



FCC Draft Notice of Proposed Rulemaking: Implications for Tribal Responses

Overview of what the Draft NPRM Would Do:

The NPRM would seek comment on:

- How current local, State, and Commission rules and processes affect the speed and cost of infrastructure deployment, and ideas for improving State and local infrastructure reviews.
- What time limits should apply to local review, and a proposal to “deem granted” applications where there has been unreasonable delay.
- The use and impact of State and local moratoria.

The FCC invites commenters to propose other innovative approaches to expediting deployment. The FCC’s Section 106 process is partly governed by federally recognized tribes.

FCC Draft NPRM requests for comment, considerations, and proposals from tribal leaders:

Reexamining NHPA and NEPA Review

- Provide concrete information on the amount of time it takes for Tribal Nations to complete the Section 106 review process and the costs that Tribal participation imposes on facilities deployment and on the provision of services
- Provide comments and specific information on the extent of benefits attributable to Tribal participation under the FCC’s Section 106 procedures, especially in regards to preventing damage to historic and culturally significant properties.
- Provide comment on the costs and relative benefits of the FCC’s NEPA rules.

Process Reforms: Tribal Fees

- Provide comments on issues relevant to fees paid to Tribal Nations in the Section 106 process
- Provide specific information on current Tribal and industry practices and on the impacts of those practices on licenses/tower owners, Tribal Nations, and timely deployment of advanced broadband services to all Americans.
- Provide comments on practices or procedures of other Federal agencies with respect to addressing the various roles a Tribal Nation may play in the Section 106 process.
- Provide facts that might provide an answer to the following questions: At what point in the TCNS process, if any, might a Tribal Nation act as a contractor or consultant?

- Propose modifications on the requirement for the applicant to provide “all information reasonably necessary for the Indian Tribe of NHO to evaluate whether Historic properties of religious and cultural significance may be affected.
- Provide comments on the ACHP’s statement that an applicant can refuse payment, but the agency still retains the duties of obtaining the necessary information to fulfill its Section 106 obligations.
- Provide comments on the manner of cost recovery used by most Tribal nations and whether such cost recovery is consistent with ACHP’s fee guidance in its 2012 handbook.
- Provide comments on how disputes between parties might be resolved when a Tribal Nation asserts that compensable effort is required to initiate or conclude the Section 106 review.
- Provide comments on how the due regard for tribal sovereignty and the Government’s treaty obligations affect the FCC’s latitude for action in this area.
- Provide examples of other Federal agencies formally or informally resolving fee disputes between applicants and Tribal Nations.
- The steady increase of areas of interest for Tribal nations has proven burdensome to broadband companies. The FCC is seeking comments on whether there are actions the Commission can and should take to mitigate this burden while complying with their obligation under Section 101 of the NHPA and the promoting the interest of all stakeholders.
- Provide comment on whether the FCC should require some form of certification for areas of interest, and if so, what would be the defaults if a Tribal Nation fails to provide a certification?
- Provide comments on when it is necessary for an applicant to compensate multiple Tribal Nations for the same project or for the same activity related to that project. Propose mechanisms that can be considered to ensure that duplicative reviews are not conducted by each Tribal Nation involved.
- Provide opinions on whether the Commission can adjudicate referrals by evaluating whether the threshold of “reasonable and good faith effort” to identify historical properties has been met.
- Provide comment on when the FCC must engage in government-to-government consultation to resolve fee disputes.
- Provide comments and proposals on how to speed the review process, either by amending the NPA or otherwise, while assuring historical preservation is evaluated.
- Provide comments on whether the process can be revised to permit applicants to self-certify their compliance with Section 106.

Right of Way Disputes

- Provide comment on whether NHO and Tribal Nation participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties.

Collocations

- Provide comment on the participation of Tribal Nations in the review of collocations on historic properties or in or near historic districts.
- Provide comments on whether to exclude from the NPA procedures for Tribal and NHO participation collocations that are subject to Section 106 review solely because they are on historic properties or in or near historic districts. Discuss whether collocations in these circumstances have the potential to cause effects on properties significant to Tribal history or culture.
- Propose alternative to streamline procedures for Tribal and NHO participation in cases like the one mentioned in the bullet point above.

- Provide comments on whether the process for engaging Tribal Nations and NHO's for these collocations should continue to be required.

Collocations on Twilight Towers

- Provide comments regarding the concern that some of the towers that were constructed between 2001 and 2005 may have effects on properties of religious and cultural significance that have not been noticed because their people are far removed from their traditional homelands.

Find all Tribal specific information from the FCC NPRM in the following pages.

ALL FCC NPRM tribal specific sections with extended background information:

Furthermore, some of the changes discussed below might significantly or uniquely affect Tribal governments, their land and resources. We direct the Wireless Telecommunications Bureau (WTB), in coordination with the Consumer and Governmental Affairs Bureau, Office of Intergovernmental Affairs, and other Bureaus and Offices as appropriate, to consult with other agencies and organizations, including the CEQ, ACHP, and NCSHPO, as warranted to develop the record and obtain their perspectives on the issues herein. We further direct the Office of Native Affairs and Policy (ONAP), in coordination with WTB and other Bureaus and Offices as appropriate, to conduct government-to-government consultation as appropriate with Tribal Nations.

