Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of

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

Reply Comments of

National Congress of American Indians

United South and Eastern Tribes Sovereignty Protection Fund

National Association of Tribal Historic Preservation Officers

Reply Comment to CTIA and WIA

The National Congress of American Indians, the United South and Eastern Tribes- Sovereignty Protection Fund and the National Association of Tribal Historic Preservation Officers submit these reply comments in response to joint comments submitted by the Wireless Infrastructure Association and CTIA (hereinafter "Joint Comments" and "Joint Commenters") regarding the Commission's Notice of Proposed Rulemaking addressing WT-17-79 "Accelerating Wireless Broadband Deployment by Removing Barrier to Infrastructure Investment." NCAI, USET-SPF and NATHPO have submitted comments on this item during the draft period and the 30 day initial comment period. The below comments are in response to CTIA and WIA's Joint Comments.

Introduction

The Federal Communications Commission (FCC or the Commission) has a trust responsibility to Tribal Nations, not to the Wireless Industry. Chairman Pai recently acknowledged this responsibility to Tribal Leaders at the National Congress of American Indians Mid-Year Conference on June 14th, when he stated "I honor and embrace that trust relationship and my responsibilities as the Chairman of the FCC." When considering Tribal Historic Preservation, Chairman Pai went on to say "let me assure you that we [The FCC] also share a common commitment to respecting your history." This commitment was greatly appreciated by the gathered Tribal leaders. The FCC can meet the requirements of federal law and live up to Chairman Pai's commitment by affording to tribes the opportunity and sovereign flexibility needed to protect their cultures and histories through the Section 106 process.

In reviewing the Joint Comments, it is clear that the Joint Commenters fail to fully recognize the Commission's trust responsibility to Tribes, Tribal Sovereignty, Tribal Self-Determination, and the Government-to-Government relationship between the United States and the 567 Federally-Recognized Tribes. As a trustee to tribes throughout the United States, the Commission has a responsibility to consider these underlying principles when reviewing all public comments--including the Joint Comments--and to uphold 200 years of precedent by looking for solutions in the TCNS System that respect Tribes as sovereigns.

The Commission's responsibility is to engage with Tribes as sovereign governments and to interact with Wireless Industry as business interests that the Commission regulates.

NCAI, USET SPF and NATHPO completely support the Commission's efforts to expand broadband to areas that need it the most, especially in Indian Country. However, as we mentioned in earlier comments that we have submitted on this matter, we oppose efforts that would have the effect of limiting Tribal involvement in the Section 106 Process. Tribes are the only credible source for determining adverse effects to their own sites of cultural and historic

significance. Accordingly, tribes must be fully included in the Section 106 process to ensure protection of these sites from industry destruction.

While there are many improvements to TCNS that NCAI, USET SPF and NATHPO support, as outlined in our previous comments, we adamantly disagree with many of the suggestions provided by Joint Commenters. Their suggestions certainly accommodate their mission of reducing costs and maximizing profits, but they fail to account for the values enshrined in the National Historic Preservation Act (and many other federal laws and commitments) as implemented in accordance with the unique relationship the Commission has with Indian Tribes. Accordingly, we ask the full Commission, in the words of Chairman Pai, "honor and embrace th[e] trust relationship" in a manner that meaningfully assures the protections of Tribal cultural sites.

As the FCC itself has stated:

> The Commission recognizes the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions. As domestic dependent nations, Indian Tribes exercise inherent sovereign powers over their members and territory. The federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. In this regard, the Commission recognizes that the federal government has a longstanding policy of promoting tribal self-sufficiency and economic development as embodied in various federal statutes.

In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, FCC 00-207 (footnotes omitted).

Areas of Agreement

While we reject many of the Joint Commenters' recommendations, there are points where we agree. We believe that if the FCC uses the following areas of agreement when moving forward, all parties, Industry stakeholders and sovereign Tribal Governments, will be able to mutually benefit.

