

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	FCC 17-165
	)	

**JOINT REPLY COMMENTS OF CTIA AND  
THE WIRELESS INFRASTRUCTURE ASSOCIATION**

**WIRELESS INFRASTRUCTURE ASSOCIATION**

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## EXECUTIVE SUMMARY

The Draft Program Comment, which excludes from historic preservation review certain wireless facilities mounted on Twilight Towers, is a sensible solution to free these towers from regulatory limbo, enable additional use of existing infrastructure, and enhance the wireless experience for consumers. By enabling Twilight Towers to serve as collocation platforms, the Draft Program Comment will help expand wireless coverage to new areas that can then be densified with small cells needed to support next-generation wireless services. This enhancement of wireless networks and the deployment of 5G services will create tremendous opportunities for all Americans, including those in rural areas. In addition to creating ultra-fast mobile broadband zones in high-traffic areas, network enhancement and 5G deployment will deliver better quality wireless broadband service to areas that are currently unserved or underserved. The deployment of 5G services will also lead to the expansion of remote surgery and drive innovations in telemedicine, patient monitoring, and data collection, providing consumers across the country with better access to important information, enabling better choices and providing more access to quality healthcare. Broadband-enabled new technologies will also make curriculum and educational tools more accessible and available in a way that meets the unique learning styles of all students. The Draft Program Comment will help realize this future by permitting collocations on Twilight Towers while continuing to protect historic resources.

Parties opposed to the Draft Program Comment have provided no compelling reason why the Draft Program Comment should not be implemented. The premise that Twilight Towers are somehow “non-compliant” and that this supposed non-compliance must be remedied through a tower-by-tower review under Section 106 of the National Historic Preservation Act (“Section 106 review”) is incorrect. In addition to the fact that these towers were built in compliance with the Commission’s historic preservation rules as they existed at the time, requiring Section 106 review for all collocations on Twilight Towers would undermine the fundamental purpose of “program alternatives,” which are intended to reduce or eliminate Section 106 reviews where the potential for effects to historic properties is minimal, such as in the case of collocations on existing towers.

Likewise, the Draft Program Comment will protect historic properties, not only by reducing the need for some new towers to be built, but by placing conditions on collocations designed to minimize any potential for effects. These conditions are identical to those established in the 2001 Collocation Agreement, which has functioned well for almost two decades. Finally, the Draft Program Comment complies with the Advisory Council on Historic Preservation’s rules and appropriately complies with the Commission’s trust responsibilities to Tribal Nations.

CTIA and the Wireless Infrastructure Association, therefore, urge the Commission to work with the Advisory Council on Historic Preservation to adopt and expeditiously implement the Draft Program Comment.

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The Wireless Infrastructure Association (“WIA”) and CTIA (collectively “the Associations”) submit these joint reply comments in response to the Draft Program Comment released by the Federal Communications Commission (“Commission”) in the above-referenced proceeding.<sup>1</sup> For the reasons set forth below, the Associations urge the Commission and the Advisory Council on Historic Preservation (“ACHP”) to expeditiously adopt and implement the Draft Program Comment.

**I. THE DRAFT PROGRAM COMMENT WILL SERVE IMPORTANT PUBLIC POLICY GOALS.**

The Associations and other commenters have provided substantial evidence demonstrating the significant public benefits that will result from expeditious adoption of the Draft Program Comment.<sup>2</sup> First and foremost, the Draft Program Comment will support

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<sup>1</sup> *Comment Sought On Draft Program Comment For The Federal Communications Commission’s Review Of Collocations On Certain Towers Constructed Without Documentation Of Section 106 Review*, Public Notice and Draft Public Comment, 32 FCC Rcd 10715 (2017) (respectively, “Public Notice” and “Draft Program Comment”).

