Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

JOINT COMMENTS OF CTIA AND THE WIRELESS INFRASTRUCTURE ASSOCIATION

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June 15, 2017

SUMMARY

Wireless broadband services are essential: They promote job, education, and training opportunities; support critical government services; and enable individuals to stay connected with family and friends. The wireless industry as a whole generates more than $400 billion in total U.S. spending, and the mobile industry is expected to make a value-added contribution of $1 trillion to the North American economy by 2020. This trend will accelerate as 5G technologies produce new innovation and investment across the mobile ecosystem, offering unparalleled speeds, a massive increase of Internet of Things ("IoT") devices, and entirely new services and applications. Supporting this wireless revolution is a projected $275 billion in industry investment, which stands to inject $500 billion into the U.S. economy and create three million jobs.

It follows that wireless broadband deployment is, and must remain, a national priority. The deployment of the facilities necessary to support wireless broadband must also be done while protecting areas of historic, cultural, and religious significance across the country. Fortunately, wireless facilities, whether macrosites or small facility deployments, raise few, if any, historic and environmental concerns, particularly with regard to the preservation of historic sites of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations (collectively referred to herein as "Tribes").

In these circumstances, the need for an efficient, uniform, and expeditious Section 106 review process has never been more critical. However, based upon data provided by their members and analysis of publicly available information, the Wireless Infrastructure Association and CTIA have found that certain aspects of the Section 106 review process as it is currently administered by the Federal Communications Commission on non-Tribal lands hinder the goal of efficient wireless broadband deployment. The same data also indicate that the process as it is currently administered on non-Tribal lands is also failing to meaningfully contribute to the preservation of historic sites of religious and cultural significance to Tribes. Stated broadly, the data show:

- The average time for completing the Section 106 consultation with Tribes is 110 days, with more than 30 percent of all reviews taking more than 120 days to complete;

- Per-project fees for Section 106 consultation with Tribes have increased dramatically, with the average cost per Tribe that assess fees increasing by 30 percent and the average fee for collocations increasing by almost 50 percent between 2015 and 2016;

- A small but growing number of Tribes view the Section 106 process primarily as a revenue source, and this small group has a disproportionate impact on the process, as it generates over 70 percent of the review requests; and

- Notwithstanding the foregoing, wireless infrastructure is extremely unlikely to impact Tribal historic properties—only 0.33 percent of Tribal reviews of wireless infrastructure projects result in a finding of adverse effect.

This evidence confirms that concrete changes are needed to facilitate a more effective and efficient Tribal consultation process that serves the goal of protecting sites of historic, religious, and cultural significance to Tribes, while supporting the delivery of nationwide communications services.

The Commission has broad discretion to administer and structure the Section 106 Tribal consultation process for projects located on non-Tribal lands, and it should exercise this discretion to promote predictable, efficient, and effective consultation with Tribes. Specifically, the Commission should:

- **Re-examine its *de facto* fee policy regarding Tribal fees.** The agency should make clear that, for projects located on non-Tribal lands, Tribes are serving as consulting parties under Section 106. Consulting parties are not authorized to charge fees for their participation. In contrast, professional contracting services from Tribes may be appropriate for specific historic sites and charging fees for such services would be appropriate. In the latter instances, where Tribes are acting as professional contractors rather than as consulting parties, the Commission should make clear that such services must be formally requested by either the FCC or an applicant based on evidence that an intact historic property of religious and cultural significance is present in the projects' areas of potential effects. The FCC must distinguish Tribal roles for projects on Tribal lands from their consulting party role on non-Tribal lands. Only if the project is located on Tribal lands may Tribes assume the role of historic preservation officer ("THPO"). THPOs are subject to certain limitations on fees that may be charged for their services, but these comments do not address such issues for Tribal lands.

- **Take steps to resolve the delays associated with Tribal consultation.** The Commission should establish a rebuttable presumption that the information contained in the Preliminary Form 620/621 Submission Packet contains sufficient information for Tribes to ascertain whether a historic property of religious and cultural significance may be affected by the proposed project. An applicant would not be required to provide additional information beyond what is contained in the draft information packet based on the FCC Form 620/621 requirements ("Preliminary Form 620/621 Submission Packet") unless a Tribe or Tribes provide an appropriate written explanation of the additional information being requested and why that information is necessary.

- **Set finite timelines for concluding consultation.** The Commission also should establish a 30-day response period for Tribes to review Preliminary Form 620/621 Submission Packets. If a Tribe has not responded at the end of these 30 days, the Tribe should be deemed to have no interest, and the applicant should be permitted to proceed with the project with the understanding that it has completed the Tribal consultation process with respect to that non-responding Tribe.

- **Reform its Tower Construction Notification System ("TCNS") to modernize the Section 106 Tribal consultation process.** *First*, the Commission should modify the TCNS to support information sharing such that users with a valid FCC Registration Number ("FRN") can identify sites where both Tribes and State Historic Preservation Officers ("SHPOs") previously have made findings of "no properties" or "no effect."

Second, with respect to projects that are not otherwise excluded from Section 106 generally, or Tribal consultation specifically, the Commission should encourage 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. *Third*, to the extent they are not otherwise excluded, the Commission should develop 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. *Fourth*, the Commission should take steps to provide applicants with better and more timely information on areas in which Tribes do have an interest and may wish to participate in Section 106 Tribal consultation for proposed projects in those areas. *Finally*, the Commission should require Tribes to notify the Commission in writing of any prospective changes in their designated areas of interest.

- **Set guideposts for monitoring of wireless infrastructure construction.** The FCC should require Tribes that intend to request the opportunity to monitor to make an affirmative showing that there is a high probability of an eligible property in the area of potential effect ("APE"). Tribes should be encouraged to consolidate their monitoring efforts so that, where feasible, one Tribe could conduct the monitoring, providing the other Tribes with its findings. Applicants should be required to pay for only one Tribal monitor per project. Further, the terms and conditions pursuant to which monitoring will occur should be reflected in a written monitoring agreement.

In addition to these consultation process reforms, the Commission should resolve the long-standing concerns surrounding so-called "Twilight Towers" (*i.e.*, towers built between March 16, 2001 and March 7, 2005) by finding those towers exempt from the consultation process based upon previous changes in the Commission's rules. This solution will make Twilight Towers available for collocation—thus reducing the need for new construction in these instances.

With these changes, the Commission can better ensure that the Tribal consultation process is efficient and effective and will promote the goal of supporting wireless broadband deployment in a manner that protects sites of historic, religious, and cultural significance.

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JOINT COMMENTS OF CTIA AND THE WIRELESS INFRASTRUCTURE ASSOCIATION

The Wireless Infrastructure Association[1] ("WIA") and CTIA[2] (collectively "the Associations") jointly submit these comments[3] with respect to the above-captioned *Wireless Infrastructure NPRM/NOI*[4] 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")[5] with respect to wireless infrastructure to be located on non-Tribal lands. The

[1] The Wireless Infrastructure Association is the principal organization representing the companies that build, design, own, and manage telecommunications facilities throughout the world. Its over 230 members include carriers, infrastructure providers, and professional services firms.

[2] CTIA® (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st- century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[3] These Joint Comments are intended to complement and are filed in addition to WIA's and CTIA's individual comments on the remaining aspects of the *Wireless Infrastructure NPRM/NOI*. *See* Comments of the Wireless Infrastructure Association, WT Docket No. 17-79, WC Docket No. 17-84 (filed June 15, 2017) ("WIA Comments"); Comments of CTIA, WT Docket No. 17-79, WC Docket No. 17-84 (filed June 15, 2017) ("CTIA Comments").

[4] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, ¶¶ 32-64 (2017) ("*Wireless Infrastructure NPRM/NOI*").

[5] 54 U.S.C. § 306108 ("Section 106").

Associations also provide joint comments on measures the Commission should take to facilitate collocations on so-called "Twilight Towers."[6]

The Associations support the dual goals of protecting sites of historic, religious, and cultural significance to Tribes, *and* delivering advanced communications services and technologies nationwide. These goals are not mutually exclusive, and the measures supported in these joint comments will promote both of those goals.

I. INTRODUCTION.

The *Wireless Infrastructure NPRM/NOI*, taken together with the companion *Wireline Broadband Deployment NPRM/NOI*[7] and the *Small Cell Infrastructure PN*,[8] presents an opportunity for the Commission to take significant and critical steps to expedite the deployment of new network infrastructure, both wireless and wireline. Now is the time for sustained efforts on the part of the Commission to improve the predictability, efficiency, and effectiveness of communications infrastructure siting processes and procedures.

The Associations have a long history of, and are committed to, respectful engagement with Tribes and have collaborated with Tribes on several occasions to develop good consultation practices for their members. Both organizations worked extensively with representatives from associations representing Tribal interests and with the Commission to identify common goals and Tribal concerns. The Associations therefore applaud Chairman Pai and the Commission staff for

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[6] *Wireless Infrastructure NPRM/NOI* ¶¶ 78-85.

[7] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) ("*Wireline Broadband Deployment NPRM/NOI*").