1. The Commission needs to address the small number of tribes who are not acting in good faith regarding large fees or areas of interest through meaningful government-to-government consultation; *similarly*, the Commission needs to address Industry actors who withhold requested information causing much of the delay.
2. The Commission should encourage Tribes, on a voluntary basis, to identify areas where no Tribal Section 106 review is required (our organizations will make the same recommendation).

3. A 30 day timeline, as outlined in the FCC-USET Best Practices, should serve as the model for creating any future shot clocks, but that clock should only commence once a Tribal Nation has received the information it has requested.
4. Facilities that do not disturb the ground in any way are reasonable exclusions (though it should be remembered that there may be occasions, hopefully rare, where a facility adversely impacts a site visually.
5. It is the responsibility of the FCC to make TCNS a functional tool for both Industry and Tribes.

Tribal Nations are Uniquely Authoritative on Tribal Cultural Sites.

Tribes are the only credible source for determining adverse effects to their own sites of cultural and historic significance. Accordingly, tribes must be fully included in the Section 106 process to ensure protection of these sites from industry destruction. Tribes hold thousands of years of knowledge and histories that inform their historic preservation decisions which cannot be replicated by anyone outside of the Tribe. In the Joint Comments, Industry aims to remove Tribes from the process while inflating the role of outside consultants. This recommendation is based on a fundamental misunderstanding by Industry that the FCC should not further consider when moving forward on the Proposed Rulemaking.

Outside consultants do not have the thousands of years of cultural and historical knowledge and expertise that Tribes hold. We understand that it is more convenient for industry to solely rely on the work of outside consultants as they do for other sub-contractors, but that is not in line with Federal Indian Policies and case law that predate the US telecommunications industry and the FCC.

We greatly distrust the ability of the environmental and/or archaeological consulting firms employed by Industry to provide unbiased and accurate evaluations on ***Tribal*** historic and cultural properties because: (1) they do not fully understand Native culture, both as it has existed traditionally and as it exists today and so cannot properly evaluate the impact of a cell siting on Native cultural properties; (2) their economic interest in advancing their client's goals incentivizes them to take short-cuts and to clear sites without adequate evaluation; and (3) the uniqueness of each Tribal government

Industry points to a handful of bad actors in Indian Country who allegedly overcharge, cause undue delay or have turned the review process into a cottage industry without providing meaningful value. As we have noted previously there are bad actors on both sides-- as Industry points out the "mote" in our eye, they should consider the "beam" in theirs. We have looked at this question closely and it is clear to us that when there is a delay it is just as likely to be due to the Industry actor providing inadequate information, as it is to Tribal conduct. This is correctable by Industry.

On a hopeful note, we have witnessed areas of the country where Industry's environmental and archaeological consultants have developed respectful relations with Tribal cultural preservation offices. When these relationships are established the conflicts and issues are dramatically reduced, with sufficient information on both sides shared speedily and in an environment of trust. This is the model we would like to encourage. Although we point to the USET Best Practices as a practical framework for a workable process, we also believe that the best outcome from following those Best Practices would be the establishment of positive working relationships between and among the parties.

With regard to those circumstances where a Tribe is not fulfilling its obligations, we are just as concerned as Industry. We urge the FCC to step up when these situations develop and work with Indian tribes in providing helpful frameworks that exemplify successful collaborations of Tribal Nations and industry representatives. As the knowledge base of this evolving practice continues, our organizations will continue sharing with Tribal Nations what are considered to be best practices with justifiable fees and reasonable timelines.

The TCNS has been Successful in Protecting Tribal Sites– Regrettably, Industry Promoted a Fundamental Misunderstanding of this Success.

As mentioned in our previous comments, TCNS has been a successful system for avoiding detrimental and adverse effects to tribal cultural and historic sites. However, Industry would have you believe otherwise by noting that "only one third of one percent of Tribal reviews of wireless infrastructure projects result in a finding of adverse effect." It is hard to evaluate this statistic since it is derived from polling of their own biased membership in what appears to have used a non-rigorous methodology. Nonetheless, to the extent it may be true ***it is indicative of the success of TCNS—not its failure***.