<sup>2</sup> *See generally* Comments of AT&T Services (filed Feb. 9, 2018) (“AT&T Comments”); Comments of Verizon (filed Feb. 9, 2018) (“Verizon Comments”); Comments of T-Mobile (filed Feb. 9, 2018) (“T-Mobile Comments”); Comments of Competitive Carriers Association (filed Feb. 9, 2018) (“CCA Comments”); Comments of Mobile Future (filed Feb. 9, 2018) (“Mobile Future Comments”); Comments of NTCA – The Rural Broadband Association (filed Feb. 9, 2018) (“NTCA Comments”); Comments of the National Association of Tower Erectors (filed Jan. 18, 2018) (“NATE Comments”); Joint Comments of CTIA and the Wireless Infrastructure Association (filed Feb. 9, 2018) (“Association Comments”); *see also* Comments of the National Conference of State Historic Preservation Officers at 1 (filed Feb. 9, 2018) (“NCSHPO Comments”) (“[W]e 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.”).

wireless providers' efforts to enhance their networks and deploy next-generation wireless services, to the benefit of consumers and communities.

It is undisputed that such 5G services will create tremendous opportunities for all Americans, including those in rural areas. In addition to creating ultra-fast mobile broadband zones in high-traffic areas, network enhancement and 5G deployment will deliver better quality wireless broadband service to areas that are currently unserved or underserved.<sup>3</sup> The fast speeds and low latency of 5G will, for example, lead to the expansion of remote surgery and drive innovations in telemedicine, patient monitoring, and data collection.<sup>4</sup> Consumers across the country will have better access to important information, enabling better choices and providing more access to quality healthcare. Broadband-enabled technologies will likewise make curriculum and educational tools more accessible and available in a way that meets the unique learning styles of students across the country.<sup>5</sup>

This future, however, depends heavily on new infrastructure as well as on the densification of existing wireless networks – meaning placing more antennas closer together. Over the next few years, there will be hundreds of thousands of small cells deployed to accommodate consumer demand and to make this new generation of wireless services possible.<sup>6</sup>

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<sup>3</sup> See Thomas K. Sawanobori and Paul V. Anuszkiewicz, *High Band Spectrum: The Key to Unlocking the Next Generation of Wireless*, CTIA, at 4-5 (June 13, 2016), <http://www.ctia.org/docs/default-source/defaultdocument-library/5g-high-band-white-paper.pdf>; see also T-Mobile Comments at 3 (“Collocation on existing infrastructure can reduce deployment timelines and potentially enable T-Mobile to accelerate its deployment plans to reach new customers and bring competition to new parts of the country, particularly in rural areas.”).

<sup>4</sup> *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation*, DELOITTE, at 7 (Jan. 2017), [https://www.ctia.org/docs/default-source/default-document-library/deloitte\\_20170119.pdf](https://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf).

<sup>5</sup> See Thomas Sawanobori, *5G, The Next Generation of Wireless: 5G Leadership in the U.S.*, CTIA, at 11 (Feb. 9, 2016), [https://www.ctia.org/docs/default-source/default-document-library/5g\\_white-paper\\_web2.pdf](https://www.ctia.org/docs/default-source/default-document-library/5g_white-paper_web2.pdf).

<sup>6</sup> CTIA, *Wireless Snapshot 2017*, at 3 (2017), <https://www.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf>.

Permitting collocations on Twilight Towers can help meet this need while continuing to protect historic resources. Collocations on Twilight Towers will help expand coverage to new areas that can then be densified with small cells. Equally important, infrastructure collocated on Twilight Towers can also be used to support 5G backhaul services. Consequently, collocations on Twilight Towers can reduce the need for the construction of new towers in the future.

However, if Twilight Towers are to make a meaningful contribution to 5G build out, the Commission must act quickly. Industry is gearing up for 5G deployment and developing capex construction budgets.<sup>7</sup> If Twilight Towers are to be used as 5G platforms, the Draft Program Comment must be instituted quickly.

## **II. OBJECTIONS TO THE DRAFT PROGRAM COMMENT ARE PREMISED ON THE INCORRECT ASSERTION THAT TWILIGHT TOWERS ARE SOMEHOW “NON-COMPLIANT.”**

There is nothing in the record that contradicts the important public policy goals that permitting collocations on Twilight Towers can achieve. Nevertheless, some commenters oppose the Draft Program Comment, urging the Commission to preclude collocations on Twilight Towers until each and every such tower is specifically identified and subject to Section 106 review.<sup>8</sup> The primary driver behind these measures seems to be an incorrect assumption that

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<sup>7</sup> See, e.g., *Everyone says they'll be first with 5G*, AXIOS, <https://www.axios.com/everyone-says-they-are-first-with-5g-cadce03-7d59-4660-9bb1-b99368187fe2.html>.

