



National Conference of State Historic Preservation Officers

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February 9, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC

Re: Public Notice of Draft Program Comment Addressing Collocation on Twilight Towers,
WT Docket No. 17-79

Dear Ms. Dortch:

On behalf of the National Conference of State Historic Preservation Officers (NCSHPO), we thank you for the opportunity to provide comments on your agency's draft "Program Comment" for "Twilight Towers." These comments augment those that were previously submitted on December 9th, 2018, but did not appear to influence the release of the subsequent draft earlier this month.

As we previously have stated, overall, we agree that it would be advantageous for industry to be able to utilize existing towers to collocate equipment rather than requiring the installation of additional ones. But we believe that an approach that simply excludes these towers from review and repeatedly attempts to validate some industry members' claims that their Section 106 responsibilities were "unclear," is inappropriate.

The Draft Rewrites History

NCSHPO has worked with the FCC for years to try to come up with a solution for what we refer to as "Non-Compliant" towers. We have repeatedly heard that several industry members consider and define the period between the adoption of the 2002 Collocation Agreement and the 2005 Nationwide Programmatic Agreement as an era where sufficient ambiguity existed as to how to comply with the National Historic Preservation Act of 1966 (NHPA).

As comments submitted by other State Historic Preservation Officers clearly show, thousands of towers were installed prior to or during this time period that properly underwent Section 106 review. Your agency's own "Fact Sheet" from 2002 directly references how the 2002 Collocation Agreement was meant to "streamline" existing Section 106 procedures and the Commission's rules. Clearly there were underlying rules and procedures tied to Section 106 review. Why they were sufficiently clear for some applicants, but not for others, is unknown to us. Regardless, even if one accepts that there was ambiguity in the rules and procedures, not all wireless providers made the same decision to proceed by not complying with the NHPA at all.

Therefore, the first point we would like to make, is that the Program Comment should tell the whole story. The draft repeatedly cites the lack of clarity as the reason why so many towers did not go through Section 106 review, but it fails to mention that sufficient clarity apparently existed for the many that did. The result, in our opinion, is a biased document which is simply misleading. It rewrites history and then uses “confusion” as an excuse to subsequently set the stage for a broad exclusion from review.

There is no Opportunity to Consider Effects

Regardless of the motivation for not completing Section 106 review, we are dealing with towers for which their impact upon historic properties has either not been evaluated or for which documentation cannot be located. When trying to consider a path forward, our members have asked two basic questions – how many are there, and where are they located? Unfortunately on these two points we have had only some cooperation – a total of 4,298 potential towers have been identified by the members of the two major associations representing the industry. Beyond this, we have no idea where they are – not even how many are located in each state. Without this basic level of information it has been difficult to identify an efficient way forward. The level of documentation, the number of submissions that could be submitted at once, and the timeframe for review would vary greatly depending on whether a state had 20 towers or 1,000.

There is also the question of the effects that these towers have had on historic properties. In our view, the position stated in your agency’s Notice of Proposed Rulemaking that “... *these towers have been standing for 12 years or more and in the vast majority of the cases, no adverse effects have been brought to our attention*” is not acceptable. While indeed many towers may have had no adverse effects, in some instances adverse effects could be present but not brought to anyone’s attention.

The commission’s draft proposal relies solely on whether or not a complaint about a tower has already been received by the Commission. Since thousands of towers were installed without SHPO knowledge, our members would not have been able to flag them as a problem and to submit such a complaint. Beyond this, a member of the public (who would be the most likely source for such a tip), may have no idea whether a particular tower was vetted through proper regulatory processes. They may also have no idea who to contact, what the protocol would be, or what legal options are at their disposal. Even if they did, given the fact certain Industry members have argued that their responsibility during this time was “unclear,” a concerned citizen could very well have been told by any number of regulators or tower owners there was “nothing they could do.” Excluding from review non-compliant towers to facilitate the collocation of yet even more equipment would potentially add insult to injury. Bypassing due process, because your agency is unaware of any issue, or because you think too much time has passed, is simply not the right thing to do. It also sets a terrible precedent.

According to the ACHP’s own regulations concerning Program Comments, the Agency must, among other things, “...specify the steps the agency official will take to ensure that the effects are taken into account.” In our view, the draft fails to deliver on this point – not only providing no clear procedure or provision for “taking into account” any effects that do exist, but providing no opportunity to identify effects to begin with.

At minimum, we believe that whatever process is employed must include a fair opportunity for SHPOs to know where Twilight Towers are located, an opportunity to concur with or dispute any no adverse effect determination, and subsequently, an opportunity to pursue mitigation for any adverse effects. If, as the Commission states, there are so few adverse effects, then this should be a fairly straightforward process.

We all share the same common goal – to find a solution so that these towers can be used for collocations. Once again, NCSHPO stands ready to work with the FCC and the ACHP on a solution.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Erik M. Hein", with a stylized flourish at the end.

Erik M. Hein
Executive Director