Our organizations have been repeatedly told by tribal cultural resource staff that as part of the Section 106 work of identification and discussions with Industry have led to a number of proposed cell locations being abandoned to protect a sensitive area. This is a result of good communication on the ground and we are grateful when Industry does this. However, we strongly suspect that these successes are not fully captured by Industry's "self-survey." NCAI, USET SPF and NATHPO firmly believe that TCNS is fulfilling its original objective -- to protect Tribal cultural and historic sites from being harmed by construction of wireless infrastructure while promoting wireless infrastructure deployment.

Timing

We understand Industry's expressed concern about a lack of timely response from some Tribal Nations, as well as that tribal review is causing delays in wireless infrastructure deployment. We actually believe that without the TCNS the situation would be far worse. That said, as a general principle, we believe that all parties should comply with reasonable deadlines. Consistent with that principle, the National Programmatic Agreement (NPA), FCC's internal process and the Best Practices all lay out a time frame for review, which is not always met *by any of the parties*, including Industry, consultants, and the FCC. Notably, a Tribal Nation cannot respond within a time frame if: (1) basic information that is needed for a determination is not provided by Industry Applicants; (2)technical issues with TCNS prevent industry consultants from understanding that tribal review has been completed; or (3)FCC-Tribal communication has been ineffective for a host of possible reasons.

NCAI has endorsed, by our comments and by a resolution of our membership, the timeline set forth in the FCC-USET Voluntary Best Practices. The Best Practices would help address concerns related to delay. The Commission should consider this existing document when moving forward on Tribal timelines for review.

<u>USET-FCC Voluntary Best Practices Timeline Example</u>

- Tribal Nation replies to Initial Contact within 14 days (generally handled by the TCNS system)
    - If no response after 14 days, the Applicant should make a second effort to contact the tribe
    - If no response after 7 more days (21 days since TCNS submission) the Applicant can ask the FCC to initiate Government to Government Consultation.
- Government-to-government Consultation (if necessary) will occur within 30 days
- Request for Review and Tribal Response, no later than 30 days (consistent with NPA)
    - During the Request for Review there are 6 determinations Tribes can make
        - Request additional information. Upon receiving the requested information, review will be completed within 30 days
        - No interest. Applicant can move forward
        - Request for additional time. 30 day extension
        - No effect. Applicant can move forward
        - No Adverse effect. This is when the Tribe identifies properties of significance within the area of potential effect but has determined that the property will not be affected by the construction of the infrastructure. Applicant can move forward.
        - Adverse Effect- a property is identified and a tribe submits it in writing.
    - Resolving Adverse Effects in 30 days under resolution plan

- If a Tribe does not respond within 30 days of the Request for Review, the applicant should contact the tribe. If no response after 7 further days, the applicant can ask the FCC to consult with the tribe.

The above timeframe, agreed to by USET and the FCC in 2004, and endorsed by NCAI in 2017, is very similar to requests from Industry. We ask the Commission to use its existing Best Practices as the model and baseline for any rules it is considering regarding timing. We believe that if the Time Frame established in the Best Practices is used as the basis for this rulemaking, it would satisfy both Industry and Tribal Nations concerns.

Joint Commenters have asked that the FCC complete government-to-government consultation within 15 days. Both Tribes and the FCC know this to be an unreasonable request. Government-to-government consultation requires at least 30 days once consultation has been initiated, often including face-to-face discussions; it always take substantial planning on the FCC, as well as the involved Tribal Nation. Considering the small budget of the Office of Native Affairs and Policy, 15 days is not reasonable. We suggest working under the parameters already established in the FCC-USET Best Practices allowing for 30 days to complete government-to-government consultation from its proper initiation.

