

March 16, 2001

**PRESS STATEMENT OF COMMISSIONER GLORIA TRISTANI  
ON INDIAN TRIBE ASPECTS OF THE NATIONWIDE PROGRAMMATIC  
AGREEMENT FOR THE COLLOCATION OF WIRELESS ANTENNAS**

Today I write to express my belief that the Commission must do better to live up to our commitment to work with Indian Tribes on a government-to-government basis and to engage in consultations on matters of import to Tribes. The programmatic agreement enacted today fails to fulfill the spirit of these commitments and cannot be a model for future relations.<sup>1</sup>

The Tribal Lands Initiative adopted in June 2000 is one of my proudest accomplishments as a member of this Commission. As I've said before, it's unconscionable that Indians, the first Americans, remain the last Americans to enjoy the wonders and benefits of the Information Age. Yet I am heartened that the policies we recently adopted are making a difference. More Indians than ever are getting connected because of the enhanced Lifeline program, which reduces basic monthly rates for eligible subscribers on tribal lands to \$1 in most cases. Navajo Communications, which serves the Navajo community exclusively, reports that in the program's first 5 months it has added nearly 1,650 *new* residential subscribers. And I look forward to more wireless service coverage in Indian country that will develop as a result of the tribal lands bidding credit.

As part of the Tribal Lands Initiative, however, we promised to do more than increase telephone subscribership in Indian country. My colleagues and I adopted a policy statement that recognized the Commission's general trust relationship with federally-recognized Indian Tribes, and we committed to work with Tribes on a government-to-government basis. We stated that we would "facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands."<sup>2</sup>

The collocation agreement falls short of this commitment. In response to inquiry on a draft of the agreement, we received nearly 20 comments from tribal governments and representatives, and the overwhelming majority told us our approach is not working.<sup>3</sup>

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<sup>1</sup> See *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, executed by the Federal Communications Commission, the National Conference of State Historic Preservation Officers, and the Advisory Council on Historic Preservation (March 16, 2001).

<sup>2</sup> Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, *Policy Statement*, FCC 00-207 (rel. June 23, 2000) at page 5.

<sup>3</sup> See, e.g., Letter from Alan Downer, General Chairman, National Association of Tribal Historic Preservation Officers to Magalie Roman Salas, Secretary, FCC (Mar. 14, 2001) ("[W]e are particularly disturbed by the cavalier attitude towards consultation with Indian Tribes by the FCC and the Advisory Council on Historic Preservation."); Letter from Mark D. Harding, Deputy Tribal Historic Preservation Officer, Wampanoag Tribe of Gay Head (Aquinnah) to Magalie Roman Salas, Secretary, FCC (Jan. 22, 2001) ("We oppose this policy because Tribes, especially Tribes with Tribal Historic Preservation Offices (THPO), were not consulted during these negotiations with the National Conference of State Historic Preservation Officers (NCSHPO) and the Advisory Council of Historic Preservation (ACHP)."); Letter

Despite the Commission staff's efforts to reach out to Tribes, this response is *prima facie* evidence that our understanding of Tribal consultation is misguided. We need to develop a more robust, meaningful consultation process.

Moreover, I am troubled that the Commission has endorsed the agreement's use of the Advisory Council for Historic Preservation's (ACHP) definition of tribal lands.<sup>4</sup> The ACHP definition is more limited than the generally accepted definition of Indian country based upon 18 U.S.C. § 1151, which not only includes Indian reservations and dependent Indian communities but Indian allotments as well.<sup>5</sup> Fundamental to this more comprehensive definition is the concept of trust lands. These are lands to which the federal trust responsibility adheres. The United States holds title, and the tribes or individual Indians enjoy the beneficial interest.<sup>6</sup> Having formally recognized our general trust relationship in the *Policy Statement*, the Commission should act accordingly and recognize all trust lands as tribal lands. We should not roll back the definition of tribal lands or circumscribe tribal jurisdiction.

Ultimately, I am concerned that inadequate consultations and soured relations will overshadow the Commission's Tribal Lands policies and our genuine desire to connect Indian country to the Information Age. I hope that the programmatic agreement will not serve as precedent but as a learning experience as we go forward.

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from Dallas Massey, Sr., Tribal Chairman, White Mountain Apache Tribe to the Honorable William E. Kennard, Chairman, FCC (Jan. 25, 2001) ("The memorandum violates various principles of government-to-government communications and FCC trust principles.").

<sup>4</sup> See 36 C.F.R. § 800.16(x) ("Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.").

<sup>5</sup> 18 U.S.C. § 1151. See Felix S. Cohen's *Handbook of Indian Law* 27 (1982) ("[F]or most jurisdictional purposes the governing legal term is 'Indian Country' . . . defined comprehensively in 18 U.S.C. § 1151.").

<sup>6</sup> Although New Mexico Pueblos are held in fee communally, the Supreme Court has held that they are in a trust relationship with the federal government and the lands cannot be alienated without the consent of the United States. *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Candelaria*, 271 U.S. 432 (1926).