

## **Draft Program Comment for the Federal Communications Commission's Review of Collocations on Certain Towers Constructed Without Documentation of Section 106 Review**

This Program Comment was issued by the Advisory Council on Historic Preservation (Advisory Council) on [insert date], pursuant to 36 CFR § 800.14(e), and went into effect on that date. It provides the Federal Communications Commission (FCC or Commission) with an alternative way to comply with its responsibilities under Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, and its implementing regulations, 36 CFR part 800 (Section 106), as supplemented by two nationwide programmatic agreements. In particular, this Program Comment excludes from Section 106 review the collocation of wireless communications facilities on “Twilight Towers” (*i.e.*, certain communications towers for which construction commenced after March 16, 2001, and before March 7, 2005), provided that these collocations satisfy the conditions specified below.

### **I. Background**

To fulfill its obligations under the NHPA, the FCC imposes certain compliance requirements on its applicants and licensees, but the ultimate responsibility for compliance with the NHPA remains with the FCC. In particular, Section 1.1320 of the FCC's rules (47 CFR § 1.1320) directs licensees and applicants, when determining whether a proposed action may affect historic properties, to comply with the Advisory Council's rules, 36 CFR Part 800, or an applicable program alternative, including the *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas* (Collocation NPA), 47 CFR Part 1, App. B, and the *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (Wireless Facilities NPA), 47 CFR Part 1, App. C. These programmatic agreements, which were executed pursuant to Section 800.14(b) of the Advisory Council's rules, substitute for the procedures that Federal agencies ordinarily must follow in performing their historic preservation reviews.<sup>1</sup>

The Collocation NPA, adopted and effective on March 16, 2001,<sup>2</sup> provides that collocations on towers<sup>3</sup> constructed on or before the effective date of that agreement are excluded from routine historic preservation review regardless of whether the underlying tower has undergone Section 106 review provided that they satisfy the specified conditions.<sup>4</sup> By contrast, the Collocation NPA provides that collocations on towers whose construction commenced after March 16, 2001, are excluded from historic preservation review only if the proposed collocation meets specified conditions and the Section 106 review process for the underlying tower and any associated environmental reviews has been completed.<sup>5</sup> Through the Wireless Facilities NPA, which was incorporated into the FCC's rules effective on March 7, 2005, the FCC adopted and codified for the first time detailed procedures for reviewing the effects on historic properties of communications towers and those collocations that are subject to review.

Prior to the adoption of the Wireless Facilities NPA, the FCC's rules did not require its licensees and

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<sup>1</sup> 36 CFR § 800.14(b)(2).

<sup>2</sup> The Collocation NPA was amended in 2016 to establish further exclusions from review for small antennas. *See Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 4617 (WTB 2016).

<sup>3</sup> The Collocation Agreement defines “tower” as “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.” Collocation NPA, § I.E.

<sup>4</sup> Collocation NPA, § III.

<sup>5</sup> Collocation NPA, § IV.

applicants to follow the ACHP's rules or any other specified process when evaluating whether their proposed facilities might affect historic properties as mandated under Section 106. Accordingly, a large number of towers constructed during the period between the effective dates of the two NPAs – that is, those for which construction began after March 16, 2001, and before March 7, 2005 - do not have documentation demonstrating compliance with the Section 106 review process (an issue exacerbated by the limitations of State Historic Preservation Officers' (SHPOs') record-keeping as well as subsequent changes in tower ownership). These towers are referred to as "Twilight Towers." And because collocation on towers whose construction began after the effective date of the Collocation NPA is excluded from Section 106 review only if the tower was itself subject to review, licensees or applicants cannot currently collocate on these Twilight Towers unless each collocation completes a separate Section 106 review or the underlying tower completes an individual post-construction review process.

To develop a Program Comment, the rules of the Advisory Council require federal agencies to arrange for public participation appropriate to the subject matter and the scope of the category of covered undertakings and in accordance with the standards set forth in the Advisory Council's rules.<sup>6</sup> Over the past several years, the FCC has engaged with Tribal Nations, Native Hawaiian Organizations (NHOs), SHPOs, and industry, by holding many face-to-face meetings, sponsoring webinars and workshops, participating in conferences, and distributing written materials. In 2014, FCC staff began consultations with relevant parties to discuss possible solutions to make Twilight Towers broadly available for collocations in a manner consistent with the requirements of and policies underlying the NHPA. In October 2015, the FCC circulated a discussion document to SHPOs, Tribal Nations, NHOs and industry associations, and in January 2016, the FCC facilitated a summit in Isleta Pueblo, New Mexico, devoted to discussion of Twilight Towers. Industry, Tribal, and SHPO representatives participated in this meeting. Following the meeting, the FCC sought written comments from the summit participants. In August 2016, the FCC circulated to industry associations, SHPOs, and Tribal/NHO contacts a discussion draft term sheet developed as a result of those consultations. Follow up calls with Tribal and SHPO representatives and other interested parties, including the Advisory Council staff, were held throughout 2016.