[8] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360 (WTB 2016) ("*Small Cell Infrastructure PN*").

their recent invitations for Tribal consultation. Meaningful Tribal consultation and expeditious buildout of wireless infrastructure are not mutually exclusive goals.

As WIA and CTIA demonstrate in their individual comments in this proceeding, expeditious and efficient wireless infrastructure deployment is a matter of national urgency.[9] Broadband services are essential: they promote job, education, and training opportunities; support critical government services; and enable individuals to stay connected with family and friends. Indeed, more than 4.6 million Americans have jobs that depend directly or indirectly on the wireless industry.[10] The wireless industry as a whole generates more than $400 billion in total U.S. spending.[11] Overall, the mobile industry is expected to make a value-added contribution of $1 trillion to the North American economy by 2020, representing 4.5 percent of GDP by the end of the decade.[12]

These trend lines can only accelerate with the growing Internet of Things ("IoT"), smart communities, and next-generation 5G wireless networks. 5G technologies will produce new innovation and investment across the mobile ecosystem, offering unparalleled speeds, a massive increase of IoT devices, and entirely new services and applications.[13] Supporting this wireless

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[9] *See generally* WIA Comments; CTIA Comments.

[10] Roger Entner, *The Wireless Industry: Revisiting Spectrum, the Essential Engine of US Economic Growth*, RECON ANALYTICS, at 18 (Apr. 2016), http://www.ctia.org/docs/default-source/default-document-library/entner-revisiting-spectrum-final.pdf.

[11] Coleman Bazelon & Giulia McHenry, *Mobile Broadband Spectrum: A Vital Resource for the American Economy*, THE BRATTLE GROUP, at 19 (May 11, 2015), https://www.ctia.org/docs/default-source/default-document-library/brattle_spectrum_051115.pdf.

[12] Press Release, GSMA, Mobile Industry to Add $1 Trillion in Value to North American Economy by 2020, Finds New GSMA Study (Nov. 1, 2016), http://www.gsma.com/newsroom/press-release/mobile-industry-add-1-trillion-value-north-american-economy-2020-finds-new-gsma-study/.

[13] Thomas K. Sawanobori, CTIA, *The Next Generation of Wireless: 5G Leadership in the U.S.*, CTIA (Feb. 9, 2016), https://www.ctia.org/docs/default-source/default-document-library/5g_white-paper_web2.pdf.

revolution is a projected $275 billion in industry investment, which stands to inject $500 billion into the U.S. economy and create three million jobs.[14] These benefits could be lost, or at the very least significantly delayed, if the status quo of infrastructure deployment review processes remains unchanged.

The Commission's infrastructure siting policies must adapt to keep pace. 5G services will require dense wireless networks, with hundreds of thousands of new small cells, and expanded backhaul and transport facilities to provide needed capacity and coverage. Chairman Pai, Commissioner Clyburn, and Commissioner O'Rielly all have recognized the urgent need to build densified broadband networks and the critical importance of removing regulatory barriers obstructing that deployment.[15] As Chairman Pai has stated, he has:

> [H]eard time and time again how current rules and procedures impede the timely, cost-effective deployment of wireless infrastructure. This will only become a bigger problem as our wireless networks evolve. A key feature of the transition from 4G to 5G is a change in network architecture. The future of wireless will evolve from large, macro-cell towers to include thousands of densely-deployed small cells, operating at lower power. As networks evolve, our rules should too.[16]

[14] *How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY, at 3 (Jan. 12, 2017), https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf.

[15] *See, e.g.*, *Wireless Infrastructure NPRM/NOI*, Commissioner Mignon L. Clyburn, Concurring Statement ("We have all seen the statistics and read the headlines about the predicted explosive growth when it comes to the demand for wireless services. We are also very aware that consumers expect us to take our policy role seriously, when it comes to ensuring that the nation is prepared to meet this demand. Part of that preparation is ensuring that we can readily deploy the necessary infrastructure to support current, and future wireless offerings."); *id*., Commissioner Michael O'Rielly, Concurring Statement ("The Commission can continue to release spectrum into the marketplace, but wireless services only become a reality if the infrastructure is in place to deliver them to the American consumer.").

[16] *Id*., Chairman Ajit Pai, Statement, at 1.

Wireless providers will need flexibility to place hundreds of thousands of distributed antenna systems ("DAS") and small cell facilities, and to continue to build and collocate on macrosites throughout the country within the next few years. Yet, wireless providers continue to face significant challenges in their efforts to obtain authorizations for deploying this necessary infrastructure, not only from local governments, but also in completing the Commission's environmental and historic preservation review processes under the National Environmental Policy Act ("NEPA") and Section 106 of the NHPA.[17] Thus, as the *Wireless Infrastructure NPRM/NOI* acknowledges, realizing the potential benefits of next-generation wireless broadband technologies will depend in part on a regulatory framework that facilitates rather than hinders wireless providers' efforts to complete the Commission's environmental and historic preservation review processes.[18]

Fortunately, wireless facilities raise few, if any, historic preservation concerns. Small wireless facilities are designed to be attached to existing structures and, in most cases, all required gear for the attachment can be mounted safely on the existing structure, leaving no "footprint" in the right-of-way or surrounding property and offering minimal visual impact. Macrocells similarly have minimal impact on historic preservation, as demonstrated by the data provided below. These facts should give the Commission comfort that it can take steps to improve the predictability and efficiency of its Section 106 process, while ensuring these procedures remain effective as a means for the Commission to satisfy its obligations under NEPA and Section 106 of NHPA.

[17] *Id.* ¶ 32.

[18] *Id.* ¶ 1.

In particular, the Associations urge the Commission to take a fresh look at its Section 106 Tribal consultation processes and procedures. There is compelling evidence demonstrating that the existing Section 106 Tribal consultation process results in delay and increased costs, all without meaningfully facilitating the goal of preserving historic sites of religious and cultural significance to Tribes.

The Associations' data reveal that the Commission's existing Tribal consultation process is neither effective for wireless facility deployment nor meaningful in contributing to the preservation of historic sites of religious and cultural significance to Tribes. Stated broadly:

- The average time required for Tribes to complete a request for consultation (as defined in 36 C.F.R. 800.2(c)(2)(b)(ii)) is 110 days, with more than 30 percent of all requests taking more than 120 days to complete;
- Wireless infrastructure is extremely unlikely to impact Tribal historic properties—only 0.33 percent of Tribal reviews of wireless infrastructure projects result in a finding of adverse effect;
- Per-project Tribal fees have increased dramatically, such as $830,000 in Tribal review costs for an 83-node project with no ground disturbance in the downtown area of a large metropolis; and
- A small but growing number of Tribes view the Section 106 process primarily as a revenue source.

The current state of affairs is untenable and will only worsen absent Commission action. Indeed, given the many hundreds of thousands of expected new wireless deployments, the consultation process as it is currently administered will result in the imposition of substantial burdens on limited Tribal resources. This in turn will result in additional delay, frustrating the critical mission of rapidly deploying wireless broadband and 5G technologies.

It is critical that the Commission act now to remedy the flaws in the process. The Commission has broad discretion to administer and structure the Section 106 Tribal consultation process to promote predictable, efficient, and effective consultation for proposed wireless

infrastructure to be located on *non-Tribal* lands. To this end, the Associations urge the Commission to:

- Re-examine the *de facto* policy regarding Tribal fees to make clear that, for projects located on non-Tribal lands, Tribes are not authorized to charge fees when they are acting as consulting parties, not professional contractors;
- Establish a rebuttable presumption that information contained in the draft information packet based on the FCC Form 620/621 requirements ("Preliminary Form 620/621 Submission Packet") contains sufficient information for Tribes to ascertain whether a historic property of religious and 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;
- Establish a process to allow applicants to submit applications in batches when doing so will be efficient and subject to certain standards;
- Reform the Commission's Tower Construction Notification System ("TCNS") so that it can more effectively be used as a planning tool for Tribes and applicants; and
- Set guideposts for Tribal monitoring of wireless infrastructure construction.

Finally, and in addition to these Tribal consultation process reforms, the Commission should resolve the long-standing concerns surrounding "Twilight Towers" (*i.e.*, wireless facilities built between March 16, 2001 and March 7, 2005) by finding those towers exempt from the consultation process based upon previous changes in the Commission's rules.

II. SECTION 106 TRIBAL CONSULTATION IS INCREASINGLY INEFFICIENT, COSTLY, AND BURDENSOME.

A. Consultation for Proposed Projects on Non-Tribal Lands, As Discussed Herein, Is Distinct from Review of Proposed Projects on Tribal Lands.

As an initial matter, it bears emphasizing that these joint comments are focused on Tribal consultation with regard to projects proposed on *non-Tribal* lands. The distinction between projects proposed on Tribal lands versus those proposed on non-Tribal lands is crucial. For

projects on Tribal lands, the Tribe serves as Tribal Historic Preservation Officer ("THPO"), a role that is functionally identical to the role played by the State Historic Preservation Officer ("SHPO") in Section 106 reviews of projects located on non-Tribal lands.[19] In the context of proposals for facilities on Tribal land, the THPO's concurrence in the proposed "no properties" or "no effect" finding is required (or a memorandum of agreement must be negotiated) before the project may proceed.

