

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BLACKFEET TRIBE, COUSHATTA
TRIBE OF LOUISIANA, FORT
BELKNAP INDIAN COMMUNITY,
ROSEBUD SIOUX TRIBE, UTE
MOUNTAIN UTE TRIBE, and
UNITED SOUTH AND EASTERN
TRIBES, INC.,

Petitioners

vs.

FEDERAL COMMUNICATIONS
COMMISSION, and THE UNITED
STATES OF AMERICA,

Respondents

No. 18-1184

(Consolidated with Nos. 18-1129, 18-
1135, 18-1148, 18-1159)

**RESPONSE IN OPPOSITION TO MOTION TO HOLD CASE IN
ABEYANCE**

Petitioners the Blackfeet Tribe, the Coshatta Tribe of Louisiana, the Fort Belknap Indian Community, the Rosebud Sioux Tribe, the Ute Mountain Ute Tribe, and United South and Eastern Tribes, Inc. (“Petitioners”) respectfully submit this Response in Opposition to the Motion to Hold Case in Abeyance and to Defer Filing of the Record, filed by Respondent the Federal Communications Commission (“FCC”). On July 9, 2018, the Court granted petitioners in the consolidated cases an extension to file oppositions to the Motion for Abeyance by July 19, 2018. However, the Petitioners named herein are filing this opposition as

soon as practicable because Respondents are already implementing the New Rule, so this Court should immediately consider its legality.

Petitioners challenge the FCC's legal authority to promulgate regulations that would excuse itself from its statutory obligation to comply with Section 106 of the National Historic Preservation Act ("NHPA") and other requirements. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Dkt. No. 17-79, FCC 18-30 (adopted Mar. 22, 2018, *released* Mar. 30, 2018), *summarized* 38 Fed. Reg. 19,440 (May 3, 2018). Petitioners further challenge the process by which the FCC adopted and promulgated the New Rule.

The FCC has moved the Court to hold these proceedings in abeyance. Respondent argues that abeyance is merited because it has received, and is currently reviewing, a number of petitions for reconsideration of the New Rule. The Court should deny this motion for two reasons. First, the undersigned Petitioners in docket 18-114 have not sought review before the FCC, therefore other pending petitions should have no effect on them. Second, abeyance would be improper here because Respondent is not staying its hand; it is instead proceeding apace to implement the New Rule and thus an abeyance would allow it to evade timely judicial review.

In general, the existence of other petitions at the FCC does not necessarily affect the Petitioners. This Court has held that “[t]he fact that the parties other than [Petitioners] petitioned the FCC for reconsideration of the *Report and Order* does not deprive the court of jurisdiction over [Petitioners’] Petition.” *Teledesic LLC v. FCC*, 275 F.3d 75, 82 D.C. Cir. 2001) (emphasis in original). Indeed, as the Fifth Circuit has recognized, “‘finality with respect to agency action is a party-based concept.’” *City of Arlington v. FCC*, 668 F.3d 229, 238 (5th Cir. 2012) (quoting *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994)). While courts may hold in abeyance petitions for review when the FCC is considering petitions for reconsideration by other parties, “*this practice is not an iron-clad rule.*” *Teledesic*, 275 F.3d at 82 (citing *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998)) (emphasis added). In fact, in *City of Arlington v. FCC*, the Fifth Circuit recognized that “[i]t is *well-established* that ‘a petition for agency reconsideration by one party does not affect the right of other parties to seek judicial review.’” 668 F.3d at 238 (quoting *Cal. Dep’t of Water Res. v. FERC*, 362 F.3d 517, 521 (9th Cir. 2004)) (emphasis added).

