

Tribal Groups Blast FCC Plan To Ease Wireless Buildout

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Law360 (March 16, 2018, 10:30 PM EDT) -- Two tribal groups hinted at potential legal action in comments filed Thursday with the [Federal Communications Commission](#) that blasted its proposal to roll back environmental and historic site reviews for small wireless infrastructure deployment in the race to roll out 5G services.

The [National Congress of American Indians](#) and the [United South and Eastern Tribes Sovereignty Protection Fund](#) argued that nixing National Historic Preservation Act and National Environmental Policy Act reviews when companies want to deploy small cells enabling next-generation mobile service would be “unlawful” and would represent the commission shirking its responsibilities just to make things easier for industry.

FCC Commissioner Brendan Carr has touted the proposal, which is [up for a vote March 22](#), as an update to rules designed for giant cell towers that will [exempt new "backpack-sized" 5G infrastructure](#) while streamlining tower approval processes. But the tribal groups argued Thursday that the small infrastructure could still irrevocably harm historic sites and those culturally or religiously important to Native Americans, especially when considering the hundreds of thousands of antennas likely to be installed over the next few years to make way for 5G deployment.

“Despite the extraordinarily [sic] extent of future deployments, the commission spends no time considering potential cumulative environmental effects of such broad deployment,” the groups said, and instead describes in proposal language the costly impracticality of subjecting every small cell deployment to large tower review requirements.

“In short, the commission, when faced with an opportunity to analyze the potential cumulative environmental effects of next generation networks, proposes to shirk its duties and obligations under NEPA in favor of easing cost and regulatory burdens for private industry,” the groups continued. “This is unlawful.”

They argued that the FCC has effectively ignored tribal concerns and shirked its obligations for substantive dialogue with tribes, even as they voiced support for badly needed broadband infrastructure in Indian Country. They argued that the Tower Construction Notification System established some 15 years ago adequately addressed concerns over the burden of consultations for thousands of individual sites, facilitating “the rapid deployment of the telecommunications infrastructure,” and the groups said they have been open to discussing an update to TCNS.

There are better ways, the groups said, to facilitate infrastructure deployment than a “wholesale exemption” for small wireless facilities that would be “arbitrary and capricious.” And the potential impacts of small cell sitings cannot be properly evaluated without “a Tribal Nation’s unique expertise in its cultural and religious history,” the groups said.

The NHPA and NEPA both require reviews, and the FCC cannot allow them to be skirted simply because the project at issue is a small cell being installed by a private party, the groups said. Their 16-page filing argued that small cells still require a government license, which by definition amounts to an “undertaking” or “major federal action” that invokes review under the two laws.

The filing also took aim at the FCC's proposal to eliminate initial fees that companies must pay tribes to deploy infrastructure, arguing the agency is citing "a handful of unverified, outlier examples of tribal fees" charged at unfair rates. Instead of punishing all tribes, the FCC should be talking to the few that purportedly charged the outsize amounts, the groups said. Tribes, according to the filing, need those funds to be able to respond to industry infrastructure queries.

"The FCC charges fees for its services; similarly Tribal Nations should be able to recoup the reasonable costs associated with these reviews," the groups said. "Tribal Nations are providing invaluable and indeed unique expertise that provides an assurance that a site will not be disturbed or that the appropriate mitigation has occurred. Only a Tribal Nation can provide a definitive statement on the meaning of a cultural property."

The groups are not alone in their opposition the FCC's GOP-led efforts targeting rules seen as unnecessary and burdensome.

Thursday also saw comments submitted by or on behalf of the Northern Cheyenne Nation, the National Trust for Historic Preservation, the [Natural Resources Defense Council](#), and the [Navajo Nation](#), among others, pushing back on the proposal.

The Navajo argued that the FCC skirted its obligations to consult with tribes, while the NRDC argued that the FCC cannot exclude small wireless facilities from the definitions of "major federal action" and "undertaking" to avoid NHPA and NEPA review.

"Some of these facilities will have little or no impact. But others may have significant impact either individually or cumulatively. Distinguishing between those with impact and those without is the point of the review process under NEPA and the NHPA," the NRDC said. "The elimination of such review denies NRDC members both the voice and the protections that Congress has provided them."

--Additional reporting by Kelcee Griffis and Kyle Jahner. Editing by Edrienne Su.

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