For projects located on *non-Tribal lands*, however, Tribes may participate as "consulting parties" and their concurrence is not required. As the ACHP Tribal Consultation Handbook states:

> If the proposed undertaking's area of potential effect ("APE") is located outside of the Tribal lands it oversees, the THPO does not supplant the jurisdiction or have the same rights as the SHPO, but rather may serve as the official representative designated by his/her Tribe to represent its interest as a consulting party in Section 106 consultation.[20]

As consulting parties, Tribes may identify concerns, advise on identification and evaluation, comment on potential effects, and participate in the resolution of any adverse effects.[21] 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.

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[19] *See* 54 U.S.C. § 30271.

[20] Advisory Council on Historic Preservation, *Consultation With Indian Tribes in the Section 106 Review Process: A Handbook*, at 7§ III.B (June 2012) ("ACHP Tribal Consultation Handbook"), http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf ("The THPO's role for federal undertakings off Tribal lands (in other words, on non-Tribal lands such as private, state, or federal lands) is different from its role on its own Tribal lands."). For undertakings on non-Tribal lands, THPOs often fulfill the consulting role for the Tribes they represent, but that role may be served by another individual designated by the Tribe.

[21] *See* 36 C.F.R. § 800.2(c)(2)(ii)(A), (a)(4); *id*. § 800.16(f) (defining consultation as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process").

B. The TCNS Does Not Function as an Effective Tool.

The Commission signed the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("NPA")[22] and created the TCNS to "improve compliance and streamline the review process for construction of towers."[23] The agency took these steps in response to concerns about delay and inefficient processes, noting that:

> Applicants, SHPOs and Commission staff began experiencing ever-growing caseloads and backlogs that, it soon became clear, were posing a threat to the timely deployment of wireless service to customers.[24]

The TCNS plays a central role in identifying and notifying Tribes that might wish to be consulting parties for specific locations.[25] For projects proposed on non-Tribal lands, the TCNS is designed to work as follows: (1) Tribes indicate in the system their "areas of interest," *i.e.*, the areas where they would like to be notified of wireless infrastructure projects; (2) applicants enter proposed projects into the TCNS, which then notifies the Tribes that have expressed an interest in the area in which the project will be located; (3) Tribes then notify the applicant if they would like to consult on the project;[26] (4) applicants provide consulting Tribes with a Preliminary Form 620/621 Submission Packet, containing substantial information about the project; (5) Tribes then have an opportunity to comment on the Preliminary Form 620/621 Submission Packet; and (6)

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[22] FCC, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, codified at 47 C.F.R. Part 1, App. C ("NPA").

[23] *Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1075 (2004) ("*NPA R&O*").

[24] *Id*. at 1077.

[25] *See* NPA § IV.B.

[26] *See also* 36 C.F.R. § 800.16(f).

the Tribes' comments (together with the comments of other consulting parties) are included in the final Form 620/621 Submission Packet, which is submitted to the relevant SHPO for review and, where the record so warrants, a finding of concurrence with a proposed "no properties" or "no effect" finding.[27] The efficacy of this process hinges on a few basic assumptions about the Tribes' role: they will reasonably define their "areas of interest"; they will respond to an initial contact made through the TCNS system within a reasonable period (*e.g.*, 30 days); they will act in their role as consulting parties when they respond to a notification through the TCNS; and they will complete their review of a proposed facility within a reasonable time (again, 30 days).

The TCNS has now been in operation for more than a decade and it does not function as a useful tool. Based on publicly available information, and information from the Associations' members and their historic preservation consultants, it is clear that the Tribal consultation process is plagued by delays, ambiguous procedures, and insufficient guidance regarding the roles played by Tribes in the process.

While most Tribes strive to timely and effectively engage in consultation, the Commission's processes and systems are not sufficiently definitive or flexible. This results in Tribes consulting on an overly-broad number of facilities. Further, a few Tribes now use TCNS for purposes other than consultation. For example, some conflate the roles of consulting party and professional contractor, predicating their review upon payment of fees for what they define as specialized evaluation of a project. Other Tribes conflate the roles of consulting party and THPO, asserting that applicants must secure the Tribe's concurrence or formal determination before consultation can be concluded and requiring a fee before they will grant such determination. This is particularly problematic given the disproportionate effect that a single

[27] *Id.* § 800.2(c).

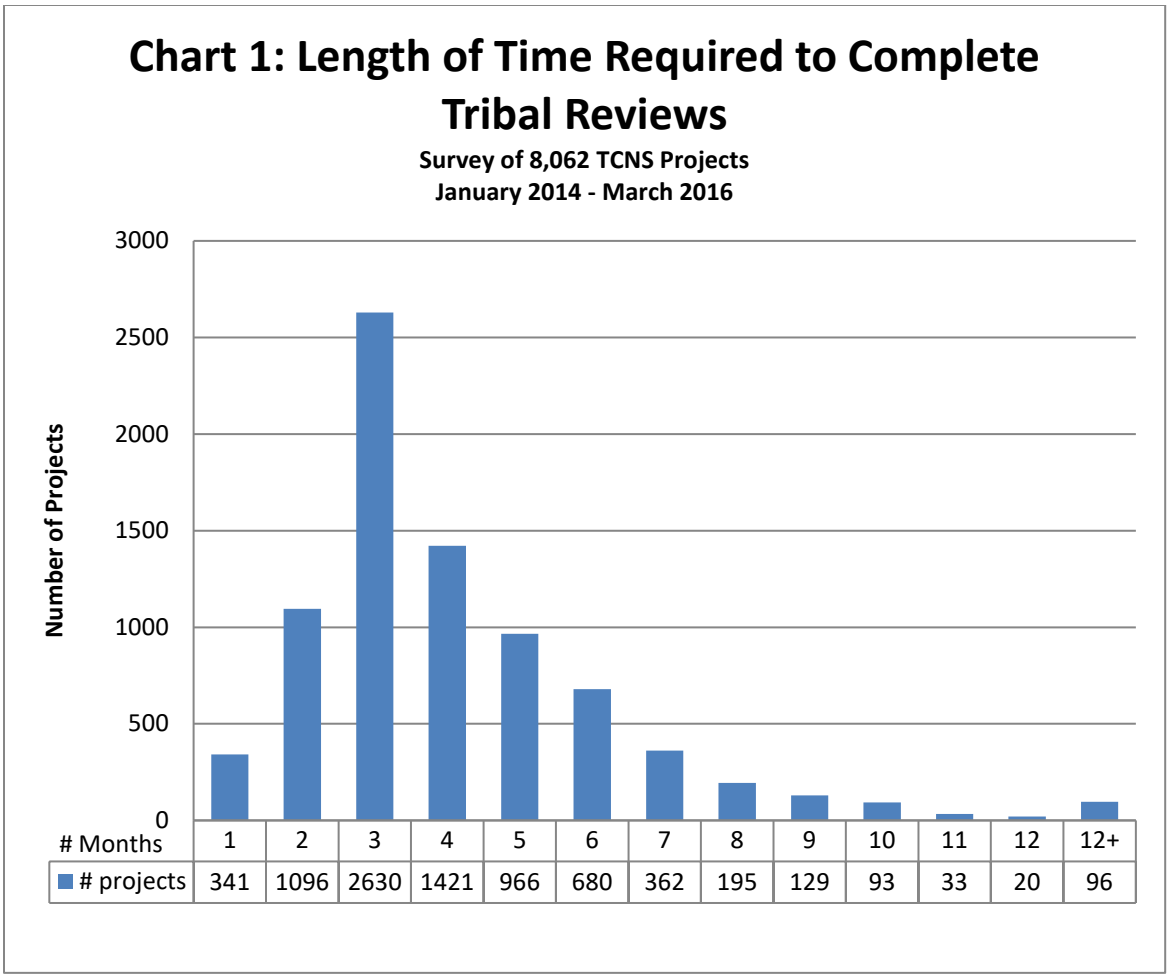
Tribe can have by precluding the applicant from completing Tribal consultation. Still others require fees before they will participate as consulting parties.

Historically, the Commission has been reluctant to clarify these matters either through written guidance or informally through discussions with Tribes and applicants. In the vacuum that has resulted, the TCNS has regressed from a tool to facilitate consultation to a system that: (1) incorrectly permits Tribes to perform the function of "gatekeepers" that determine when and if projects move forward; and (2) provides leverage for a minority of Tribes to press for inappropriate fees. The minority of Tribes that act in this way have a disproportionate impact on the Tribal consultation process and, as a result, the current process deprives consumers of advanced wireless services by adding unnecessary cost and delay.