In *Arlington*, the City of San Antonio filed a petition for review of an FCC order after a sixty-day statutory deadline. *Id.* at 237. San Antonio argued that its petition was not untimely because the deadline was tolled by another party’s petition for reconsideration filed with the FCC, even though San Antonio did not

file its own petition for reconsideration. *Id.* at 237-38. The court disagreed, holding that “the petition for reconsideration filed in this case did not affect San Antonio’s right to file a petition for review in this court . . . and we would have been able to exercise jurisdiction over such a petition for review so long as San Antonio itself did not file a petition for reconsideration.” *Id.* at 238.

Arlington is analogous here. Petitioners have not filed a petition for reconsideration with the FCC, therefore those petitions for reconsideration do not affect Petitioners right to file a petition for review in this Court. This is entirely consistent with this Court’s longstanding recognition that “parties to [FCC] proceedings have their choice whether to seek relief from [FCC] action from the [FCC] itself or from the court.” *Wrather-Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646, 649 (D.C. Cir. 1957).

The second reason to deny a motion for abeyance is that prudential considerations strongly favor more immediate attention. In *MCI Telecommunications Corp. v. FCC*, the Court specifically denied a motion for abeyance because “prudential considerations militate[d] in favor of a prompt judicial decision.” 143 F.3d at 608; *see also Am. Liberty Ass’n v. FCC*, 2004 WL 1179355, at *1 (D.C. Cir. 2004). Here, the FCC itself has created those conditions by choosing to implement its controversial and unprecedented New Rule while it simultaneously tries to evade prompt judicial review.

Respondent purports to request an abeyance “while the Commission considers the pending petitions of reconsideration of the *Second Report and Order*.” Motion for Abeyance at 8. However, on the *exact same day* that the FCC moved for abeyance of this review, it sent an email to its “Tribal Historic Preservation Contacts” regarding implementation of the New Rule. Email dated July 2, 2018, attached as **Exhibit A** to this Response. In that email, the FCC informed tribal participants that “[t]oday the FCC begins rolling out updates to the Tower Construction Notification System (TCNS) to implement the FCC’s March 2018 Wireless Infrastructure Second Report and Order (R&O).” Exhibit A. In the meantime, the FCC intends to take TCNS offline until these updates are completed, notwithstanding that TCNS is the electronic platform that the FCC uses to manage consultation with Indian tribes and nations. Attached to that email was Public Notice DA 18-675, dated July 2, 2018, attached to this response as **Exhibit B**. “A new checkbox has been added in TCNS to allow applicants to indicate that a submission is excluded from [State Historic Preservation Officer] Review when submitting a new TCNS notification.” Exhibit B at 2. Whether such a submission may properly be “excluded” from review is the precisely the issue before this Court.

While the FCC rapidly moves forward with the implementation of the New Rule, it asks for an indefinite abeyance of the legal challenges to that rule’s

validity. In its Motion for Abeyance, the FCC states that it will file status reports *every 90 days*, Motion for Abeyance at 5, clearly contemplating a protracted delay in the consideration of the petitions for reconsideration and this Petition. Importantly, there are no applicable time limits or finite period for decision-making, meaning the Petitioners (who, again, have not filed a petition for reconsideration at the FCC) could be waiting for the FCC for an indeterminate amount of time. This might be more acceptable were it not for the fact that in the interim the FCC intends to implement the challenged New Rule. Moreover, there appears to be no agency process for a preliminary injunction, meaning that during the indeterminate proceedings before the FCC, Petitioners would not be able to seek relief if necessary. This is inappropriate given the importance of the issue to Petitioners.

The importance of the impact of the New Rule cannot be overstated. The process of tribal consultation enables Petitioners to protect their cultural heritage and sacred places from accidental destruction by the placement of communications towers. While the New Rule is in force, Petitioners and other tribes run the risk of the arbitrary and permanent destruction of irreplaceable cultural, historical or religious sites. Conversely, and taking the industry's expressed concerns at face value, those concerns stem primarily from what the New Rule's proponents emphasize are cumulative effects over many years. Such impacts, which the

industry asserts would slow the growth of the next generation of wireless technologies, are incremental at best, whereas the potential harms that tribes face to their cultural resources are immediate, severe and irreparable.