The Commission developed the Tower Construction Notification System (TCNS), which automatically notifies Tribal Nations and NHOs of proposed constructions within geographic areas that they have confidentially identified as potentially containing historic properties of religious and cultural significance to them. The NPA provides that use of the TCNS constitutes a reasonable and good faith effort to identify potentially interested Tribal Nations and NHOs.

While Tribal Nations and NHOs, like SHPOs, are subject to a 30-day guideline for responses, applicants are required to seek guidance from the Commission if a Tribal Nation or NHO does not respond to the applicant's inquiries. In 2005, the Commission issued a Declaratory Ruling establishing a process that enables an applicant to proceed toward construction when a Tribal Nation or NHO does not timely respond to a TCNS notification. The Commission staff, in collaboration with industry, has subsequently developed a similar process (the "Good Faith Protocol") to address situations where a Tribal Nation or NHO expresses initial interest in a project, but then fails to communicate further with the Applicant after having been provided any additional information or fees that it has requested.

This process not only requires that providers make their own determinations as to whether a project will have effects on historic properties, but also requires obtaining input from SHPOs and Tribal Nations, and wireless providers argue that this process results in significant delays in the execution of their deployment plans.

A large number of wireless providers complain that the Tribal component of the Section 106 review process is particularly cumbersome and costly. Providers have argued that Tribal Nation review has caused substantial delays that significantly exceed those attributable to the SHPO review process, and Tribal compensation in connection with the review of submissions to TCNS has become a highly contentious subject. We observe that TCNS data reveals that, in recent years, the areas of interest claimed by Tribal Nations have increased. TCNS data reveals that the 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 fuller States in addition to select counties. In 2015, 50 Tribal Nations noted fees associated with their review process in TCNS; by March 2017, FCC staff was aware of at least 95 Tribal Nations routinely charging fees, including 85 with fees noted in TCNS and 10 we were aware of from other sources. This data 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.

Moreover, Verizon notes that the total fees it pays for Tribal participation “increased from just over \$300,000 in 2012 to almost \$4 million in 2015. We seek concrete information on the amount of time it takes for Tribal Nations to complete the Section 106 review process and on the costs that Tribal participation imposes on facilities deployment and on the provision of service. We also seek comment and specific information on the extent of benefits attributable to Tribal participation under the FCC’s Section 106 procedures, particularly in terms of preventing damage to historic and culturally significant properties.

In addition, in May 2016, PTA-FLA’s filed a Petition for Declaratory Ruling arguing that “Tribal fees have become so exorbitant in some cases to approach or even *exceed* the cost of actually erecting the tower. In the alternative, PTA-FLA states that “the reviewing fees should be limited to no more than \$50” unless a Tribal Nation “demonstrates that the review is exceptionally complex,” and that the total fee should never exceed \$200. In addition, PTAFLA argues that Tribal Nations “should be required to identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact” on an area in which Tribal Nations “actually resided or habituated”

In addition to commenting on the legal framework and on potential resolutions to the issues, we encourage commenters to provide specific factual information on current Tribal and industry practices and on the impacts of those practices on licensees/tower owners, Tribal Nations, and timely deployment of advanced broadband services to all Americans. We further welcome information on the practices of other Federal agencies for our consideration.

Further, “if the agency or applicant has made a reasonable and good faith effort to consult with 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.” The guidance also states, however, that when a Tribal Nation “fulfills the role of a consultant or contractor” when conducting reviews, “the tribe would seem to be justified in requiring payment for its services, just as any other contractor,” and the company or agency “should expect to pay for the work product.”

Moreover, we seek comment on practices or procedures of other Federal agencies with respect to addressing the various roles a Tribal Nation may play in the Section 106 process and how to identify those services for which a Tribal Nation would be justified in seeking fees.

The NPA requires applicants to make a reasonable and good faith effort to identify Tribal Nations and NHOs that may attach religious and cultural significance to historic properties affected by an undertaking, and this effort is commonly accomplished through the TCNS. Some Tribal Nations require the payment

of a fee prior to performing even preliminary review of all or nearly all projects submitted to them via the TCNS.

At what point in the TCNS process, if any, might a Tribal Nation act as a contractor or consultant? We seek comment on any facts that might affect the answer to that question. Does the particular request of the applicant determine whether a Tribal Nation is acting as a contractor or consultant? We also seek comment on whether Tribal review for some types of deployment is less in the nature of a contractor or consultant.

Once a Tribal Nation or NHO has been notified of a project, an applicant must provide “all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected” and provide the Tribal Nation or NHO with a reasonable opportunity to respond. We seek comment on this requirement and on any modifications the FCC can and should make.