Further, in the Wireless Infrastructure NPRM, adopted in April 2017, the FCC sought public comment on how to resolve remaining Section 106 issues associated with collocation on Twilight Towers, and it received numerous comments on these issues.<sup>7</sup> Finally, the FCC facilitated consultations with Tribal representatives on the Rosebud Sioux Reservation on June 8, 2017; at the annual meeting of the National Conference of American Indians on June 14, 2017; on the Navajo Reservation on August 22, 2017; and in Washington, DC on October 4, 2017. FCC staff have also continued to meet in person and by phone with SHPOs and Tribal representatives since release of the Wireless Infrastructure NPRM.

## **II. Need for Program Comment to Address Twilight Towers**

This Program Comment adopts an exclusion under Section 106 for certain collocations on Twilight Towers. This exclusion is warranted due to a number of unique factors associated with towers whose construction commenced during the period from March 17, 2001 through March 6, 2005, including: (1) the limited reliability of Section 106 review documentation from that time period; (2) the lack of specificity in the FCC's rules regarding Section 106 review at the time the Twilight Towers were

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<sup>6</sup> 36 C.F.R. § 800.14(e)(2).

<sup>7</sup> See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3358-3361, paras. 78-86 (2017) (Wireless Infrastructure NPRM).

constructed; (3) the limited likelihood that Section 106 review could identify adverse effects from these towers that are not yet known after 12 years or more; and (4) the significant public interest in making these towers readily available for collocation.

Although during the time between the Collocation NPA and the Wireless Facilities NPA the FCC's environmental rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties, the rules did not then state that parties must perform this evaluation by following the Advisory Council's rules or any other specific process. Thus, prior to the effective date of the Wireless Facilities NPA, it was unclear whether the FCC's rules required consultation with the relevant SHPO and/or Tribal Historic Preservation Officer (THPO), engagement with Tribal Nations to identify historic properties off Tribal land (including government-to-government consultation), or any other particular procedures, and this lack of clarity may explain why many towers built during this period apparently did not obtain required clearance.

Routine Section 106 review of Twilight Towers is likely to provide little benefit in preserving historic properties. Twilight Towers have been in place for 12 to 16 years. In the vast majority of cases, no adverse effects from these towers have been brought to the FCC's attention. While the lack of objections filed with the FCC does not guarantee that *none* of the Twilight Towers have caused, or continue to cause, adverse effects on historic properties, such cases are likely few given the passage of time and absence of objections. In addition, any effects on historic properties that may have occurred during construction may be difficult to demonstrate so many years after the fact.

Further, an exclusion for collocations on Twilight Towers under the conditions specified below is in the public interest. The exclusion will rapidly make available thousands of existing towers<sup>8</sup> to support wireless broadband deployment, including the FirstNet public safety broadband network,<sup>9</sup> without causing adverse impacts. Importantly, facilitating collocations on existing towers will reduce the need for new towers, thereby avoiding the impact of new tower construction on the environment and on locations with historical and cultural significance.

A Program Comment is necessary to facilitate collocation on Twilight Towers. While the Wireless Facilities NPA contemplates a process for review of proposed collocations on towers that were built without required review, review of each collocation only satisfies the Section 106 requirement for that collocation; it does not clear the tower for future collocations. Given the large number of Twilight Towers and potential collocations that could be installed on those towers, the existing review process imposes burdens on all participants that, in the context of the other considerations discussed herein, are not commensurate with its historic preservation benefits.

Accordingly, an approach different from the standard Section 106 review process is warranted to make Twilight Towers readily available for collocations. Given the significant public benefits to be realized by making these facilities available for collocation, together with the other considerations discussed above,

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<sup>8</sup> The members of two major industry associations have collectively reported owning 4,298 towers that could be classified as Twilight Towers. Letter from Brian Josef, Assistant Vice President, Regulatory Affairs, CTIA – The Wireless Association, and D. Zachary Champ, Assistant Vice President, Regulatory Affairs, PCIA – The Wireless Infrastructure Association, to Chad Breckinridge Associate Chief, WTB, FCC (dated June 4, 2015). There may be more Twilight Towers owned by entities that are not members of these associations or that did not participate in their survey.

<sup>9</sup> See 47 U.S.C. § 1426(c)(3) (providing that “the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure”).

requiring each licensee or applicant to review each tower individually before collocating is not an effective or efficient means for the FCC to comply with its obligations under Section 106. This Program Comment is responsive to the unusual set of factors surrounding the use of these Twilight Towers for the limited purpose of collocation.

### **III. Exemption from Duplicate Review of Effects of Collocations by Other Federal Agencies**

Other federal agencies are not required to comply with Section 106 with regard to the effects of collocations on Twilight Towers that are excluded from review under this Program Comment. When other federal agencies have broader undertakings that include collocations on Twilight Towers, they must, however, comply with Section 106 in accordance with the process set forth at 36 CFR 800.3 through 800.7, or 800.8(c), or another applicable program alternative under 36 CFR 800.14 for aspects of the undertaking not involving the collocations.

