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April 30, 2025

Joel Taubenblatt
Acting Bureau Chief, Wireless
Telecommunications Bureau
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Dear Bureau Chief Taubenblatt,

The Suquamish Indian Tribe of the Port Madison Reservation opposes the Wireless Association's (CTIA) request that the Federal Communications Commission (FCC) update its rules implementing the National Environmental Policy Act (NEPA) to state that wireless facility deployments are not a major federal action. Such an update would be contrary to a 2019 U.S. Court of Appeals for the District of Columbia decision and would result in the destruction of Tribal Nations' cultural resources and the disinterment of their ancestors' remains.

The Suquamish Indian Tribe of the Port Madison Reservation (Tribe) is a federally recognized Indian Tribe with a governing body recognized by the United States Secretary of the Interior. The Tribe is located on the Port Madison Reservation in Suquamish, Washington in Kitsap County. The Tribe is a signatory of the 1855 Treaty of Point Elliott, in which the Tribe forever reserved its right to take fish among other reserved rights.

The Tribe's government operations include the operation of a Historic Preservation Office, which reviews FCC-related projects to determine their potential impact on sensitive cultural resources. On an annual basis, the Tribe's Historic Preservation Office reviews approximately 130 FCC-related project notices. It is a critical role for the Office, as these projects often involve ground disturbance that negatively impact the Tribe's cultural resources.

The CTIA's request that the FCC "update its rules" implementing NEPA is an affront to Tribal sovereignty and a fundamental violation of the Federal trust responsibility to Tribal Nations. An FCC decision to follow through on the CTIA's request would be a mistake and an abrogation of the FCC's legal responsibilities. A decision that wireless facility deployments are not a major federal action would not only have an impact on NEPA requirements that the FCC consult with Tribal Nations, but also on National Historic Preservation Act (NHPA) requirements for consultation with Tribal Nations.

In their petition, the CTIA explicitly stated, "The Commission additionally should propose to find that geographic area deployments are not undertakings under the NHPA and amend Section 1.1312 accordingly." CTIA, essentially, asks the FCC to do one of three things to achieve this result: either unilaterally exempt an entire category of undertakings from Section 106 review; declare that an entire

category of federally licensed activities and projects are not undertakings; or redefine the term undertaking to exclude FCC-licensed activities and programs from Section 106 review. The FCC cannot do any of these actions.

The FCC cannot unilaterally exempt an entire category of undertakings from Section 106 review. The NHPA established the Advisory Council on Historic Preservation (ACHP)[1] and delegated to it exclusive authority to promulgate regulations "govern[ing] the implementation of section [106] of th[e] [NHPA] in its entirety."[2] These regulations are promulgated at 36 C.F.R. Part 800, and all "federal agencies must comply with these regulations."[3] As part of these regulations, the ACHP has developed procedures for federal agencies to seek exemptions from Section 106 review for certain programs or categories of undertakings.[4] The FCC may request such an exemption, but only the ACHP can grant it, and only after the specific process set forth in 36 C.F.R. § 800.14(c) is followed.[5] Accordingly, the FCC lacks the unilateral authority to exempt entire categories of undertakings from Section 106 review, even under the guise of a rulemaking.

CTIA further asserts that the FCC possesses unilateral discretion to determine what constitutes an undertaking. This statement grossly misrepresents and overstates the FCC's authority. The authority hinted at in the petition presumably derives from 36 C.F.R. § 800.3(a), wherein federal agencies have discretion to determine whether Section 106 is triggered for a specific undertaking.

36 C.F.R. § 800.3(a) requires federal agencies to determine whether the proposed "action is an undertaking as defined in [36 C.F.R.] § 800.16(y) and, if so, whether it is the type of activity that has the potential to cause effects on historic properties."[6] This is a project-specific determination made based on the specific parameters of and potential effects caused by the proposed action. This provision does not grant the FCC authority to categorically proclaim entire categories of undertakings exempt from Section 106 review. Nor does it grant the FCC authority to define what constitutes an undertaking to sidestep its Section 106 obligations.

The NHPA defines the term undertaking. In part, undertaking is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license, or approval[.]"[7] The ACHP's regulations codify this definition verbatim.[8] Courts have repeatedly held that the deployment and construction of wireless infrastructure subject to FCC licenses are undertakings subject to Section 106.[9]

The FCC does not have the authority to redefine the term undertaking to exclude federally licensed projects and activities. As discussed above, the NHPA delegated to the ACHP exclusive Section 106 rulemaking authority and defined the term undertaking in the statute. Accordingly, the FCC does not have authority to undertake a rulemaking to redefine the term undertaking or ignore the statutory

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[1] *See* 54 U.S.C. § 304101(a).
[2] *Id.* § 304108(a); *see CTIA-Wireless Ass'n v. Fed. Commc'ns Comm'n*, 466 F.3d 105, 116 (D.C. Cir. 2006) ("Congress has entrusted one agency with implementing and administering section 106 of the NHPA: the [ACHP].").
[3] *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (citation omitted).
[4] *See* 36 C.F.R. § 800.14(c); 54 U.S.C. § 304108(c).
[5] 36 C.F.R. § 800.14(c)(5).
[6] *Id*. § 800.3(a).
[7] 54 U.S.C. § 300320(3).
[8] 36 C.F.R. § 800.16(y).
[9] *See, e.g.*, *CTIA-Wireless*, 466 F.3d at 112-5; *United Keetoowah Band of Cherokee in Okla. v. Fed. Commc'ns Comm'n*, 933 F.3d 728 (D.C. Cir. 2019).

definition of the term in order to exempt activities and projects that require an FCC-issued license.[10] Moreover, the FCC is not entitled to any deference in interpreting the meaning of the NHPA, the definition of undertaking, or its obligations under Section 106 and the ACHP's regulations.[11] The FCC cannot—and more precisely, does not possess the authority to—rulemake itself out of compliance with the NHPA by unilaterally exempting an entire category of undertakings from Section 106 review.

