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MEMORANDUM

May 26, 2017

To: USET Sovereignty Protection Fund

From: Gregory Smith
Akilah Kinnison

Re: *FCC Infrastructure Deployment Conference Call Consultation*

On May 25, 2017, the Federal Communications Commission (FCC) held a "Conference Call Consultation for Tribal Nations" on its Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry (NOI) entitled *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (NPRM/NOI)*. The NPRM/NOI was released April 21, 2017. Comments are due June 9, 2017, and then there is an opportunity for reply comments, which are due July 10, 2017.

The FCC announced that it will also be holding in-person consultations, which both the FCC Chair and staff members will attend, on June 8th in Mission, South Dakota on the Rosebud Sioux Reservation and on June 14th at the National Congress of American Indians' Mid-Year Conference at the Mohegan Sun in Connecticut. Additionally, the FCC stated that Tribes may send requests for additional or one-on-one consultations to tribalinfrastucture@fcc.gov.

Clarification of the Role of the Consultation Call

Although the FCC termed the call a "consultation," issued a public notice of consultation, and made the call open to only Tribal leaders and their duly appointed representatives, FCC staff stated early in the call that nothing that was said on the call would be considered "on the record." Instead, they urged Tribes to put feedback in written comments submitted for the record.

Tribal leaders were very frustrated by this announcement, stating that the purpose of consultation was for Federal decision makers to receive Tribal feedback and incorporate it into their decision-making. They urged the FCC to ensure that consultations contribute to the record and to use other terms, such as listening sessions or informal dialogues, to refer to other forms of communication. FCC staff stated that they would seek to incorporate this suggestion in the future. Tribal leaders also stated that the FCC should have consulted with Tribes on these issues prior to releasing the NPRM/NOI.

Overview of FCC Rulemaking Process

Dan Margolis, Legal Advisory for the FCC's Office of Native Affairs and Policy (ONAP), provided an overview of the agency. He explained that the FCC is an independent agency overseen by Congress and is the country's primary authority for communications laws, regulations, and technological innovation. He reported that ONAP was created in 2010 by Commission Order FCC 10-141, that it is part of the Consumer and Governmental Affairs Bureau, and that it is charged with bringing benefits of modern communication infrastructure to all Native communities. He said ONAP is responsible for "ensuring that Native concerns and voices are considered in all relevant Commission proceedings and initiatives." Mr. Margolis provided an overview of the rulemaking process and relevant terminology. He also explained that the FCC has exempted *ex parte* presentations with Tribes from certain disclosure requirements and other communication restrictions that would normally apply in the period before a rulemaking.

Technology Overview

Mr. Margolis and Jill Springer, Deputy Federal Preservation Officer for the Wireless Telecommunications Bureau (WTB) Competition and Infrastructure Policy Division, provided an overview of the technological developments that have led to the NPRM/NOI. Mr. Margolis reported that the demand for wireless spectrum is growing, causing the FCC to reallocate spectrum historically available to broadcast television stations to wireless communication providers. Ms. Springer reported that this increasing demand for mobile devices is fueling the deployment of 5G, which is the next and fifth generation of wireless services. She said that the new 5G networks will rely on lower power, higher frequency devices and will therefore provide services over a smaller geographic area per site.

Ms. Springer described the "small cell" wireless base stations that will be used for 5G technology, saying they will generally be placed on existing structures in existing rights of way (ROWs), such as power poles and street lamps. She said using several small cells instead of a single "macrocell" can provide more coverage, increasing capacity in an area that would otherwise be served by a single macrocell. According to Ms. Springer, there will be an estimated 37 million more small cells by the end of 2017. One of the benefits of small cell technology, she said, is that smaller facilities are required, resulting in more flexible siting with a smaller impact.

Ms. Springer also provided an overview of distributed antenna systems (DAS), which distribute radio frequency signals to a specific area with poor coverage or inadequate capacity. She said DAS networks often consist of a number of remote communication nodes deployed through a certain coverage area and that these networks can accommodate multiple providers. She reported there will be an estimated 16 million DAS nodes by 2018.

Tribal leaders commented that what is being described as "small cell" technology did not always fit Ms. Springer's description, with some companies erecting stand-alone, 120-foot poles. She responded that there may be a need to define what constitutes "small cell" technology to the extent final regulations put in place a system that would treat small cell technology in a different manner.

Presentation and Discussion on NPRM Questions

Jeff Steinberg, Deputy Chief of the WTB's Competition and Infrastructure Policy Division, presented issues raised by the NPRM and provided an opportunity for discussion by Tribal leaders and representatives. Mr. Steinberg explained that the FCC is examining its regulations for implementing the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) with an eye toward removing or reducing regulatory impediments to wireless network infrastructure investment and deployment.

Cost-Benefit Analysis. Mr. Steinberg said that the motivation for the reassessment is that there is concern that the costs and delays associated with regulatory review will be intensified with the transition to small cell technology and that it is less apparent what the benefits of review are for small facilities. He also reported that providers say that the Tribal component of the NHPA Section 106 process is particularly cumbersome and costly. Mr. Steinberg said the review will consider the costs and benefits of the Section 106 process and its Tribal component. He also said that the FCC is reconsidering when wireless facilities construction constitutes a federal action or undertaking. He encouraged Tribes to provide stories for the public record regarding the process, saying that the FCC would work with Tribes to ensure that confidential information was entered into the record under seal.