We seek comment on how the ACHP Handbook’s statement that an “applicant is free to refuse [payment] just as it may refuse to pay for an archaeological consultant,” as well as its statement that “the agency still retains the duties of obtaining the necessary information [to fulfill its Section 106 obligations] through reasonable methods,” impacts our analysis of payments for Tribal participation.

We seek comment on this manner of cost recovery and whether such cost recovery is consistent with ACHP’s fee guidance in its 2012 Handbook. Tribal Nations have also indicated that they have experienced difficulties in collecting compensation after providing service as a reason for upfront fee requests. We seek comment on whether this concern could be alleviated if we clarify when a Tribal Nation is acting under its statutory role and when it is being hired as a contractor or consultant under our process.

How does the reasonable and good faith standard for identification factor, if at all, into when a Tribal request for fees must be fulfilled in order to meet the standard? We seek comment on how disputes between the parties might be resolved when a Tribal Nation asserts that compensable effort is required to initiate or conclude Section 106 review

One factor that appears to be driving tower owners and licensees to seek Commission guidance in the fee area is not the mere existence of fees, but instead the amount of compensation sought by some Tribal Nations. How, if at all, does the “reasonable and good faith” standard for identification factor into or temper the amount of fees a Tribal Nation may seek in compensation? Are there any extant fee rates or schedules that might be of particular use to applicants and Tribal Nations in avoiding or resolving disputes regarding the amount of fees?

How does due regard for Tribal sovereignty and the Government’s treaty obligations affect our latitude for action in this area? Have any other Federal agencies formally or informally resolved fee disputes between applicants and Tribal Nations, and if so, under what legal parameters?

Tribal Nations have increased their areas of interest within the TCNS as they have improved their understanding of their history and cultural heritage. As a result, applicants must sometimes contact upwards of 30 different Tribal Nations and complete the Section 106 process with each of them before being able to build their project. We seek comment on whether there are actions the Commission can and should take to mitigate this burden while complying with our obligation under Section 101(d)(6) of the NHPA and promoting the interests of all stakeholders.

We also seek comment on whether we should require some form of certification for areas of interest, and if so, what would be the default if a Tribal Nation fails to provide such certification.

In addition, applicants routinely receive similar requests for compensation or compensable services from multiple Tribal Nations. While we recognize that each Tribal Nation is sovereign and may have different concerns, we seek comment on when it is necessary for an applicant to compensate multiple Tribal Nations for the same project or for the same activity related to that project, in particular site monitoring during construction. We also seek comment on whether, when multiple Tribal Nations request compensation to participate in the identification of Tribal historic properties of religious and cultural significance, whether there are mechanisms to gain efficiencies to ensure that duplicative review is not conducted by each Tribal Nation.

Under the NPA, when a Tribal Nation or NHO refuses to comment on the presence or absence of effects to historic properties without compensation, the applicant can refer the procedural disagreement to the Commission. We seek comment on whether the Commission can adjudicate these referrals by evaluating whether the threshold of “reasonable and good faith effort” to identify historic properties has been met, given that the Tribal Nation can always request government-to-government consultation in the event of disagreement. We seek comment on when the Commission must engage in government-to-government consultation to resolve fee disputes, including when the compensation level for an identification activity has been established by a Tribal government.

As discussed above, while both SHPOs and Tribal Nations/NHOs are expected ordinarily to respond to contacts within 30 days, the NPA and the Commission’s practice establish different processes to be followed when responses are not timely. We seek comment on what measures, if any, we should take to further speed either of these review processes, either by amending the NPA or otherwise, while assuring that potential effects on historic preservation are fully evaluated. What effect would such proposals have on addressing Section 106-associated delays to deployment?

With respect to Tribal Nations and NHOs, we seek comment on whether the process can be revised in a manner that would permit applicants to self-certify their compliance with our Section 106.

We also seek comment about whether Tribal and NHO participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties.

Next, we seek comment on the participation of Tribal Nations and NHOs in the review of collocations on historic properties or in or near historic districts.

We seek comment on whether to exclude from the NPA procedures for Tribal and NHO participation collocations that are subject to Section 106 review solely because they are on historic properties or in or near historic districts, other than properties or districts identified in the National Register listing or determination of eligibility as having Tribal significance. Commenters should discuss whether collocations in these circumstances have the potential to cause effects on properties significant to Tribal history or culture.

We also seek comment on alternatives to streamline procedures for Tribal and NHO participation in these cases, for example different guidance on fees or deeming a Tribal Nation or NHO to have no interest if it does not respond to a notification within a specified period of time.

We seek comment on this option and on any alternatives, including whether any additional conditions should apply and whether the process for engaging Tribal Nations and NHOs for these collocations should continue to be required.

Tribal Nations have expressed concern that some of the towers that were constructed between 2001 and 2005 may have effects on properties of religious and cultural significance that have not been noticed because their people are far removed from their traditional homelands. We seek comment on these concerns.