C. Inefficiencies in the Tribal Consultation Process Can Unduly Delay Wireless Infrastructure Projects.

Perhaps the most striking revelation from the Associations' data is the extended period of time often required for applicants to complete the Commission's Tribal consultation process. Based on information obtained by the Associations, the average number of days required for Tribal consultation (measured from receipt of the TCNS Notice of Organizations email to receipt of the final Tribal response) is 110 days.[28] Even more significant: more than 30 percent of wireless infrastructure projects required more than 120 days; 11.5 percent of the projects required more than 180 days; and 1.2 percent required more than 365 days, with the longest project requiring more than four years. **Chart 1** below categorizes by month how many projects were completed within monthly time periods.

[28] While recognizing that Tribal consultation differs from SHPO review, we note that the average review time for Tribal consultation (from receipt of an information packet to final response) contrasts markedly with an average of 29 days for final SHPO responses even though they are both reviewing the project's Form 620/621 (preliminary and final, as applicable).



1. Tribes fail to or delay responding to Preliminary Form 620/621 Submission Packets.

The extraordinary length of time required to complete Section 106 consultation with Tribes appears to be caused largely by Tribes that express interest in a project in response to the TCNS notification, but then do not respond to the Preliminary Form 620/621 Submission Packet in a timely fashion, *e.g.*, within 30 days.[29] Even a single non-responsive Tribe can exert a disproportionate effect on the timeline, as that Tribe's non-response to the Preliminary Form 620/621 Submission Packet effectively precludes the applicant from completing Tribal

[29] It bears noting that the NPA itself implicitly recognizes 30 days an appropriate time frame for allowing Tribes to respond to communications from applicants. *See* NPA § IV.F.4. This discussion assumes submission of a complete Preliminary Form 620/621 Submission Packet.

consultation. For example, in one instance, it took 525 days for the applicant to complete Tribal review for the construction of a proposed 198-foot monopole because a single Tribal representative for one Tribe was on extended leave and was unavailable to complete review of the Preliminary Form 620/621 Submission Packet. In another instance, it took 293 days for the applicant to complete Tribal consultation for a non-tower collocation, involving no ground disturbance, because two Tribes failed to timely respond to the Preliminary Form 620/621 Submission Packet.

In both cases, the applicants attempted to escalate these projects to the Commission for assistance but, although concurrence is not legally required, were told by Commission staff that the project could not proceed until the Tribes in question affirmatively completed consultation. Based on informal discussions with Commission staff, this appears to be current Commission policy—*i.e.*, applicants have no formal recourse in cases where a Tribe expresses interest in the project but fails to or unreasonably delays responding to the Preliminary Form 620/621 Submission Packet.[30] This lack of a clear path for resolving a situation in which a Tribe expresses interest in a project, but fails to take steps to timely complete the consultation process after receiving the requested information, institutionalizes delay into the TCNS process.

2. Tribes seek information beyond what is required by the Preliminary Form 620/621 Submission Packet.

The Associations' members have also found that more and more often, Tribes are directing applicants to provide additional information beyond what is contained in the

[30] *See* FCC Presentation, Communications Protocols: The Good Faith Process (presented June 7, 2017), https://www.fcc.gov/news-events/events/2017/06/annual-tower-training-workshop-0. Commission staff indicated that the "Good Faith" Process would be made available on the Commission's website, but recognized that, at the time the Process was presented in June, the Commission had not yet made it publicly available. Although the Commission's "Good Faith" process is a step in the right direction, a formal, universal, and enforceable practice is needed. As discussed herein, the time is ripe for the Commission to establish such a process.

Preliminary Form 620/621 Submission Packet. For instance, different Tribes routinely request, and often make it a pre-requisite for obtaining a final response, that applicants provide ethnographic reports, SHPO concurrence letters, extensive shovel tests or archeological surveys, and site visits by Tribal representatives. This additional information is often unnecessary for initial review because the Preliminary Forms 620 and 621 already require applicants to provide a substantial amount of information—*e.g.*, detailed description and geographic coordinates of the proposed project, color photographs, topographical maps—that is sufficient for the Tribe's initial consultation review to identify whether any properties of interest exist within the area of potential effects. Furthermore, responding to these requests can require applicants to undertake additional work that can take weeks or even months to complete and may involve substantial additional costs.

By way of example, as of June 2016, 29 Tribes required a copy of the SHPO determination before they would complete their Section 106 reviews. This runs directly counter to Advisory Council on Historic Preservation ("ACHP") requirements. The SHPO's Section 106 review must appropriately consider all input from consulting parties in concluding whether there are historic sites in the area of potential effect for a given project[31]—in other words, to complete its work, the SHPO must first have any relevant input from the Tribes. And, if the SHPO makes its determination without such input, the determination is arguably incomplete and subject to challenge. Thus, a Tribe's insistence that it have a copy of the SHPO determination *before* it engages in Tribal consultation puts applicants on the horns of a regulatory dilemma.

As with Tribal non-response, wireless infrastructure builders have not been able to secure Commission assistance in resolving these situations. As such, applicants are left with only one

[31] *See* 36 C.F.R. § 800.2(c)(1); NHPA § 101(b)(3).

recourse: to try and resolve the situation as best they can. As these requests for new information continue to increase in number, complexity, and diversity, however, the collective delays and costs caused by these special requests have reached a tipping point.

D. Tribes' Assessment of Review Fees is Expanding in Scope and Amount.

The Associations' members report, and data show, that a growing number of Tribes refuse to respond to a notification through the TCNS unless the applicant agrees to pay a Tribal review fee. These Tribes routinely require project applicants to pay fees *before* the Tribe will respond to the TCNS notification and *before* any potentially eligible property has been identified. Further, the number of Tribes charging such fees has increased significantly over the last several years, and the amount of fees Tribes charge per project continues to increase.

When Tribes first requested fees through the TCNS, it was common for fees to be in the $50-$200 range. By contrast, as of the fall of 2016, at least one Tribe had raised its review fees to $2,000 per project, three Tribes were at $1,500, and seven additional Tribes had fees of $1,000 or more. The Commission acknowledges that at least 95 Tribes are known to charge fees for new construction of wireless infrastructure projects:

> In 2015, 50 Tribal Nations noted fees associated with their review process in TCNS; by March 2017, Commission staff was aware of at least 95 Tribal Nations routinely charging fees, including 85 with fees noted in TCNS and 10 that staff was aware of from other sources.[32]

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."[33]

[32] *Wireless Infrastructure NPRM/NOI* ¶ 35.

[33] *Id.*

Even some Tribes recognize that fees charged by other Tribes can be unreasonable. The Blackfeet Tribal Historic Preservation Office stated:

> At present and from the outset of utilizing the FCC E-106 program Blackfeet THPO has established a Research and Review fee of $400.00 for each TCNS project. It [is] our view that some Indian Tribes are charging an excessive amount for this service. Although there may be specific TCNS projects that require additional costs, the Tribes that charge an excessive amount are jeopardizing Blackfeet THPO's right to protect and preserve our Blackfeet culture.[34]

The Associations' data reveals Tribal review fees totaling as high as $13,000-$19,550 per single tower.[35] For 23 projects undertaken in the Midwest[36] by one member between June 2016 and May 2017, a range of 24 to 38 Tribes (with the average number being 31) expressed an interest in reviewing each application, resulting in Tribal fees ranging from $8,725-$19,550 per site (with the average per site fees being $12,076).[37]

E. Tribes Are Expanding Their Areas of Interest.

Further, Tribes are actively expanding their areas of interest in the TCNS. This compounds the problem of obtaining a timely consultation when considering the increasing delays and fees associated with each review, as detailed above. According to the Commission's own statistics:

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[34] Comments of the Blackfeet Tribal Historic Preservation Office, WT Docket No. 17-79 (filed Apr. 13, 2017).

[35] For a proposed new tower in Wisconsin, where another tower was reviewed in the same county (and same town) last year, an applicant is facing $19,550 in Tribal review costs (ranging from $200 to $1,500 per Tribe with five Tribes charging $1,000 or more), while last year it was $13,075 for a project there. In just one year's time, the overall Tribal review cost has jumped by almost $6500. Since last year four additional Tribes have ascribed interest in the area bringing the total up to 38 Tribes.

[36] States included in the review were Iowa, Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

[37] Looking at Wisconsin alone, an average of 32 Tribes expressed an interest in each of the six projects within the state, with average Tribal fees of $14,381. In Ohio, an average of 28 Tribes expressed an interest in each of the seven projects in the state, with average Tribal fees of $10,878.

> [T]he average number of Tribal Nations notified per tower project increased from eight in 2008 to 13 in August 2016 and 14 in March 2017. Six of the 19 Tribal Nations claiming ten or more full States within their geographic area of interest in March 2017 had increased that number since August 2016, with three Tribal Nations claiming 20 or more full States in addition to select counties.[38]

In the Midwest, it is not uncommon to have 25 to 35 Tribes or more notified for a single project. Even more troubling, evidence gathered by the Associations suggests that Tribes' expansion in their areas of interest may be driven in part by the economic interests in charging Section 106 consultation fees. As just one example, during a Tribal council meeting of the Delaware Tribe of Indians, the Tribe discussed the advantages of charging fees and expanding areas of interest.[39] Six days after this discussion, the Tribe adopted a new fee schedule, and over the next several months the Tribal council also adopted an investment plan for the FCC fee revenue that redirected 70 percent of the fee revenue to non-Section 106 activities.[40]

F. Tribes are Increasingly Requiring the Use of Tribal Monitors.

Some Tribes are increasingly requiring monitors to be present at the construction of wireless infrastructure projects. Tribes often request this monitoring even when no evidence of properties of religious or cultural significance have been identified through the Section 106 process. Most of the Tribes that request monitors expect payment, and expenses often include hourly wages, travel costs, hotels, and per diems. Further, many of those Tribes require an additional flat rate or administrative fee, all of which cumulatively can cost over $1,000 per day.

