Band of Lake Superior Chippewa Comments at 3; Muscogee (Creek) Nation Comments at 8; Cahuilla Band of Indians Comments at 1; Eastern Shawnee THPO Comments at 3-4; Comments of Hualapai Department of Cultural Resources, Attachment at 1.
This distinction simply muddies the analysis. The fact is that “consultants” are distinct from “consulting parties” for purposes of Section 106. Thus, the relevant question for purposes of Tribal fees is whether the Tribe is serving as a “consulting party” (i.e., participating in the Section 106 consultation process in order to exercise the opportunity to help identify resources potentially affected and to have their views considered in connection with a proposed project), for which compensation is not appropriate, or whether it is providing professional services as requested by the Commission or applicants, for which compensation is appropriate.

The Section 106 process was designed so that “consulting parties,” including Tribes, who have an active interest in protecting historic properties potentially affected by a federal project also have the opportunity to make the responsible federal agency take those properties into consideration. In short, the Section 106 Tribal consultation process is an opportunity for Tribes to highlight known sites and elements so that they are taken into account before a federal undertaking is approved. The process is not intended to facilitate discovery of heretofore unknown religious or cultural resources. Such discovery obligates applicants immediately to cease work and notify and involve potentially affected Tribes. Nowhere does the law contemplates that “consulting parties” will also be paid for exercising their right to protect historic properties. In other words, as “consulting parties” under Section 106, Tribes have the right, but not the obligation, to participate as consulting parties in order to have an opportunity to help identify resources potentially affected and to have their views considered in connection with a proposed project.


67 See id. at § IX; see also 25 U.S.C. Chapter 32, § 3001 et seq.
Several Tribes also seek to draw distinctions between serving as “consultants” and “contractors” for purposes of evaluating whether Tribal fees are appropriate. However, being a contractor, or even a “consultant,” implies that there has been an agreement on terms of service, specifying each party’s rights and obligations, and that the contractor will satisfy the relevant Secretary of the Interior qualifications. But the reality is that, when serving as consulting parties, the Tribes are not being engaged to provide specific services or information; there is no agreement between the applicant and the Tribes. Tribes are simply given an opportunity to comment—an opportunity that they can choose to pursue or not. Conversely, where Tribes are providing professional services pursuant to an agreement with an applicant, the Associations agree that the Tribes are entitled to charge for their services.

### C. Congress is the Appropriate Source for Additional Tribal Funding Resources.

Tribes also make an equitable argument that they have limited resources and fees are critical to enable them to protect their interests by participating in the Section 106 process. While the industry is not unsympathetic to this point, the Commission is not the appropriate forum for relief. Congress created the Historic Preservation Fund in 1976, setting aside $150 million from revenues generated by royalties from mineral extractions on the Outer Continental Shelf. Since Congress annually appropriates money from this fund to support nonfederal participants in the Historic Preservation program, it must be assumed that both the executive and legislative branches are aware of the funding issues that the commenters raise.

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68 Miami Tribe of Oklahoma Comments at 2; Choctaw Nation of Oklahoma Comments at 7.

69 See supra note 22.

70 See Joint Association Comments at 23-24.

71 The NHPA established a variety of historic preservation programs, including the historic preservation fund to provide assistance to non-federal entities for the preservation of their cultural heritage. The
commenters may believe that the Congressional appropriation to the Historic Preservation Fund—which has been between $60 and $70 million in recent years—is inadequate, their remedy lies with Congress, not in extracting fees from Commission applicants. Further, as noted above, it appears that, at least some Tribes are charging fees that are being used for purposes other than historic preservation.

VI. THE COMMISSION SHOULD FIND THAT TWILIGHT TOWERS ARE EXEMPT FROM THE SECTION 106 CONSULTATION PROCESS.

Some commenters urge the Commission to require all Twilight Towers to be reviewed under Section 106 with no exclusion. These draconian measures appear to be premised on a desire to “punish” “wrong doers,” forcing the Commission to correct what is perceived as a failure to live up to its Tribal trust responsibilities, and ensuring that these towers do not cause harm to historic resources.72

There is, however, broad support, including some support in the preservation community, for finding a solution to Twilight Towers, without forcing each tower to be reviewed retroactively.73 Further, the towers were built in compliance with the rules as they existed at that