Many Tribes note that incomplete applications with necessary information are the principle reason for delay. Each Tribe has a determined set of application requirements. In some cases in the USET region, Tribes and Industry consultants have formed good working relationships and the industry consultants understand what each Tribal Nation needs to make their determination. However, in many other cases, incomplete applications and insufficient information result in delays for tribal review. In these cases, Tribes often must wait more than 30 days to receive complete materials from industry applicants. When determining Tribal Response timeframes, the Commission needs to recognize each Tribe's individual application requirements and should not count time against the tribe when an applicant has not submitted a complete application. For example, the Choctaw Nation of Oklahoma[1] turns around 97.4% of their TCNS applications within 30 days. The 2.6% that are not completed within 30 days are the direct result of Industry failing to provide complete packets. We support Tribal Nations listing their full requirements upfront in the TCNS (only to be added to if a concern arises based on what the Tribal Nation is presented).

While it may make sense from an industry perspective to shorten response times for different types of wireless infrastructure, it is not consistent with the established processes of Tribal Nations. Tribes take each TCNS application very seriously, and request to continue reviewing for 30 days, regardless of type of technology. If there is a sincere effort to work with Tribal Nations on additional streamlining of the TCNS process, then time and resources need to be dedicated to achieve this goal.

[1] Comments of the Choctaw Nation on Docket 17-79 submitted June 15, 2017

Joint Commenters ask the Commission to limit Tribal requests for additional information in the TCNS process. They claim that this creates more work for Industry and takes additional time. However, additional information is requested because it is essential for determining potential or adverse effects, not on a lark. Each Tribe, as a sovereign government, has a right to review applications in their own way and determine what information is needed to come to a final decision. Limiting Tribal requests for additional information is a bad practice that will result in more adverse effects to cultural and historic sites and more requests for government-to-government consultation.

Fees

There is no dispute that Tribal Nations should be compensated for providing consultant services.[2] The Commission seeks comment on when Tribes act as contractors or consultants. We believe that this question is clearly answered in the FCC-USET's existing Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act[3].

USET Model for Best Practices

Title IX. Compensation for Professional Services of the FCC-USET Best Practices states,

> "The Advisory Council [on Historic Preservation] regulations state that the "agency official shall acknowledge that Indian Tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." (§ 800.4(c)(1)). Consistent with the ACHP Memorandum on Fees in the Section 106 Review Process, payment to a Tribe is appropriate when an Agency or Applicant "essentially asks the Tribe to fulfill the role of a consultant or contractor" when it "seeks to identify historic properties that may be significant to an Indian Tribe, [and] ask[s] for specific information and documentation regarding the location, nature and condition of individual sites, or actually request[s] that a survey be conducted by the Tribe[4]." In providing their "special expertise," Tribes are fulfilling a consultant role. To the extent compensation should be paid, it should be negotiated between the Applicant and the Tribe. USET has adopted a model

[2] References to "consultant services" provided by Tribal Nations to industry is a completely distinct concept from the use of the term "consultation" referring to the FCC's consultation obligation under Federal law to Tribal Nations.

[3] FCC-USET Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act, 2004. https://apps.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf

[4] See Executive Director Memorandum of John Fowler, Advisory Council on Historic Preservation, regarding Fees in the Section 106 Review Process, at 3 (July 6, 2001).

cost recovery schedule for such consultant or contractor services, which it states is intended solely to cover Tribal costs[5].”

Tribes are justified in requesting payment when they provide their unique expertise in a consultant role on tribal and non-tribal land—as tribes often have treaty, statutory, and other reserved rights that apply outside their current tribal lands. Industry would like to remove Tribes from this process, principally for financial reasons; while we consider ourselves to be essential, for reasons of identity and cultural survival. Tribes become consultants in this process when they enter into discussions with applicants on the historic and cultural sites that may be impacted by building new infrastructure.

The USET Culture and Heritage Committee simplifies this dichotomy into two elements

1. The FCC has a requirement to consult with Tribes. At this point in the process, this engagement is reflective of the government-to-government relationship.

2. At the point in which “special expertise” or special cultural expertise is necessary, Tribes then take on this “consultant” role (in the business-sense of the word). However, Tribal Nations are consultants unlike any others, with expertise in their own cultures that cannot be duplicated by outside entities. The provision of this expertise, for FCC and industry purposes, is best understood in the business model of a “consultant”.