CTIA asserts that geographic area deployments are not undertakings because the deployment of wireless facilities subject to geographic area licenses are not carried out by or on behalf of the FCC, do not receive federal financial assistance, and, inconceivably, do not require a federal license. These points are inaccurate and irrelevant.

It is irrelevant that wireless deployments are not undertakings by or on behalf of the FCC. A project, activity, or program does not need to be carried out by or on behalf of a federal agency to be an undertaking. The NHPA and the ACHP's implementing regulations make clear that non-federal projects, activities, and programs are undertakings so long as they "require a Federal permit, license, or approval[.]"[12] It is also irrelevant (and likely untrue) that wireless deployments do not receive federal financial assistance.[13] Courts have consistently held that federal funding is not a prerequisite for a project, activity, or program to be a undertaking when they are subject to federal approvals.[14] Finally, it is incorrect for CTIA to assert that deployments subject to FCC-issued geographic area licenses are not licensed by the FCC. Courts have consistently held that wireless deployments are undertakings because they require an FCC license to operate.[15]

The NEPA and NHPA Tribal consultation processes are fundamental tools that the Tribe's Tribal Historic Preservation Officers (THPOs) use to protect places that are important to the Suquamish People. Eliminating NEPA and NHPA reviews and Tribal consultation as the purported, would contradict the Federal Indian trust responsibility, one of the most important principles in federal Indian law.

The best way to address a consultation process that at times is inefficient and fails to provide for adequate protection of Tribal Nations' cultural resources and sacred places, would be to increase federal support for THPOs. In Fiscal Year 2025, THPOs will receive on average $100,900 from the Historic

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[10] *See Am. Libr. Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691 (D.C. Cir. 2005) ("It is axiomatic that administrative agencies may issues regulations only pursuant to authority delegated to them by Congress."). The ACHP, and not the FCC, was delegated Section 106 rulemaking authority. Accordingly, the FCC has not legal authority to promulgate regulations that purport to implement or define the agency's compliance with Section 106.

[11] *See United Keetoowah Band*, 933 F.3d at 738 ("We owe no deference to the FCC's interpretations of the NHPA . . . which [is] primarily administered by the [ACHP.]").

[12] 54 U.S.C. § 300320(c); 36 C.F.R. § 800.16(y); *see Sheridan Kalorama Hist. Ass'n v. Christopher, 49 F.3d 750, 755 (D.C. Cir. 1995).*

[13] *See 5G Fund*, Fed. Commc'ns Comm'n, https://www.fcc.gov/5g-fund/

[14] *See, e.g.*, *CTIA-Wireless*, 466 F.3d at 112 ("[A] 'project, activity, or program[]' does not require federal funding to be an 'undertaking' under section 106 of the NHPA." (internal citations omitted)).

[15] *See, e.g.*, *United Keetoowah Band*, 993 F.3d at 736 ("Those licenses . . . necessarily contemplate facility construction."). CTIA admits as much in its petition but asserts that changes to the NEPA and its implementing regulations require this to be reexamined. Not so. Contrary to CITA's assertion, undertaking under the NHPA and major federal action under the NEPA are not "essentially coterminous." The statutory definition of undertaking encompasses a far broader range of activities that the statutory definition of major federal action. *Compare* 54 U.S.C. § 300320, *with* 42 U.S.C. § 4336(e)(10). Indeed, a project may be an undertaking and therefore subject to Section 106 review even if it is not a major federal action and not subject to any NEPA review. *See* Wesley James Furlong, *"Subsistence is Cultural Survival": Examining the Legal Framework for the Recognition and Incorporation of Traditional Cultural Landscapes within the National Historic Preservation Act*, 22 Tribal L. J. 51, 75 n.136 (2023).

Preservation Fund (HPF). The Tribe strongly supports a reauthorization of the HPF that would require that:

- THPOs receive a minimum of 20 percent of the HPF each year, and;
- direct the National Park Service to review if THPO funding is keeping pace and adjust the funding to reflect the annual increase in the number of THPOs.

We also urge the Administration to propose budgets and Congress to pass appropriations bills that reflect the important role that THPOs play in protecting the places that tell the stories of Tribal Nations.

The failure to provide adequate federal funding for THPOs was exacerbated by the FCC's 2018 decision to eliminate requirements that telecommunication companies pay fees to Tribal Nations for the review of projects associated with the deployment and construction of wireless infrastructure. The restoration of a system for providing THPOs compensation for consultation on these projects, would both make the process more efficient and support the protection of Tribal Nations' cultural resources.

Consistency and certainty are important for both THPOs and the companies whose projects are essential for all Americans, including members of Tribal Nations. We are confident that with thoughtful changes and proper funding for THPOs, the project permitting process can be efficient, while at the same time guaranteeing that Tribal Nations' cultural resources are protected.

The Tribe is disappointed that the FCC is even seeking comment on the CTIA's request that the Commission update its rules implementing NEPA to clarify that wireless facility deployments are not a major federal action. The Court has clearly spoken on this issue and it would be much more productive for the wireless industry and the FCC to thoughtfully engage with Tribal Nations on how the consultation process can be improved, rather than seeking to eliminate Tribal consultation.
Thank you for considering our comments. Please do not hesitate to contact me if you would like to discuss this matter or if I can be helpful in any other way.

Sincerely,



Stephanie Trudel
Tribal Historic Preservation Officer
Suquamish Indian Tribe