Finally, the FCC asserts that its reconsideration can “crystallize” the issues before the Court, but in reality the opposite is true. The Court’s determination of the extent of the FCC’s authority will benefit the resolution of the petitions for reconsideration. Indeed, the FCC concedes “that the Court ultimately will need to review” the New Rule. Motion for Abeyance at 4. Indefinitely delaying resolution of this case so that the FCC can revisit its erroneous New Rule, while simultaneously implementing it, does not serve judicial economy and efficiency.

The FCC cannot have it both ways. This Court should move forward with consideration for this Petition and deny the Motion for Abeyance. In the alternative, Petitioners respectfully request that this Court deny the FCC the indefinite abeyance that it requests and instead simply provide the FCC with a 90-day extension of time to address the petitions for reconsideration before moving forward with this Petition for Review. A third option is that if the FCC wants these proceedings to be held in abeyance while it considers the petitions for reconsideration, then the FCC must stay its implementation of the Report and Order until the conclusion of the reconsideration process.

DATED: July 11, 2018

Respectfully submitted,

s/Jennifer H. Weddle

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of July 2018, I electronically filed the foregoing RESPONSE IN OPPOSITION TO MOTION TO HOLD CASE IN ABEYANCE with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all participants in the case via the Court's CM/ECF system.

s/Jennifer H. Weddle _____

Jennifer H. Weddle

From: TCNShelp <TCNShelp@fcc.gov>

To: TCNShelp <TCNShelp@fcc.gov>

Cc: Aaron Goldschmidt <Aaron.Goldschmidt@fcc.gov>; Leon Jackler <Leon.Jackler@fcc.gov>; Matthew Duchesne <Matthew.Duchesne@fcc.gov>

Sent: Monday, July 2, 2018, 7:26:13 AM MDT

Subject: Changes and Updates to TCNS

Dear Tribal Historic Preservation Contacts,

This is to alert you to changes in the Tower Construction Notification System (TCNS) that require your attention.

Today the FCC begins rolling out updates to the Tower Construction Notification System (TCNS) to implement the FCC's March 2018 Wireless Infrastructure Second Report and Order (R&O), available for review here: <https://www.fcc.gov/document/fcc-acts-speed-deployment-next-gen-wireless-infrastructure-0>.

Please note that TCNS is currently offline and will not resume service until 10:00 am EDT on July 6, 2018. Further details on the changes made to TCNS are provided in the attached *Public Notice*.

The TCNS update implementation process will clear out information that users had provided in the "Additional Details Box." This email is to alert you to the opportunity to submit newly proposed text within TCNS if you wish to continue to provide system users with such information.

While TCNS is offline, you may email proposed text to tcnshelp@fcc.gov and we will make our best effort to publish it when the system goes back on line on July 6th. After July 6th, proposed text can be entered in the TCNS interface directly for publication upon approval. Unless updated "Additional Information" is provided, Applicants will rely on your contact information in the system to determine the email or postal address for project submittals. You may update your contact information at any time after TCNS resumes service on July 6th.

All information that the Commission has determined to be necessary to review TCNS filings will be available to Tribes at the start of the review period through a link in TCNS, and you will receive a notification at that time.

CONTENT: To ensure publication in TCNS, "Additional Details" must be consistent with the Commission's rules. In particular,

- The "Additional Details Box" may be used as a way to communicate additional information to applicants. Generally, this box may be used to convey any information that does not conflict with the limitations discussed below. For instance, the text included may provide directions on:
 - How you wish to be contacted, if it differs from the contact information listed in the system. You may provide email or postal addresses if your preferred method of receiving applications is not through TCNS; or
 - How you treat specific types of projects, such as more specific information about your concerns within geographic areas (*e.g.*, projects near bodies of water or along certain routes or corridors) or project types that you elect not to review.