This FCC-USET document states that “Contact between Applicants and Tribes is a two-step process,” Initial Contact being the first step and a Tribal Interest Discussion being the second. During initial contact, a Tribe determines if it has a cultural or historical interest in the proposed site. The yes or no answer regarding initial interest would not require payment from the applicant.

In the vast majority of these cases, that first contact is now handled by the TCNS system. Prior to that system, it was a guessing game as to which Tribes might have an interest in a certain area. With TCNS, industry is put into direct contact with those Tribes with an interest in a potential cell site area. This information was researched and inputted by Tribes at Tribal expense. Industry is not charged for this initial determination of interest.

[5] FCC-USET Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act, 2004.

If the Tribe indicates that the proposed facility may impact properties eligible for or included in the National Register of Historic Properties, to which that Tribe attaches religious and cultural significance, the Tribe and the Applicant should engage in a discussion regarding whether any further review is necessary and, if so, the terms of that additional review. This discussion is identified as the Tribal Interest Discussion in the FCC's Best Practices. In this discussion the parties should address the Tribal need for adequate information early enough to have input into decision-making and the Applicant's need to move forward in a cost-effective and timely way.[6] ***It is at this point in the process that Tribes are justified for asking for payments from applicants.***

The Commission asks if it should clarify when a Tribal Nation is acting under its statutory role and when it is being hired as a contractor or consultant. We believe that when the Tribal Interest discussion begins (laid out in the FCC-USET Best Practices) is when the Tribal Nation becomes a consultant. Guidance from the Commission supporting this point would be beneficial for all parties to avoid confusion.

The NPRM asks "should the Commission infer if the applicant does not ask explicitly for such information and documentation, then no payment is necessary?" No, the Commission should not infer that to be the case. If the Commission created such an inference or presumption, it would unfortunately encourage Industry practices that would take advantage of the fact that many Tribes are under resourced and cannot always respond quickly. Such an inference is also contradictory to the principles behind the FCC-USET Best Practices and would essentially violate the Trust Responsibility. The Applicant should expect to pay for the work product and to follow the law, regardless of the applicant's explicit request for information and documentation, when Tribes make determinations on potential effects to their statutorily protected cultural and historic properties.

The Commission should provide guidance, consistent with its established policy of Voluntary Best Practices, to address the circumstances when tribes act in the role of consultant and contractor and therefore are entitled to seek compensation.

Before the establishment of the TCNS, cell tower companies had, with few exceptions, been unwilling to pay fees to cover Tribal costs despite the onerous workload involved in responding to letters from industry. The companies argued that Tribal Nations should provide this information as a free government service. The companies also wanted this work done immediately.

Of course, it is common for Federal agencies, including the FCC, as well as other types of government experts to charge reasonable fees for their services. Charging fees for government

[6] Many Tribal Nations list in the TCNS the information they need to receive to complete an evaluation. Frequently, Industry does not provide that information, at least not initially. It would improve efficiency if all Tribal Nations listed their requirements in the TCNS and if Industry actually met those requirements.

services, as well as consulting services, is a well-practiced and common part of working with governments in America. As sovereign governments, it is appropriate for Tribal Nations to assess reasonable fees for providing their expertise to facilitate Industry applications.

Without a Tribal Nation's unique expertise in its cultural and religious history, it is impossible to properly evaluate the historic significance of a proposed site or its potential impact on properties of cultural and religious significance to that Tribal Nation. 36 CFR 800.4(c)(1) recognizes that Tribal Nations have "special expertise" in the evaluation of sites of importance to them. Indeed, Tribal Nations have unique expertise that is not replicable by individuals outside of the respective Tribal Nation. This expertise can and has allowed certain projects to go forward. There are examples of a proposed facility that would have disrupted a site, but after Tribal review it was deemed sufficient for the site to be moved as little as 20 feet to avoid disruption of historical and cultural properties. Like access to engineering, environmental, architectural and other expertise, access to unique Tribal expertise should be compensated at a fair rate.