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[38] *Id.*

[39] Minutes August 4, 2015 Regular Tribal Council, submitted by Nicky Kay Michael, PhD, Tribal Council Secretary, http://delawaretribe.org/wp-content/uploads/council-2015-08-04.pdf.

[40] *See* Resolution 2016-23, A Resolution of the Tribal Council of the Delaware Tribe of Indians to Adopt an Investment Plan for the (THPO) Historic Preservation Section 106 Consultation Fees for One Year (dated Mar. 15, 2016), http://delawaretribe.org/wp-content/uploads/Res-2016-23.pdf.

For example, one tower in Pennsylvania accumulated fees of $19,100 for 11 days of monitoring, and another in Ohio resulted in $14,800 on fees for nine days of monitoring.

The applicant often must incur additional costs and delays due to coordination efforts necessitated by some Tribes' requirement that they receive several weeks advance notice prior to the initiation of construction activities, limited availability of Tribal monitors, and Tribal monitors who do not show up on the date when construction is scheduled to begin. It can take an applicant three or more weeks to coordinate Tribal monitoring efforts. The costs incurred during the monitoring process can easily exceed the significant Tribal fees for Section 106 review, costing up to $19,000.

III. THE COMMISSION SHOULD IMPROVE THE PREDICTABILITY, EFFICIENCY, AND EFFECTIVENESS OF THE TRIBAL CONSULTATION PROCESS.

As noted above, the Section 106 process as administered by the Commission on non-Tribal lands is not serving its intended goals. Those problems will only be exacerbated in the context of future deployment of infrastructure for wireless broadband and 5G services, which will involve thousands of projects each year (including both small wireless deployments and macrosites). These increasing inefficiencies, costs, and burdens of the Tribal consultation process will hinder and frustrate the urgent need to build densified broadband networks to meet growing consumer demand.

In short, now is the time for the Commission to bring clarity to and address the efficiency and effectiveness of the Tribal consultation aspects of the Section 106 review 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 allow projects to proceed. Without establishing a finite procedural timeline, the Commission risks continuing and exacerbating the delays and concerns associated with the current Tribal consultation process.

A. The Commission Has Broad Discretion to Administer, Structure, and Modernize the Section 106 Tribal Consultation Process.

The Commission is responsible for compliance with Section 106 of the NHPA as it applies to wireless infrastructure projects and has the necessary authority to make the Section 106 Tribal consultation process for projects located on non-Tribal lands more timely, predictable, and efficient for all. In this regard, the Commission's duties include allowing Tribes to express interest in projects constructed on non-Tribal lands, but satisfaction of this obligation should not impinge upon the Commission's ability to establish standardized procedures for administering the consultation process, particularly with regard to matters such as Tribal fees, timelines for completing review, and the process for designating areas of interest.

The NHPA, as reflected in the ACHP's implementing regulations, provides the Commission with legal authority necessary to administer Tribal consultation in a manner that facilitates the agency's overall mission of promoting ubiquitous, advanced, and affordable broadband services.[41] Nevertheless, Commission action must not interfere with Tribal sovereignty.

Each federal agency, including the Commission, has the authority to determine how to fulfill its own consultation with Tribes[42] and "should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement."[43] In short, the NHPA and the ACHP regulations empower agencies to exercise flexibility and establish a balance between the level of Tribal consultation and the agency's overall mission and level of involvement in the project.

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[41] *See* 36 C.F.R. § 800.3(c)(3) ("The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.").

[42] ACHP Tribal Consultation Handbook § II.B.

[43] 36 C.F.R. § 800.2(a)(4).

This means that the Commission can and should ensure that its Section 106 review process overall represents a "reasonable and good faith effort to carry out appropriate [historic property] identification."[44] Further, the level of effort should accord with "the nature of the undertaking and its corresponding potential effects on historic properties."[45] In other words, the process should enable "all parties to focus their limited resources on the cases where significant damage to historic properties is most likely."[46] This is particularly important as the wireless industry looks to deploy hundreds of thousands of small cells that have a less obtrusive footprint and visual presence, and additional macrosites, which have widely been shown not to affect properties of historic or cultural significance to Tribes; indeed, only one third of one percent of Tribal reviews of wireless infrastructure projects result in a finding of adverse effect.

B. The Commission Should Clarify Its Tribal Fee Policy.

The Commission should re-examine its *de facto* fee policy. As noted above, a growing number of Tribes are demanding such fees, the amount of the fees is increasing, and Tribes' areas of interest are expanding. The Commission is the only federal agency that has, in effect, institutionalized a fee structure for Section 106 Tribal consultation. These fees impose needless delay and expense on wireless infrastructure buildout. The Commission should clarify, based on existing ACHP guidance, when fees may be appropriate and how those fees should be negotiated.[47]

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[44] *Id*. § 800.4(b)(i); *see also Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 805–07 (9th Cir. 1999) (describing the good faith effort to identify historic properties on Tribal land); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 582 (9th Cir. 1998) (finding that not all properties need to be identified if a study demonstrates that the effects could not impact any type of property).

[45] Protection of Historic Properties, 65 Fed. Reg. 77698, 77719 (Dec. 12, 2000); 36 C.F.R. § 800.4(b)(1).

[46] *NPA R&O*, 20 FCC Rcd at 1082 (citation omitted).

[47] *Wireless Infrastructure NPRM/NOI* ¶¶ 43-49.

1. Establish that fees are not appropriate for Tribes participating solely as consulting parties under Section 106.

The Commission should clarify that applicants are *not* required to compensate Tribes for participating as consulting parties in the Section 106 review process. Indeed, the question of fees for participation in the Section 106 consultation process is the subject of growing concern, including among other agencies. As the National Park Service ("NPS") stated:

> There has been a growing concern about the practice of certain parties charging fees from Federal agencies or their applicants for their participation in the Section 106 process. In particular, the issue has emerged in the context of Indian Tribes and their participation in the process. While the question of fees has many dimensions that will require more detailed attention over the long term, this memorandum is intended to provide some immediate guidance on the current Tribal issue.[48]

Nowhere does the ACHP, the NHPA, or the implementing rules require agencies to pay, or consulting parties to charge, for their participation—Section 106 was simply not intended as a revenue stream for consulting parties. Yet, in the competitive environment of wireless service provision, in the past it has been more expedient to simply pay the fees than ask the FCC for assistance in resolving the issue. Nevertheless, existing policy makes clear that applicants *are not* required to compensate Tribes merely for participating as consulting parties in the Section 106 review process:

> [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

[48] *See* National Park Service, Tribal Historic Preservation Office Historic Preservation Fund Grant Quick Guide, Chapter 8, at 49, https://www.nps.gov/thpo/downloads/2017THPOHPFQuickGuide.pdf.

> 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.[49]

This ACHP policy, dating back to 2001, is quoted with approval in the NPS Tribal Historic Preservation Office's Historic Preservation Fund Grant 2016 Quick Guide.[50]

Consistent with this policy, other federal agencies have developed effective administrative practices that limit Tribal compensation. For example, the Bureau of Land Management, the Forest Service, 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.[51] The Commission is unique among federal agencies in facilitating Tribes routinely charging fees for participating as consulting parties. As demonstrated above, this policy imposes needless delay and expense on wireless infrastructure buildout, and the Commission should exercise its discretion to revise its rules.

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[49] ACHP, Section 106 Assistance for Users, *Fees in the Section 106 Review Process* (updated Apr. 26, 2002), http://www.achp.gov/regs-fees.html ("ACHP Fees Review Process").

[50] NPS, Tribal Historic Preservation Office Historic Preservation Fund Grant: Quick Guide, Chapter 8 (Fees Charged for Consultation) (2016), https://www.nps.gov/thpo/downloads/manual/2016THPO-HPF-Quick-Guide.pdf. The NPS provides federal funding that supports THPO activities on *Tribal* lands. It should be noted that the NPS (and the ACHP) seem to conflate the roles of THPOs with their role as a Tribal consulting party in projects on non-Tribal lands. This contributes to the confusion over when fees are appropriate as expressed in the 2001 ACHP fee letter.