- Applicants must provide the Form 620/621 or a specified Alternative Submission package to Tribal Nations and NHOs for Section 106 review, but are only required to provide additional information after a Tribal Nation or NHO has indicated that a historic property may be affected and that it has become a consulting party. Consistent with these rules, the Commission will not publish requests for additional information as “details” in TCNS.
- Applicants are not required to pay up-front fees to initiate reviews. Consistent with this, the Commission will not publish language in TCNS suggesting that Applicants must pay up-front fees.

If you have any questions about content guidelines prior to submitting proposed text, please send an email to tcnshelp@fcc.gov requesting clarification.

TIMING:

- “Additional Details” submitted through the TCNS interface between Friday, July 6, 2018 (when TCNS resumes service) and Tuesday, July 10, 2018 and approved as consistent with the Commission’s rules will be included in Applicant Notices of Organizations (NOO) that are sent on July 13, 2018, *i.e.*, the first NOO under the new procedures.
- “Additional Details” received after July 10, 2018 will be reviewed by Commission staff as soon as possible, but may not be approved in time for the first NOO.
- “Additional Details” that conflict with the Commission’s rules (e.g., language requesting information beyond what the R&O requires or requesting up-front fees) will be returned with a request for revision prior to approval for publication.

Thank you in advance for your assistance. Commission staff will provide information on other TCNS changes in the upcoming weeks. Users can always seek assistance by emailing tcnshelp@fcc.gov.

Respectfully,

Federal Communications Commission



PUBLIC NOTICE

Federal Communications Commission

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News Media Information 202 / 418-0500

Internet: <http://www.fcc.gov>

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DA 18-675

Released: July 2, 2018

CHANGES AND UPDATES TO TOWER CONSTRUCTION NOTIFICATION AND E-106 SYSTEMS ON JULY 2, 2018

WT Docket No. 17-79

This Public Notice describes changes and updates to the FCC's Tower Construction Notification System (TCNS) and Electronic Section-106 System (E-106).¹ These changes are being made to implement the Commission's *2018 Infrastructure Second Report and Order*, which was released on March 30, 2018,² and whose rules are effective for TCNS and E-106 filings submitted on or after July 2, 2018. To make this transition possible, effective immediately TCNS has stopped accepting new submissions, and E-106 will stop accepting new submissions at **6:00 a.m. EDT, Friday, July 6, 2018.**³ Both systems will resume accepting new submissions at **10:00 am EDT on July 6, 2018.**

Changes Affecting Applicants and Their Consultants

The following changes are relevant primarily to applicants and their consultants conducting Section 106 review for a proposed construction:

- A new line has been added to all E-106 email and letter notifications of a Form 621 "Collocation Submission Packet." The new line asks, "Has the Communications Tower or Non-Tower

¹ TCNS is a system that allows applicants and licensees to submit notifications of proposed tower constructions to federally-recognized Indian Tribes, Tribal Historic Preservation Officers (THPOs), Native Hawaiian Organizations (NHOs), and State Historic Preservation Officers (SHPOs), as required by Section 106 of the National Historic Preservation Act. TCNS is linked to E-106, a separate system that enables real-time exchange of information and documents necessary to complete and clear the Section 106 process required by FCC rules.

² *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Second Report and Order, FCC 18-30 (Rel. Mar. 30, 2018) (*2018 Infrastructure Second Report and Order*).

³ Any filings made today before TCNS went offline will be held for inclusion in the Weekly Notice of Tower Construction Notification System Filings that will be sent to Tribes on July 11th.