### **IV. Exclusion for Twilight Towers**

In August 2000, the Advisory Council established a Telecommunications Working Group to provide a forum for the FCC, industry representatives, SHPOs, THPOs, other Tribal representatives, and the Advisory Council to discuss improved coordination of Section 106 compliance regarding wireless communications facilities affecting historic properties. The Advisory Council and the Working Group developed the Collocation NPA, which recognized that the effects on historic properties of collocations on buildings, towers, and other structures are likely to be minimal and not adverse provided that certain premises and procedures are taken into consideration, including limitations on the extent of new construction and excavation. Further, the Collocation NPA stated that its terms should be “interpreted and implemented wherever possible in ways that encourage collocation.” Consistent with that directive, this Program Comment serves to resolve a long standing impediment to collocation on Twilight Towers within the broader protective framework established by the Collocation NPA.

We intend the exclusion here to mirror the exclusion in the Collocation NPA that applies to collocations on towers for which construction commenced on or before March 16, 2001. And so, pursuant to the exclusion adopted here, an antenna may be mounted on an existing tower for which construction commenced between March 16, 2001, and March 7, 2005, without such collocation being reviewed through the Section 106 process set forth in the Wireless Facilities NPA, unless:

- (1) The mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
- (2) The mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
- (3) The mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this

paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

- (4) The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site; or
- (5) The tower has been determined by the FCC to have an adverse effect on one or more historic properties, where such effect has not been avoided or mitigated through a conditional no adverse effect determination, a Memorandum of Agreement, a programmatic agreement, or a finding of compliance with Section 106 and the Wireless Facilities NPA; or
- (6) The tower is the subject of a pending environmental review or related proceeding before the FCC involving compliance with Section 106 of the NHPA; or
- (7) The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a Tribal Nation or NHO, a SHPO, or the Advisory Council that the collocation has an adverse effect on one or more historic properties. Any such complaint must (1) be submitted to the FCC within 90 days of the date of adoption of this Program Comment and (2) be in writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register. The substantial evidence submitted with a complaint must include specific, articulated facts about the claimed impact on historic properties and sufficient documentary evidence, including photographs and maps, to substantially support the claim. Any complaint not resolved within 120 days of the filing of the complaint will not bar a collocation from meeting the terms of this exclusion.

In the event that a proposed collocation on a Twilight Tower does not meet the conditions specified above for this exclusion, the collocation must undergo historic preservation review as required by the rules of the Advisory Council as revised or supplemented by the Wireless Facilities NPA and the Collocation NPA. As provided in the Wireless Facilities NPA, such review is limited to effects from the collocation and shall not include consideration of effects on historic properties from the underlying tower.

## **V. Additional Provisions Relating to Tribal Nations**

This Program Comment does not apply on Tribal lands unless the relevant Tribal Nation has provided the FCC with a written notice agreeing to its application on Tribal lands.

A Tribal Nation may request direct government-to-government consultation with the FCC at any time with respect to a Twilight Tower or any collocation thereon. The FCC will respond to any such request in a manner consistent with its responsibility toward Tribal Nations. When indicated by the circumstances, and if the request is in writing and supported by substantial evidence as described in paragraph IV.7., the FCC shall treat a request for consultation as a complaint against the proposed collocation and shall notify the tower owner accordingly.

A Tribal Nation may provide confidential supporting evidence or other relevant information relating to a historic property of religious or cultural significance. The FCC shall protect all confidential information

consistent with Section IV.I of the Wireless Facilities NPA.

## **VI. Administrative Provisions**

- A. Definitions. Unless otherwise defined in this Program Comment, the terms used here shall have the meanings ascribed to them under 36 CFR part 800 as modified or supplemented by the Collocation NPA or Wireless Facilities NPA.
- B. Duration. This Program Comment shall remain in force unless terminated or otherwise superseded by a comprehensive Programmatic Agreement or the Advisory Council provides written notice of its intention to withdraw the Program Comment pursuant to Section VI.B.1, below, or the FCC provides written notice of its intention not to continue to utilize this Program Comment pursuant to Section VI.B.2, below.
  - 1. If the Advisory Council determines that the consideration of historic properties is not being carried out in a manner consistent with Section 106, the Advisory Council may withdraw this Program Comment after consulting with the FCC, the National Conference on State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers, and thereafter providing them with written notice of the withdrawal.
  - 2. In the event the FCC determines that this Program Comment is not operating as intended, or is no longer necessary, the FCC, after consultation with the parties identified in Section VI.B.1 above, shall send written notice to the Advisory Council of its intent to withdraw.
- C. Periodic Meetings. Throughout the duration of this Program Comment, the Advisory Council and the FCC shall meet annually on or about the anniversary of the effective date of this Program Comment. The FCC and the Advisory Council will discuss the effectiveness of this Program Comment, including any issues related to improper implementation, and will discuss any potential amendments that would improve its effectiveness.
- D. Complaints Regarding Implementation of this Program Comment. Members of the public may refer any complaints regarding the implementation of this Program Comment to the FCC. The FCC will handle those complaints consistent with Section XI of the Wireless Facilities NPA.