[51] Forest Service, *FSM 2300 – Recreation, Wilderness, and Related Resource Management: Chapter 2360 – Heritage Program Management*, at 37 (July 25, 2008), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd488845.pdf (Chapter 2361.5 – Compensation); Forest Service, *FSH 1509.13 – American Indian and Alaska Native Relations Handbook: Chapter 10 – Consultation with Indian Tribes and Alaska Native Corporations*, at 13 (Mar. 9, 2016), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd517668.pdf (Chapter 12 – Compensation); Bureau of Land Management, *BLM Handbook 1780-1 Improving and Sustaining BLM-Tribal Relations*, App. 2, A2-5 (Dec. 15, 2016), https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1__0.pdf (Policy Covering Compensation for Tribal Input into BLM Decision Process); HUD, Notice CPD 12-006, *Process for Tribal Consultation in Projects That Are Reviewed Under 24 CFR Part 58*, at 7 (June 15, 2012), https://www.hudexchange.info/resources/documents/Notice-CPD-12-006-Tribal-Consultation-Under-24-Cfr-Part-58.pdf; DOT, *Interagency Guidance: Transportation Funding for Federal Agency Coordination Associated with Environmental Streamlining Activities*, Section II, Key Points, https://www.environment.fhwa.dot.gov/strmlng/igdocs/section2.asp.

To effectuate the purpose of Section 106, and to promote consistency with policies of other federal agencies, the Commission should make clear that Tribes are not authorized to charge, and applicants need not pay, fees when the Tribe is acting as a consulting party. Thus, in cases where a Tribe identified through the TCNS demands that the applicant pay a fee before the Tribe will respond to the Preliminary Form 620/621 Submission Packet, and the applicant has otherwise made a reasonable attempt to obtain a response from that Tribe, the Tribe will be deemed to have no further interest and the applicant will be deemed to have completed its Section 106 Tribal consultation with respect to that Tribe.

By clarifying that applicants are not required to pay fees when Tribes are acting as consulting parties, the Commission will reduce confusion and expedite the Section 106 consultation process. Furthermore, it will benefit all parties to the process—Tribes, the FCC, and applicants—to more effectively direct resources toward projects that may have a significant effect on Tribal sites of religious and cultural significance.

2. Clarify fees that may be charged when Tribes provide requested contractor services as part of the Section 106 process.

The Commission also should make clear that professional contracting services from Tribes may be appropriate for specific historic sites, but such services must be reasonable and based on evidence that an intact historic property of religious and cultural significance is present in the projects' APE. In this regard, applicants should be the entity responsible for determining when and whether professional Tribal contractors are needed for further identification efforts or mitigation for an individual project, without mandatory recourse to the Commission. Given the overall lack of impact wireless projects have on areas of cultural or historic interest to Tribes, demands that applicants automatically use Tribal contractor services are unwarranted.

Nevertheless, if an applicant needs the services of a Tribal contractor, the contractors who render services to applicants should meet the Secretary of the Interior's Historic Preservation Professional Qualification Standards.[52] The terms on which Tribal contractors provide service should be negotiated on a case-by-case basis between the applicant and the Tribal contractor and should be reasonable and generally commensurate with other cultural resource contractors of similar education and experience levels engaged by the applicant. Those negotiated terms should be documented in a written contract. In the event that one of the parties considers the negotiations to be stalled by irreconcilable differences, that party should be permitted to request Commission assistance.

C. The Commission Should Reduce Delays in the Section 106 Tribal Consultation Process.

1. Establish a rebuttable presumption that the information contained in the Preliminary Form 620/621 Submission Packet is sufficient for Section 106 Tribal consultation.

As discussed above, more and more applicants are facing requests for additional information from Tribes that often require additional work that can take weeks or even months to complete and may involve substantial additional costs without commensurate preservation benefits. Often several Tribes will comment on the same project and place different information demands on applicants. To illustrate, one project to install a small facility on an existing utility pole in a Midwestern city, with no ground disturbance, required reviews by 16 Tribes.[53] Although many Tribes responded promptly, the project was significantly delayed because one

[52] *See* National Park Service, Historic Preservation Professional Qualification Standards, https://www.nps.gov/history/local-law/gis/html/quals.html.

[53] *See* Comments of Verizon, WT Docket No. 16-421, at 34 (filed Mar. 8, 2017).

Tribe took 159 days to respond.[54] Ultimately, not one of the Tribes found any effect on Tribal historic properties.[55] This emphasizes the need for standardization with regard to the information applicants are required to produce. Requiring applicants to provide different information to different Tribes for each project is unworkable and results in unacceptable delays as noted above.

The Commission should exercise its broad discretion to administer the Section 106 Tribal consultation process to standardize the types of information required of applicants during the Section 106 Tribal consultation process.[56] Specifically, the Commission should establish a rebuttable presumption that the information contained in the Preliminary Form 620/621 Submission Packet submitted to Tribes expressing an interest in a project contains sufficient information for the Tribe to ascertain whether a historic property of religious and cultural significance may exist in the APE and be affected by the proposed project.

An applicant should be required to provide additional information beyond what is contained in the Preliminary Form 620/621 Submission Packet only if the Tribe meets the following requirements: (1) provides a written explanation of the additional information being requested and why that information is necessary for a specific project; (2) provides evidence of a high probability of the presence of intact archeological historic properties within the APE for direct effects;[57] (3) makes the request no more than 15 days after it receives the Preliminary Form 620/621 Submission Packet; and (4) limits its request to the APE for the proposed project.

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[54] *Id.*

[55] *Id.*

[56] *Wireless Infrastructure NPRM/NOI* ¶ 46.

[57] Threshold considerations to demonstrate that an eligible property is located in the APE should include specific, minimum evidentiary requirements and consideration of whether any Tribal historic properties were identified by the professional contractors conducting the initial field survey. This showing can be

The applicant should make the initial determination of whether the Tribe has made an adequate showing to request additional information within 15 days of receiving the Tribe's written request. An applicant's decision that the Tribe has met requirements for additional information will toll the Tribe's 30-day review period (discussed below) until the applicant provides the requested information. Once the Tribe receives the requested additional information, its 30-day review period will recommence and the Tribe will have the remainder of the 30-day period to complete its review. Any disagreement regarding a Tribe's compliance with the standard above may be referred in writing to the Commission, with the Commission resolving such disagreements within 15 days from receipt of such a referral.

This rebuttable presumption is an important step in reducing the delays in completing the Section 106 Tribal consultation process. It will set a reasonable and well-defined baseline against which requests for additional information can be measured and an effective process for providing Tribes with additional information where it is truly warranted. Indeed, this process closely parallels the Commission and the ACHP Program Comment for Positive Train Control, which establishes that (1) Tribes must explain in writing the basis for their request for additional information, and (2) such requests in and of themselves are not sufficient to extend the time period for the Tribe to review the project.[58]

made directly to the FCC if Tribes wish to keep such information confidential from the applicant, but must be subject to the same constraints for eligibility in the National Register of Historic Places as non-confidential properties.

[58] *See Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, 29 FCC Rcd 5340, 5341 § VII.D (WTB 2014) ("PTC Program Comment").

2. Provide 30 days for Tribes to complete their review after receiving a Preliminary Form 620/621 Submission Packet.

The Commission should address the problem of Tribes failing to respond, or delaying responding, to Preliminary Form 620/621 Submission Packets by establishing a 30-day period, once the Tribe receives a Preliminary Form 620/621 Submission Packet, for the Tribe to respond. If a Tribe has not responded at the end of these 30 days, the Tribe will be deemed to have no interest, and the applicant can proceed with the project with the understanding that it has completed the Tribal consultation process with respect to that non-responding Tribe.[59]

There is general agreement that 30 days should provide Tribes with a "reasonable opportunity to respond"[60] to proposed wireless infrastructure projects. Indeed, SHPOs are required to respond to final Form 620/621 Submission Packets within 30 days.[61] Likewise, Section 106 consultation must be completed within 30 days for Positive Train Control projects[62]

[59] For documentation purposes, the Commission should also consider generation of a confirmation letter from TCNS to the applicant and Tribe to this effect.

[60] NPA § IV.F.4. *See, e.g.*, Comments of Blackfeet Tribal Historic Preservation Office, WT Docket No. 17-79 (filed Apr. 13, 2017) ("Timely response Industry Small Cell Tower deployment - Blackfeet THPO would recommend a standard response time period (30 calendar days) on the conditions that all pertinent information is received from the various consultants (maps, archaeological information, precise description of project, etc.) utilizing the TCNS E106 Program."); Comments of Missouri State Historic Preservation Office, WT Docket No. 17-79 (filed June 2, 2017) ("Missouri SHPO average response to FCC projects is 11 days. . . . Requiring response in 60 or 90 days will not improve review time."); Comments of Colorado State Historic Preservation Office, WT Docket No. 17-79 (filed Apr. 13, 2017) ("We note that over the past 20 years, the Colorado SHPO has reviewed more than 3,000 telecommunication projects, the majority of which were reviewed after March 15, 2001. The vast majority of these projects were reviewed (and responded to) well within the 30 days timetable provided under 36.CFR.800 (and later, by the 2005 Nationwide Programmatic Agreement)"); Comments of National Conference of State Historic Preservation Officers, WT Docket No. 17-79 (filed Apr. 13, 2017) (noting that "30-day response times are the expectation outlined not only in ACHP regulation, but in the NPA").