Structure been the subject of a SHPO/THPO review?” and provides a “yes” or “no” response to that question.⁴

- Purpose: Enables Tribal reviewers to identify quickly whether the underlying structure went through Section 106 review when constructed.
- A new checkbox has been added in TCNS to allow applicants to indicate that a submission is excluded from SHPO Review when submitting a new TCNS notification.
 - Purpose: Identifies projects for which Forms 620/621 are not required to initiate Tribal reviews.
- A new “Alternate Submission Packet” option has been added to the Attachment Utility in TCNS. The “Alternate Submission Packet” will be required if the “Structure Excluded from SHPO Review” box has been checked.
 - Purpose: Ensures that applicants upload – and Tribal reviewers have access to – all required information prior to the start of the review clock.
- A “Structure Excluded from SHPO Review” icon will be displayed next to each notification entry, if applicable, on the “Notifications Home” and “Notification Details/Update Status” screens. A description of that icon will also be added to the Key/Legend box on those screens.
 - Purpose: Enables Tribal reviewers to identify easily projects that the Nationwide Programmatic Agreement (NPA) establishes as having minimal potential to affect historic properties.
- The “Notice of Organization(s) Which Were Sent Proposed Tower Construction Notification Information” emails will indicate if the project is excluded from SHPO review.
 - Purpose: Identifies projects for which Forms 620/621 are not required to initiate Tribal reviews.
- The “Second Contact Date” column has been removed from all TCNS referral pages, and references to “First Contact Date” have been changed to “Contact Date.”
 - Purpose: Reflects the elimination of the requirement that an applicant attempt a second follow-up contact prior to a filing being eligible for referral.
- A new field titled “Form 620/621 available on:” has been added to the TCNS Notification Details page. The new field displays the date on which Tribes are notified of a related E-106 filing.
 - Purpose: Identifies when the review clock starts (when Form 620/621 is available).

Changes Affecting Tribal Reviewers

The following changes are relevant primarily to Tribes, THPOs, or NHOs in the Section 106 process:

⁴ This question is identical to Question No. 18 on the Form 621.

- System change implementation on July 2, 2018 will remove all current text provided by Tribes in the “Additional Details” box.⁵
 - Purpose: Clears information in the Additional Details box to ensure compliance with the types of information requests permitted, consistent with the updates made in the *2018 Infrastructure Second Report and Order*.
- When Tribes submit text in the “Additional Details” box, it will be reviewed by FCC staff before it is published in the system as direction to applicants. When Tribes enter proposed text in the box, the status will be “Pending FCC Approval.” If the FCC approves the text,⁶ the status will change to “FCC Approved” and an email, or if no email is available by US mail, will be sent notifying the Tribe of the approval. The new language will then be sent to applicants submitting TCNS notices.
 - Purpose: Provides the FCC an opportunity to review proposed language before it is placed into the TCNS system to ensure that the TCNS system does not display information that is inconsistent with the *2018 Infrastructure Second Report and Order*.
- For each TCNS submission, E-106 will now send the relevant Tribe(s) either a “Notification of New Filing” email or “Informational Notice of Section 106 Filings” paper letter when a FCC Form 620 or 621 is submitted in E-106. Tribes that elect to receive notifications through email only will receive the “Notification of New Filing” email. Tribes that elect to receive notifications by US Mail only will receive the “Informational Notice of Section 106 Filings” letter. A Tribe that has elected to receive both email and US Mail notifications will receive both forms of notification. Tribes that indicate no interest in a proposed construction will not receive either notification.
 - Purpose: Ensures Tribal notification in the preferred format when the Form 620/621 is available.
- The 30-day Tribal review period will not begin until the Form 620 or 621 is submitted in E-106, or the Alternative Submission Packet is uploaded in TCNS. TCNS will not permit referrals until 30 days after provision of the relevant form or Alternative Submission Packet for Tribes receiving information electronically, and 35 days for Tribes using only US mail.
 - Purpose: Establishes the review period deadline for a Tribe to review a Submission Packet while ensuring that Tribes have complete information before the review period begins.
- Two new lines have been added to the Form 620/621 filing information in the “Notification of New Filing” email and “Informational Notice of Section 106 Filings” paper letter. The first is a “Tribal Review Period End Date,” which displays the last date that a Tribe can reply before an applicant can refer a Tribe to the FCC for failing to respond. That date will be 30 days (if notice

⁵ Prior to TCNS going back online on July 6th, Tribal Nations and NHOs may submit new text by sending it to tenshelp@fcc.gov.