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72 See Comments of the California Office of Historic Preservation at 4; Choctaw Nation of Oklahoma Comments at 9-10; Comments of the Colorado SHPO at 3; Comments of the Eastern Shawnee Tribe of Oklahoma Comments at 5-6; Comments of the Missouri SHPO at 5; Mohegan Tribe of Indians of Connecticut Comments at 3; Comments of the Montana SHPO at 3; Muscogee (Creek) Nation Comments at 11-12; NATHPO Comments at 5-6; Comments of the National Conference of SHPOs at 5-6; NCAI Comments at 24; Navajo Nation Comments at 12-14; Comments of the New Mexico Historic Preservation Division at 1; Nez Perce Tribe Comments at 6; Comments of the Oregon SHPO at 6-7; Comments of the Pennsylvania SHPO at 4; Comments of the Rhode Island Historical Preservation & Heritage Commission at 4; Seminole Nation of Oklahoma Comments at 4, 26; Seminole Tribe of Florida Comments at 6.

73 ACHP Comments at 7-8; Comments of the Georgia Historic Preservation Division at 1; Comments of AT&T at 39-41; CCA Comments at 50; Comments of the Critical Infrastructure Coalition at 16; Sprint Comments at 33; Comments of T-Mobile USA, Inc. at 63-64; Verizon Comments at 62-63; Comments of
time; the Commission’s rules during the Twilight period simply did not expressly mandate
SHPO or Tribal consultation, such that a party could not reasonably be penalized for not going
through SHPO or Tribal consultation or not maintaining records of the consultation.\textsuperscript{74} Indeed, former Commission Chairman Powell noted that the process during this time period was
“muddled.”\textsuperscript{75} The Associations therefore continue to object to any characterization of Twilight
Towers as “non-compliant.”

The Commission’s “muddled” rules aside, the passage of time and changes in the
industry argue against penalizing these towers. After more than 12 years, the original tower
owners are not likely to be the current tower owners, so the Commission would not be, in any
meaningful way, punishing the supposed “wrong doer.”

Further, expeditiously opening Twilight Towers to collocation is appropriate in light of
the limited likelihood of those facilities having any impact on historic properties. As noted
elsewhere, the vast majority of towers that have been reviewed under the 2001 \textit{Nationwide
Programmatic Agreement for the Collocation of Wireless Antennas} have had no adverse effects
on historic properties. To repeat a previous observation, the Associations’ evidence suggests that
only 0.33 percent of Tribal reviews of wireless infrastructure projects result in a finding of
adverse effect. Moreover, even though all Twilight Towers were erected well over a decade ago,
the Associations are aware of no formal complaint that has been filed by a Tribe or a THPO
claiming that a tower has an adverse effect. Finally, there is no basis to support the idea that

\begin{footnotesize}
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\item \textsuperscript{74} See Joint Association Comments at 36-39.
\item \textsuperscript{75} \textit{Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act
Chairman Michael K. Powell).
\end{itemize}
\end{footnotesize}
boundless resources must be committed to ferret out potentially problematic sites that were constructed a decade ago under an entirely different legal regime.\textsuperscript{76}

VII. CONCLUSION.

There is broad support in the comments filed in this proceeding for the Commission to provide additional clarity, transparency, and accountability to the TCNS and the Section 106 Tribal consultation process. There are no calls to dismantle the TCNS. Parties almost uniformly agree that the Commission can and should implement the TCNS and the Section 106 Tribal consultation process in a manner that advances both the Commission’s statutory mandate for rapid deployment of wireless infrastructure and its historic preservation obligations. Improving the TCNS and the consultation process to promote more rapid and efficient deployment of wireless infrastructure will serve the interests of all stakeholders by bringing new and improved wireless services to communities across the country while ensuring that Tribes have the tools necessary to safeguard historic sites of religious or cultural significance.

\textsuperscript{76} See FCC, \textit{Final Programmatic Environmental Assessment for the Antenna Structure Registration Program}, at 4-22 – 4-23 (Mar. 13, 2012), https://apps.fcc.gov/edocs_public/attachmatch/DOC-312921A1.pdf (“While the Bureau acknowledges that information on species-specific effects would be relevant to the analysis presented in this PEA, it would be infeasible and unreasonably costly for the Commission to generate data on species-specific effects from communications towers.”).
Respectfully submitted,

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