[61] NPA § VII.B.2.

[62] PTC Program Comment, 29 FCC Rcd at 5351 § VII.D.

and Tribes also have 30 days to respond to the initial TCNS notification of a project.[63] There is no reason why the Section 106 process for Tribal consultation for projects on non-Tribal lands should have a different timeframe.

In those cases in which a Tribe may need more than 30 days to respond to a Preliminary Form 620/621 Submission Packet, the Tribe and applicant should be permitted to mutually agree, in writing, to a single extension of not more than 15 additional days. Disagreements regarding whether a 15-day extension is warranted should be referred in writing to the Commission, and the Commission should resolve such disagreements within 15 days from the receipt of the referral.

D. The Commission Should Permit Batch Processing Subject to Reasonable Limits on the Number and Types of Applications.

The Associations support establishing a process to allow applicants to submit applications in batches.[64] Batch processing, subject to reasonable limits on the number and types of applications, can increase the efficiency of the review process and reduce the overall impact on Tribal resources.

In this regard, batch processing should be permissive rather than mandatory. In other words, applicants should have the flexibility to submit applications for batch processing where they believe it is in their interests to do so. But, applicants should not be obligated to submit applications for batch processing.

Further, the maximum number of applications included for processing as a batch should be specifically defined so as not to overwhelm either the Tribes or the applicants. In addition, applications to be processed in a batch should all be fundamentally similar with similar potential

[63] NPA § IV.F.4.

[64] *Wireless Infrastructure NPRM/NOI* ¶¶ 62-63.

impacts to achieve the underlying purpose of a batch application process, *i.e.*, to increase efficiency of the review process without sacrificing effectiveness. For instance, batched applications should all pertain to facilities that are similar in type and size, with a similar degree of ground disturbance, and are within reasonable proximity of one another. Batch processing can work efficiently if the batched applications are essentially similar, thereby allowing the reviewing parties to enjoy a certain kind of economy of scale in their review process. In short, with application batches limited in number, size, type, potential environmental effect, and geographic location, batch processing should be more efficient and thus reviewing parties would not need additional time to respond to the associated Preliminary Form 620/621 Submission Packets.

E. The Commission Should Reform the TCNS to Improve Transparency Regarding Tribal Areas of Interest.

Because the Commission relies on the TCNS to administer the Section 106 Tribal consultation process, the Commission has a corresponding obligation to invest sufficient resources to manage, upgrade, and supervise the operation of the TCNS to ensure that the system is being used properly, reflects the latest technological changes in the telecommunications industry, and is not being abused. Further, under the NPA, the Commission committed to work with Tribes to limit the locations and types of facilities subject to Tribal review.[65] With these principles in mind, the Commission should implement the following reforms to the TCNS in order to improve transparency regarding Tribes' designated areas of interest.

The TCNS currently does not enable Tribes to easily narrow and target the types of projects they want to review, or allow them to easily make available the areas they have already

[65] NPA § IV.D.

cleared. This results in Tribes being forced to identify overly broad areas of interest and, consequently, to review a larger than necessary number of applications. The Commission should reform the TCNS to streamline the Section 106 Tribal consultation process.[66]

First, the Commission should modify the TCNS to support information sharing such that users with a valid FCC Registration Number ("FRN") can identify sites where SHPOs previously have made findings of "no properties" or "no effect," based on input from Tribes.[67] With more than a decade of Section 106 reviews and the increasing digitalization of the review process, the Commission has a deep database of information that could benefit applicants and reduce duplication of efforts for Tribal review. By making available this substantial record on areas that have been successfully reviewed, the Commission could encourage applicants to focus infrastructure deployment in areas where Tribes and SHPOs have agreed there are not historic sites, thereby ensuring better compliance with NHPA and ACHP requirements for enhancing preservation efforts.[68]

Use of the TCNS as a planning tool in this manner would allow applicants that are proposing a project within an APE that has already been reviewed by a Tribe, THPO, or SHPO and found to contain no historic properties to proceed without conducting a Section 106 review of the same APE. Modifying the TCNS to facilitate such information sharing in this way would be consistent with the FCC's responsibility under the NHPA, which states:

> Each Federal agency that is responsible for the protection of historic property (including archeological property) . . . shall ensure that . . . records and other data, including data produced by historical

[66] *Wireless Infrastructure NPRM/NOI* ¶¶ 53-55.

[67] Because access to the TCNS is restricted to entities with a valid FRN, this high-level information would only be available to professional entities known to the Commission.

[68] 54 U.S.C. § 306131(a)(1)(C); 36 C.F.R. § 800.4(b)(1).

> research and archeological surveys and excavations, are permanently maintained in appropriate databases and made available to potential users.[69]

Such action would also comply with ACHP rules, which direct agencies to "take into account past planning, research and studies . . . and the likely nature and location of historic properties within the area of potential effects."[70] This approach would not result in the disclosure of any information that could make Tribal sites vulnerable to discovery and plunder, as only cleared sites would be identified and only those entities with a valid FRN would be able to access the information. And, standardizing this practice would reduce workloads for both industry and Tribes.

Second, with respect to any project that is not otherwise excluded from Section 106 review generally, or the Tribal consultation process in particular,[71] the Commission should encourage Tribes to "specify geographic areas in which no review is required for direct effects on archeological resources or no review is required for visual effects."[72]

Third, as the Associations discuss in their separate comments, certain facilities should be excluded from Section 106 and NEPA review altogether.[73] However, should the Commission decline to take this action, it should take steps to ensure that these facility types are excluded from the Section 106 Tribal consultation process as discussed herein. Specifically, the Commission should develop a list of wireless infrastructure facility-types that, if they are not

[69] 54 U.S.C. § 306131(a)(1)(C).

[70] 36 C.F.R. § 800.4(b)(1).

[71] Some of the exclusions provided in the NPA provide relief from SHPO consultation, but still require Tribal consultation (*e.g.*, construction in an industrial park, strip mall, or shopping center, and construction in or near a right of way).

[72] NPA § VI.B.

[73] *See* WIA Comments at 62-73; CTIA Comments at 37-39.

excluded from Section 106 review, are unlikely to affect Tribal historic properties and therefore do not warrant review (*e.g.*, indoor facilities, non-substantial collocations with no new ground disturbance, and non-substantial structures in municipal rights-of-way). Using this list, the Commission should then modify the TCNS to provide an electronic option for Tribes to identify any or all of the facility types as not requiring Section 106 Tribal consultation. The Commission should also make a written recommendation to all Tribes using the TCNS to indicate in the TCNS those facility types for which the Commission will not require Section 106 Tribal consultation.

Relatedly, the Commission should develop a list of wireless infrastructure facilities that are unlikely to affect Tribal historic properties but that warrant a more expedited review commensurate with the potential for effects on Tribal historic properties. Examples of such facilities could include facilities placed on new structures in industrial zones as defined in Section III.D of the NPA and/or facilities on new structures in or within 50 feet of an existing utility right-of-way, as defined in Section III.E of the NPA. For these facility types, the Commission should specify the procedures for review to enable Tribes an opportunity to review the application with the understanding that the deployment is unlikely to affect Tribal historic properties and thus need not adhere to the full Section 106 review process. For these facility types, the Commission should modify the TCNS to provide an electronic option for Tribes to identify any or all as requiring only streamlined review. The Commission should also make a written recommendation to all Tribes using the TCNS to indicate in the TCNS those facility types for which the Commission will require expedited Tribal review.

Fourth, the Commission should take steps to provide applicants with better and more timely information on areas in which Tribes do have an interest and may wish to participate in

Section 106 Tribal consultation for proposed projects in those areas. This information could be made available to TCNS users with a valid FRN on a county-level basis, allowing TCNS users to minimize the likelihood of siting in an area of concern and thereby minimizing Tribes' Section 106 workloads. For instance, as an interim measure, the Commission could establish a process allowing a TCNS user with a valid FRN to request a complete list of Tribes' areas of interest on a county-level basis. Ultimately, the Commission should establish a "preview" step in the TCNS that allows TCNS users with a valid FRN to view a list of Tribes that have requested notice of proposed projects in a specific county.[74]

Finally, to further support this more efficient information sharing model, the Commission should also require Tribes to notify the Commission in writing of any prospective changes in their areas of interest. The Commission would then notify TCNS users with a valid FRN of the proposed changes and the changes would not go into effect until six months after notice to the TCNS users. Along similar lines, the Commission should modify the TCNS to notify applicants of planned expansions in Tribes' areas of interest. This process would allow the Commission to better monitor the TCNS and look into extensive expansion of Tribal areas of interest.

F. The Commission Should Set Guideposts for Tribal Monitoring.

The Commission should provide some basic parameters around the use of Tribal monitors at construction sites because no formal standards concerning monitoring currently exist. Providing some threshold criteria can reduce uncertainty, and the resultant delay, as well as the regulatory and cost burdens imposed by unnecessary monitoring. Threshold criteria will also

[74] The Department of Housing and Urban Development has implemented a similar approach. *See* Tribal Directory Assessment Tool, TDAT v2.0, https://egis.hud.gov/tdat/tribal.aspx.

help both applicants and Tribes to focus monitoring efforts on those areas with a high probability of containing sites eligible for inclusion on the National Registry of Historic Places.