Concerns with Data Presented in the Comment

We have legitimate concerns with the data presented in the Joint Comments. Most of their data assertions do not cite public sources. This was an issue during the NCAI-USET-NATHPO discussions with Industry and the FCC in late 2016. Industry refused to share their sources and methods for the data that was presented as fact to the Commission regarding fees and timing.

We understand that the Industry Associations have their own confidentiality concerns. However, when making such serious allegations, the Commission should not consider Industry's assertions as fact. The Commission itself has the most reliable data regarding timing and areas of interest. With this in mind, the Commission should cross reference the data presented by Industry with its own internal findings through the TCNS system.

Monitoring

Site monitoring and site visits require substantial resources, for Industry and for Tribes. Tribes do not undertake these activities lightly. When Tribes indicate that these measures are necessary it is because without a TCNS Tribal Representative, THPO, or other tribal cultural representative physically viewing the proposed site, there is no possible way for an applicant to know the potential effects. Contractors or consultants not associated with the Tribe cannot fill this role because they do not have the cultural knowledge – or authority -- to make a determination for the Tribe. Tribal fees associated with monitoring and site visits must be paid for by the applicant.

When considering monitoring, it is inconsistent and unwise for the Commission to compare archeological consultants to sovereign Tribal Nations. Tribal Nations have over 200 years of federal law affirming their inherent sovereign status. Accordingly, any regulation must reflect the Tribes' status as governments even when Tribes act in the role of consultants in this context.

Because a Tribe is the only entity that exists that can determine the effects that proposed infrastructure will have on the Tribes' own cultural and historic properties, they should be compensated for offering their expertise. Often times, the only way a Tribe can determine the adverse effects of proposed infrastructure is by conducting site monitoring. Tribal Nation representatives have noted the success of site monitoring. Experience has proven that monitoring the site before construction can avoid damage to cultural resources by asking the applicant to slightly change or move construction plans. The Commission should consider site monitoring as a part of the Tribal response to the request to review.

For the example noted in the NPRM, if an archeological contractor conducted site monitoring absent the request of an industry applicant, that is a disagreement between two business entities. In the case of Tribes conducting monitoring absent the request of the applicant, that activity is undertaken because the Tribe, not only as a sovereign entity but also as the party that is going to be injured, has identified a risk that the applicant (likely for financial reasons) chose to ignore. This is not a business relationship but a relationship appropriately recognized by the Federal government when it provided for Section 106 review and acknowledged the unique expertise of Tribes within that review process. If the applicant has a concern, its issue is with the FCC acting as trustee for the Tribal Nation. This disagreement on monitoring, in contrast to the archeological consultant provided in the NPRM, would be between the applicant and the Federal Government that acts as the trustee to the Tribal Nation, i.e., a business-government disagreement. Therefore, if a Tribe determines that a certain level of review is required to protect its cultural heritage, it should not be treated as a business dispute, and it is inappropriate for applicants to refuse to pay the costs of tribal review.

Sometimes Tribes can determine the effects on historic and cultural properties solely by the electronic applications submitted through TCNS. However, in some cases the only way to know if there is a problem is in-person monitoring. This is because there are determining factors in conducting a historic preservation review that can't be represented in an industry application. For example, historic Mound Building cultures in the Midwest typically need to see the small changes in elevation near a proposed site to know if the area is a historic property. These historic preservation review requirements will vary by tribe. The Federal Government knows how destructive "one-size-fits all" policies have been in Indian Country historically.

Industry is quick to characterize Tribal Monitoring as "unnecessary." The "threshold" described in the Joint Comments in not realistic in practice. Creating a system where Tribes have to further affirm their cultural concerns imposes a regulatory burden on Tribes and will only create more delays.

Industry seeks to "reimburse the monitoring expenses of only one Tribe per project." We understand that practical problem that Industry is identifying with this request. We are willing to encourage Tribes to work with the FCC and Industry to develop protocols on this issue, but it must be recognized that each Tribe is sovereign and has a separate sovereign and cultural

interest. Industry fails to recognize the sovereignty of individual Tribes. Multiple sovereign tribes often have strong cultural and historical ties to certain locations, and it would be inconsistent with federal Indian law to subject the rights of certain tribes to the right of others as proposed by Joint Commenters.