⁶ Staff will notify a Tribe in the event that language for the Additional Details box cannot be approved as submitted.

is sent by email) or 35 days (if notice is sent only by US mail) after notification is sent.⁷ The second line asks “Has the Communications Tower or Non-Tower Structure been the subject of a SHPO/THPO review?” and provides a “yes” or “no” response to that question.⁸

- Purpose: Ensures that the deadline for Tribal review and the earliest date for FCC referral is clearly identified, and enables reviewers to identify whether the underlying tower went through Section 106 review when constructed.
- A “Structure Excluded from SHPO Review” icon will be displayed next to each notification, if applicable, on the “Notifications Details,” “Reply to a Notification,” and “Notification Search Results” screens. A description of that icon will also be added to the Key/Legend box on those screens.
 - Purpose: Identifies for Tribal reviewers projects that have minimal potential to affect historic properties under the NPA, and for which Forms 620/621 are not required to initiate reviews.
- The “Weekly Notice of Tower Construction Notification System Filings” emails and letters will indicate if a project is exempted from SHPO review.
 - Purpose: Identifies for Tribal reviewers projects that have minimal potential to affect historic properties under the NPA, and for which Forms 620/621 are not required to initiate reviews.
- The Notifications Details page includes information in two new fields discussed above: “Tribal Review Period End Date” and “Form 620/621 available on:”
 - Purpose: Provides easy identification of when Form 620/621 was made available for Tribal review, thereby triggering the review timeline.
- Under the “Notifications with Pending Referrals” section on the “Reply to Notifications” screen, the “20-day Letters – Proposed Projects Requiring Immediate Attention” has been updated to reflect the Commission’s new timing requirements and now reads “15-day Letters – Proposed Projects Requiring Immediate Attention.”
 - Purpose: Reflects the change made in the *2018 Infrastructure Second Report and Order* reducing the response time for Tribal reviews following FCC referral from 20 days to 15 days.

Applications Pending on Effective Date and Withdrawal of Applications Pending on Effective Date

All applications *filed* in TCNS and/or E-106 will be processed under the rules and procedures in place on the filing date. The changes adopted in the Order, including the changes and updates to the TCNS and E-106 processes described in this Public Notice, will apply only to filings submitted *on or after* July 2, 2018.

⁷ *2018 Infrastructure Second Report and Order*, para. 111.

⁸ This mirrors the change made to the applicant and consultant’s section discussed above, and again is identical to Question No. 18 on the Form 621.

Applicants may abandon pending applications (by updating the Status of the notification to “Abandoned”) and re-submit them on or after July 2, 2018, in which case the *2018 Infrastructure Second Report and Order* and changes discussed in this Public Notice would apply to the resubmissions. In such cases, Applicants are encouraged to note that an application has been re-filed and include the earlier notification number in the new submission. Note that review periods for resubmitted notifications will reset to reflect the date of the new filing. Additionally, for Tribal response deadlines that fall during the period from July 2 through July 5, 2018 when TCNS is inaccessible, Commission staff will extend those deadlines to July 6, 2018.

All parties should take notice that rules and processes in place before the effective date will continue to govern any submission initiated before July 2, 2018, regardless of information in TCNS/E-106 that might indicate otherwise.⁹

For additional information about the transition process, please contact Leon Jackler, at leon.jackler@fcc.gov or (202) 418-0946.

-FCC-

⁹ For example, when an applicant refers a notification that was filed before July 2, it will be expected to previously have contacted the Tribe twice, even though as of July 2, TCNS will only provide space for the applicant to enter a single contact date.