Tribal representatives objected to subjecting Tribal sacred sites to a cost-benefit analysis. They said that sacred sites cannot be compared to industry analyses of costs and benefits and that the Tribal component of the Section 106 process was put in place specifically to protect Tribal sacred sites. Several participants stated that they knew of one or more specific situations in which the current process had prevented harm or destruction of a sacred site.

Tribal Fees. Mr. Steinberg said that under Advisory Council on Historic Preservation (ACHP) guidance, an agency/applicant is not required to pay fees to a Tribe for providing information but that payment is considered appropriate when a Tribe fulfills the role of a contractor/consultant when asked for "specific information and documentation." He emphasized that the applicant need not pay fees and that the agency retains the duty of obtaining information to fulfill its Section 106 obligations. He said the current practice is for applicants to accommodate Tribal fee requests but that the FCC is interested in comment on the impact of Tribal fees on the timely deployment of broadband services to all Americans. Mr. Steinberg said the FCC is also considering when Tribal fees are appropriate, whether flat fees are consistent with ACHP guidance,

whether it would be helpful if the FCC played a role in clarifying when a Tribe is engaged as a contractor/consultant, and how the FCC can help resolve fee disputes. He said the FCC is also considering what constitutes a reasonable fee, whether it can or should establish a fee schedule, and how Tribal sovereignty and treaty obligations factor into the potential development and adoption of a fee schedule.

Mr. Steinberg reported that the FCC is considering what Tribal Construction Notification System (TCNS) changes would improve the Tribal review process, whether an applicant should have to pay multiple responding Tribes and accommodate multiple monitors, when a project should be allowed to proceed without a Tribal response, whether consultation is required to resolve fee disputes, and whether the FCC should continue to facilitate meetings among Tribal and industry representatives.

Tribal representatives stated that Native people are always asked to provide information that is of value to others without compensation. They noted that it takes significant amounts of work for a Tribe to participate in the Section 106 process and provide relevant information. They also stated that delay is often caused by the consulting firms hired by applicants, which they said do not respond to Tribal requests for information in a timely fashion. Tribal representatives encouraged the FCC to continue to facilitate conversations between Tribes and industry representatives, suggesting that the proper role for the FCC is as a moderator between these two groups.

NHPA and NEPA Process Considerations. Mr. Steinberg stated the FCC is considering other potential improvements to the NHPA process. It is reviewing timeframes and requirements, including asking how reviews can be sped up and whether different time limits should apply to small cell sites. He said it is also considering whether it should allow applicants to self-certify Section 106 compliance and how it could ensure such self-certification was accurate. Additionally, he said the FCC is considering whether it should adopt a "batched" submission process for reviews and, if so, how this should be structured. Mr. Steinberg said the FCC is considering ways to improve and streamline the NEPA compliance, such as a streamlined process for floodplains.

Tribal representatives stated that batching would not be appropriate because although one Tribe may be okay with batching within a five-mile radius, for other Tribes with other geographical circumstances this may be objectionable or inappropriate. Tribal representatives suggested that the FCC consult other agencies regarding how those agencies maintain a single system while taking into account varying Tribal perspectives and needs.

NHPA Exclusions. Mr. Steinberg reported that the new Administration is looking at whether there should be another amendment to the collocation agreement and whether it should create new NHPA exclusions for small cell facilities. He said existing exclusions exist for replacements of poles classified as towers and poles in utility ROWs, except in historic districts. He said the FCC is considering new exclusions for all

replacement poles in ROWs, including historic districts and possibly without current Tribal review requirement, as well as for transportation ROWs in addition to utility ROWs. Mr. Steinberg also reported that the FCC is considering eliminating or streamlining Tribal reviews for collocations on historic properties or districts with no identified Tribal significance, in urban ROWs or indoors with no ground disturbance, and on new structures in industrial zones or within 50 feet of a utility or communication ROW. Additionally, he said the FCC is considering excluding State Historic Preservation Officer and Tribal reviews for collocations that receive approval by a National Park Service Certified Local Government or receive a Certificate of Appropriateness from a local historic preservation board.

Mr. Steinberg also said the FCC is considering exclusions for collocations on towers built before March 7, 2005 because the rules at the time did not specify a review process and those towers have been standing for 12 years without adverse effect. He said considerations will include whether there are adverse effects that have not yet been identified, whether such effects could be mitigated, and whether such effects would be exacerbated by collocation. He also said they are considering alternatives, such as a tower-by-tower review process. He stated the FCC is also requesting comment on whether it should take measures to facilitate collocations on non-compliant towers built after March 7, 2005.

Tribal representatives urged the FCC not to create categorical exclusions or determine that siting of small cell facilities is not an undertaking or federal action for the purposes of NHPA and NEPA. They stated that even small cell facilities can pose problems, noting that harm can come from the process of accessing the site of the facility, including roads and other damage created to reach a tower. They also stated that for towers built prior to March 7, 2005, the FCC cannot be sure there have been no adverse effects because it does not have a process for consulting with Tribes about these effects.

Conclusion

FCC staff stressed the importance of documenting Tribal input through comments submitted on the record, particularly as the consultation call will not form part of the record upon which the Commissioners make their decisions. FCC staff also noted that any disputes with the content submitted in other parties' comments could be registered through the reply comment process. Please let us know if you would like additional information or analysis of the NPRM or assistance submitting a comment.