Amount of Fees and Areas of Interest Sought by Some Tribal Nations

We are aware that the actions of a few Tribal Nations may be driving this conversation in a way that will impact all Tribal Nations. Joint Commenters note that "this small group has a disproportionate impact on the process." As we have stated to the Commission a number of times, if the FCC believes a Tribal Nation is charging exorbitant fees, it is the responsibility of the FCC to work with that individual Tribal Nation to remedy the situation. Changing policy in reaction to a small number of Tribal Nations, to the detriment of all Tribal Nations, would set a harmful precedent and would be contrary to the Commission's trust responsibility to work in the best interest of each respective Tribal Nations. We agree with Joint Commenters that something needs to be done to address this small number of Tribes, but we ask that it is done in a way that does not negatively impact the hundreds of Tribes acting in good faith. Tribal Nations working in this field are becoming more aware of the practices of the few and have expressed their concerns internally. We commit to continued information sharing on this topic within Indian Country about setting fees at a justifiable level, something most Tribes already do.

This comment references the Tribal Council Meeting of one Tribe in Oklahoma looking to increase fees and expand areas of interest. This example is a huge outlier. Industry would like to give it a meaning far beyond what any resolution by any one Tribe, out of 567 Federally Recognized Tribes, could possibly have.

We also note the comments submitted by the National Trust for Historic Preservation submitted June 15, 2017 that state:

> "In general, the National Trust's view is that the ***tribes are being used as scapegoats***, and the FCC's suggestion that it may unravel the current approach to Section 106 compliance is ***an overreaction***. A much better solution would be for the FCC to step up to the plate and take more responsibility for managing its tribal notification system in a manner that would reduce or eliminate abuse."

We agree with the characterization made by the National Trust for Historic Preservation and ask the FCC to step up to the plate by addressing issues with a small minority of Tribes while also respecting its government-to-government relationship with and trust responsibility to all Tribes.

We echo the comments of over 30 Tribal Nations that have filed comments on this docket; it would set a bad precedent to change a functional system in reaction to conduct by a few tribes, which in no small part may have been sparked by Industry, at the expense of all tribes.

Information Sharing and Protecting the Confidentiality of Sacred Sites

Industry does not fully understand the confidentiality concerns Tribes have when dealing with Sacred Sites and cultural and historic properties. Looting of antiquities and objects of cultural and historic significance continues to this day and is not an issue that Tribes take lightly. Information sharing in the business world is a much different practice than it is in the realm of culture, religion, and historic preservation.

The National Historic Preservation Act, the Antiquities Act, and the Native American Graves Protection and Repatriation Act were all passed with the intention of protecting the confidentiality of these important sites, items, and remains. The Commission should give great weight to the intent and effect of these laws when making any determination regarding its Section 106 responsibilities.

The Commission does not have the authority to disclose sensitive historic preservation information, as suggested in the Joint Comments, without the consent of the Tribe who identified the area originally. Whether the FCC is sharing information that an area contains or does not contain objects of cultural and historical significance, it must do so with the consent of the Tribe who identified the area. The Commission must protect the confidentiality of these important sites, as they are extremely important to Indian Country and vulnerable to looting and desecration.

For all future rulemakings and action regarding the confidentiality of these areas, we ask the Commission to use the framework outlined in the FCC-USET Best Practices Section "VII Confidentiality" which addresses this situation in a dignified and respectful way.

Conclusion

In conclusion, we believe there are areas of agreement between Tribal Nations and Industry applicants. We believe that the FCC should use the identified areas of agreement stated above as the first step when considering this Rulemaking. However, the FCC should read all Industry comments keeping in mind its responsibility to protect the interests and cultural and historic properties of the Tribal Nations of which the FCC is a Trustee. We also urge the FCC to continue consulting with Tribes across the country to get a full accounting of the concerns of Indian Country on this item.