Specifically, the Commission should require Tribes that intend to request the opportunity to monitor the construction of specific projects to make an affirmative showing during the Section 106 Tribal consultation process that there is a high probability of an eligible property in the APE.[75] If a Tribe satisfies these threshold showings, the applicant must establish a monitoring plan with the Tribe that is consistent with site safety, project implementation scheduling, cultural sensitivity, and approved construction plans.

Tribes should be encouraged to consolidate their monitoring efforts so that, where feasible, one Tribe could conduct the monitoring, providing the other Tribes with its findings. The FCC should also encourage Tribes to limit the number of monitors to one per project.

Further, to avoid misunderstandings and delays, the terms and conditions pursuant to which monitoring will occur should be reflected in a written monitoring agreement that, in addition to enumerating the obligations of each party, would require the production of a written monitoring report by the Tribe. The written agreement should also include the compensation arrangements. The applicant should be required to reimburse the monitoring expenses of only one Tribe per project and compensation should be limited to hourly wages and standard travel costs. Both the agreement and the monitoring report should be appended to the final submission packet sent to the SHPO.

[75] This showing can be made directly to the FCC if Tribes wish to keep such information confidential, but must be subject to the same constraints for eligibility in the National Register of Historic Places as non-confidential properties.

IV. THE COMMISSION SHOULD EXCLUDE COLLOCATIONS ON "TWILIGHT TOWERS" FROM HISTORIC PRESERVATION REVIEWS, CONSISTENT WITH THE 2001 COLLOCATION AGREEMENT.

Separate and apart from modernizing the Tribal consultation process, the Commission should find that Twilight Towers are exempt from the Section 106 consultation process based upon ambiguities in earlier versions of the Commission's rules and the 2001 Collocation NPA.[76] This will expeditiously resolve an issue that has hindered deployment for over a decade, and make these facilities that have been in place for 12 to 16 years available for collocation at the very time that additional infrastructure platforms are needed for FirstNet, broadband, and 5G. It will also promote preservation goals because each Twilight Tower that becomes available for collocation could obviate the need for the construction of a new tower.

This ruling is consistent with the Commission's rules and programmatic agreements as they were in effect during the period the Twilight Towers were constructed. Prior to the implementation of the NPA in 2005, the Commission's rules regarding Section 106 review *did not* mandate consultation with SHPOs or THPOs, and standards for consultation with Tribes on non-Tribal lands were not clearly defined, as the ACHP did not develop regulations for this until 2004. The rule then in effect identified the types of facilities that "require the preparation of [Environmental Assessments] by the applicant . . . and may require further Commission environmental processing," including "[f]acilities that may affect districts, sites, buildings, structures or objects . . . that are listed or eligible for listing, in the National Register for Historic Places."[77] A note to that rule stated further: "[t]o ascertain whether a proposal affects a historical

[76] *Wireless Infrastructure NPRM/NOI* ¶¶ 78-85; *see also* Letter from Brian M. Josef, CTIA, and D. Zachary Champ, PCIA, to Chad Breckinridge, WT Docket No. 17-79 (dated Feb. 19, 2016).

[77] 47 C.F.R. § 1.1307(a)(4) (2001).

property of national significance, inquiries *may* also be made to the appropriate State Historic Preservation Officer."[78] In short, nothing in the rule obligated applicants to consult with SHPO, THPO, or Tribes in order to evaluate potential effects on historic properties under Section 106 of the NHPA. Thus, communications towers constructed during the period this version of the rule was in place where there was no SHPO, THPO, or Tribal consultation, or for which there is no documentation of such consultation, were not constructed in violation of the Commission's rule implementing Section 106.

Nor did the 2001 Collocation NPA expressly mandate Section 106 consultation for towers to be constructed after that date.[79] Rather, the 2001 Collocation Agreement exempts from Section 106 review collocations on towers constructed prior to March 16, 2001, under certain conditions.[80] Collocations on antenna towers constructed after March 16, 2001 are also exempt from Section 106 review, but only if, among other things, the tower had been reviewed previously.[81] That previous review for towers built before March 16, 2001, however, would have been completed under the Commission's rules that permitted, but did not require SHPO, THPO, or Tribal consultation.

That situation did not change until the NPA became effective on March 7, 2005. As then-FCC Chairman Powell described it, prior to that the FCC's Section 106 regulations were a "regulatory muddle."[82] The NPA made clear, for the first time, that Section 106 consultation

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[78] *Id*. § 1.1307(a)(4) (note) (emphasis added).

[79] *See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 47 CFR Part 1, App. B ("Collocation NPA").

[80] *Id*. § III.

[81] *Id*. § IV.

[82] Statement of Chairman Michael K. Powell, *attached to Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, FCC 03-125, WT Docket

with SHPOs/THPOs and Tribes, as applicable, was mandatory. The NPA states: "[c]ompletion of the Section 106 review process under this Nationwide Programmatic Agreement satisfies an Applicant's obligations under the Commission's rules with respect to Historic Properties."[83] And, for the first time, the NPA established express procedures requiring consultation with SHPOs/THPOs and Tribes.[84] At the same time, the Commission amended its rule to make clear that consultation was mandatory:

> To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, *an applicant shall* follow the procedures set forth in the rules of the Advisory Council on Historic Preservation as modified and supplemented by [the Collocation NPA and the NPA].[85]

The change in the Commission's rules resulting from the implementation of the NPA and the Collocation NPA, and the 2001 Collocation Agreement, gave rise to a group of antenna towers—the so-called Twilight Towers—that were constructed after March 16, 2001 and before March 7, 2005, that may not have undergone SHPO, THPO, or Tribal consultation as applicable (or for which records reflecting such consultation cannot be found due to mergers and acquisitions over time). Many SHPOs, THPOs, and Tribes have taken the position that they are foreclosed from conducting an after-the-fact Section 106 review for such towers under the 2004 Programmatic Agreement, effectively barring these Twilight Towers from collocation under the 2001 Collocation Agreement.

No. 03-128 (rel. June 9, 2003).

[83] NPA § I.E

[84] *See id.* § IV.

[85] 47 C.F.R. § 1.1307(a)(4) (2005) (emphasis added).

The Commission must take definitive steps to solve this Twilight Towers issue. As Commissioner O'Rielly put it most recently: "It defies explanation that we have not resolved an issue that we have known about for twelve years."[86] Specifically, the Commission should treat collocations on towers built between March 16, 2001 and March 7, 2005 that did not go through Section 106 historic preservation review, or do not have records of such review, in the same manner as collocations on towers built prior to March 16, 2001 that did not go through review.[87] A Commission decision adopting this approach for all Twilight Towers is consistent with both the Commission's rules and the public interest. Past efforts to resolve these issues on a tower-by-tower basis have proven to be inefficient and time-consuming for both the agency and tower owners. The Commission, noting the importance of the issue, convened the relevant parties at a discussion session, but did not come to a resolution on this issue. The Associations are encouraged that the *Wireless Infrastructure NPRM/NOI* takes up this issue once again, as the year since the meeting of Tribes, the Commission, and industry in New Mexico has demonstrated that absent FCC action this issue will not be resolved.

Immediate and blanket action to approve the Twilight Towers for collocation under the Collocation NPA would facilitate broadband deployment by bringing towers that have been in place for 12 to 16 years out of the twilight and making them eligible to serve as collocation platforms.[88] Such action would in no way undermine the protection of historic properties of religious and cultural importance. As the Commission correctly notes, the vast majority of

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[86] Remarks of Michael O'Rielly, FCC Commissioner, Before the 2017 Wireless Infrastructure Show, Orlando, FL (May 23, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0523/DOC-345021A1.pdf ("Commissioner O'Rielly Remarks").

[87] *Wireless Infrastructure NPRM/NOI* ¶ 82.

[88] *See* Commissioner O'Rielly Remarks.

towers that have been reviewed under the NPA have had no adverse effects on historic properties.[89] Indeed, as noted above, the Associations' evidence suggests that only 0.33 percent of Tribal reviews of wireless infrastructure projects result in a finding of adverse effect. There is no reason to believe that Twilight Towers are any different in this regard.

V. CONCLUSION.

By providing additional clarity, transparency, and accountability to the Section 106 process, the Commission can implement the NPA and the TCNS in a manner that advances both the Commission's statutory mandate for rapid deployment of wireless infrastructure and its historic preservation obligations. The Associations present herein a compelling case that change is needed and that solutions are available that may be expeditiously implemented. Providing additional guidance and clarity is a win for the Commission, Tribes, applicants, the preservation community, and the public, as the improved process will result in more rapid and efficient deployment of the wireless infrastructure that will bring new and improved wireless services to communities across the country and more meaningful Tribal consultation under Section 106.

[89] *Wireless Infrastructure NPRM/NOI* ¶ 82.

Respectfully submitted,

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June 15, 2017