



**National Trust for
Historic Preservation**

Save the past. Enrich the future.

February 9, 2018

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Draft Program Comment for the FCC's Review of Collocations on Certain Towers
Constructed Without Documentation of Section 106 Review
WT Docket No. 17-79; FCC 17-165
83 Fed. Reg. 1,215 (Jan. 10, 2018)

Dear Mr. Margolis:

These comments are filed by the National Trust for Historic Preservation, in response to the Federal Communications Commission ("FCC") Public Notice of a Draft Program Comment for the FCC's Review of Collocations on Certain Towers Constructed Without Documentation of Section 106 Review (colloquially known as "Twilight Towers"), published in the Federal Register on January 10, 2018.

The National Trust has previously filed comments with the FCC relevant to this issue on December 7, 2017 and June 15, 2017.

Interests of the National Trust for Historic Preservation

The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949 to facilitate public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 54 U.S.C. § 312102(a). With more than one million members and supporters around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition, the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, which is responsible for working with federal agencies to implement compliance with Section 106 of the National Historic Preservation Act. *Id.* §§ 304101(8), 304108(a). The National Trust was also an active member of the Telecommunications Working Group that consulted with the FCC for many years to develop both the 2001 Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation PA"), and the 2004/2005 Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Reviewed by the FCC ("Nationwide PA").

General Comments on Twilight Towers

The National Trust supports the development of a mechanism that could bring Twilight Towers into compliance with Section 106 retroactively, so that they can be used in the future for collocation, and thus reduce the need to build new towers. However, that mechanism should not be based on a broad retroactive exemption for these structures from Section 106 compliance, as the FCC proposes. While certain alternatives may be foreclosed in the context of retroactive review (e.g., the “no-build” alternative), there may nonetheless be ways to minimize or mitigate the adverse effects of a Twilight Tower. Therefore, the preferred approach would be a special, streamlined Section 106 review for the Twilight Towers themselves, with an emphasis on minimizing and mitigating any adverse effects, which would then leave the tower certified for eligibility under the Collocation PA. There is nothing that currently prevents tower owners from seeking retroactive Section 106 review, and indeed, many towers have gone through such a process.

The Proposed Program Comment is Not Consistent With the Section 106 Regulations, Because it Fails to Ensure that the Effects of the Twilight Towers Will Be Taken Into Account.

The Section 106 regulations applicable to the development of Program Comments explicitly require the federal agency to identify a category of undertakings in lieu of conducting individual reviews, and to “specify the steps the agency official will take to *ensure that the effects are taken into account*,” 36 C.F.R. § 800.14(e)(1) (emphasis added). The proposed Program Comment for Twilight Towers does not comply with this requirement. Instead, the draft Program Comment proposes what is essentially an exemption. It fails to provide any mechanism whatsoever to ensure that the effects of the undertakings will be taken into account, but rather, proposes a process that will retroactively exempt the towers from review altogether.

Industry advocates clearly recognize this approach for what it is. For example, Verizon, in its December 6, 2017, comment letter, specifically refers to the approach of the Program Comment as an “exclusion”:

“Taking action to *exclude* historic preservation reviews for new collocations on towers that have been standing almost 13 years will obviate the need to build new towers. And because these towers have been standing for so long without complaint, and many, if not most, of these towers were reviewed prior to construction – Verizon’s internal procedures during the twilight period required review by the applicable state historic preservation officer and tribes determined to have an interest in the area – adopting the *exclusion* will not adversely affect any historic property.” (emphasis added)

The Presumption That Twilight Towers Have No Adverse Effects on Historic Properties is False.

We strongly disagree with the FCC’s assumption in the draft Program Comment that these Twilight Towers will be deemed to have no adverse effects on historic properties because

any effects on historic properties that may have occurred during construction may be difficult to demonstrate so many years after the fact. On the contrary, we believe the adverse effects will be *more* demonstrable in these cases, in contrast to the typical Section 106 review, which requires artificial simulations, projections, estimates, and speculations regarding a not-yet-built tower. We agree that the *majority* of these Twilight Towers are likely to have no adverse effects. Nonetheless, that provides no basis whatsoever for unilaterally pronouncing that *none* of the Twilight Towers will have adverse effects. Instead, it supports the need to provide an efficient process for identifying *which* of the Twilight Towers have adverse effects and developing a process to resolve those adverse effects retroactively through Section 106 consultation, so that all of the towers – both with and without adverse effects – can be certified as eligible for collocation and placed into service.

The “Twilight” Period Should Not Include the Six-Month Period After the FCC Formally Adopted the Nationwide Programmatic Agreement.

The FCC proposes that the “Twilight” period extend until March 7, 2005, because that is the effective date of the Nationwide PA. The FCC cites “uncertainty” and “lack of specificity” about the process required for Section 106 review during the Twilight period as part of the rationale for choosing this closing date, based on the assumption that the Nationwide PA resolved that uncertainty and lack of specificity. We agree with the comments of NCSHPO and many individual SHPOs (filed Feb. 9, 2018) that this rationale of uncertainty is simply unpersuasive. For example, the FCC itself points out in its Public Notice (Nov. 22, 2017) that a 2002 Fact Sheet about the Collocation PA clearly stated, “this evaluation process includes consultation with the relevant [SHPO] and/or [THPO], as well as compliance with other procedures set out in the ACHP rules, 36 C.F.R. Part 800,” *Antenna Collocation Programmatic Agreement*, 17 FCC Rcd 508, 511.

In any event, even if a claim of some uncertainty could be justified (which we do not concede), the Nationwide PA was formally approved by the FCC six months before its effective date – adopted on September 9, 2004, and released on October 5, 2004 – after years of consultation and comments. Thus, as of September or October 2004, at the very least, there was absolutely no excuse for “uncertainty” about the required compliance process. The process was crystal clear.

The Proposed Program Comment Provides No Safeguards Whatsoever.

If a Program Comment is adopted, it will be essential to provide a process for reporting and monitoring, which is not addressed at all in the current draft. The agency should provide a clear and well-publicized process for state and local governments, tribes, and others to raise objections with the FCC.

Thank you for considering the National Trust’s comments.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth Merritt". The script is cursive and fluid, with the first letter of each word being capitalized and prominent.

Elizabeth S. Merritt
Deputy General Counsel