<sup>8</sup> See, e.g., Comments of the National Trust for Historic Preservation at 1-2 (filed Feb. 9, 2018) (“NTHP Comments”); Comments of New Mexico State Historic Preservation Office at 1 (filed Feb. 8, 2018) (“New Mexico SHPO Comments”); Comments of the Muscogee Creek Nation at 1 (filed Feb. 9, 2018) (“Muscogee Creek Comments”). See also Comments by Ohio State Historic Preservation Office at 3 (filed Feb. 9, 2018) (“OH SHPO Comments”) (proposing that all Twilight Tower collocations undergo a truncated “desktop” review process and analogizes them to Positive Train Control (“PTC”) facilities). However, many PTC facilities were constructed after the 2004 NPA had clearly established the SHPO/THPO consultation rules and thus represent an entirely different class of events. Indeed, the Commission made clear in Section II of the PTC Program Comment that: “This Program Comment is responsive to the unusual set of factors surrounding the deployment of PTC. It is not meant to set a precedent for Section 106 Memoranda of Agreement or program alternatives covering different types of undertakings.” Also, given the extremely low potential for adverse effects, even a truncated process is unwarranted

Twilight Towers are non-compliant, coupled with an interest in “punishing” supposed “wrong doers,” and forcing the Commission to correct what these parties perceive as the Commission’s failure to live up to its Tribal trust responsibilities.<sup>9</sup>

As the record before the Commission demonstrates, however, Twilight Towers are not “non-compliant.”<sup>10</sup> To the contrary, Twilight Towers were built in compliance with the Commission’s historic preservation rules as they existed at that time.<sup>11</sup> Between 2001 and 2005, the rules did not expressly mandate consultation with State Historic Preservation Officers (“SHPOs”) or Tribal Nations;<sup>12</sup> rather, they stated that such review was permissive instead of mandatory. Indeed, it was not even clear until late 2000 that contractors even had the ability to consult directly with SHPOs or THPOs. In fact, there was a strong minority opinion within the SHPO ranks that they were not permitted by law to consult with any party except the federal agency. As late as October 28, 2002 (18 months after the Collocation Agreement was signed), there remained enough confusion on contractor consultation that the ACHP Telecommunications Working Group drafting the 2004 NPA felt it necessary to suggest the inclusion of a section on delegation of authority in the new agreement. Chairman Powell’s 2003 characterization of the

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for collocations on Twilight Towers. Moreover, the proposed process did not take into account Tribal review, which would further complicate any type of truncated review.

<sup>9</sup> See generally Muscogee Creek Comments at 1; Comments of Skull Valley Band of Goshute at 1-2 (filed Jan. 3, 2018) (“Skull Valley Comments”); Comments of Nez Perce Tribe at 2 (filed Feb. 7, 2018) (“Nez Perce Comments”).

<sup>10</sup> See, e.g., Verizon Comments at 2-3 (“[T]he Commission did not adopt the rules and process for conducting historic preservation reviews until ... March 7, 2005.”); Joint Reply Comments of CTIA and the Wireless Infrastructure Association at 2-3 (filed July 17, 2017) (“Joint Wireless Infrastructure Reply Comments”).

<sup>11</sup> Verizon Comments at 2-3; Association Comments at 2-3.

<sup>12</sup> AT&T Comments at 4 (“[P]otential tower owners had no comprehensive process for performing NHPA review until implementation of the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process in 2005.”); Verizon Comments at 2-3; T-Mobile Comments at 2 (stating that Twilight Towers “were constructed at a time when the Commission’s rules governing how to assess whether a proposed tower would adversely affect historic properties were unclear”); Association Comments at 2.

Commission's rules as "muddled" specifically referred to confusion about how to make SHPO submissions.<sup>13</sup>

As such, a party cannot now be penalized for not adequately documenting SHPO or Tribal consultation, at a time when such consultation was not expressly mandatory and there were no standards for documenting such consultation.<sup>14</sup> Nor should current licensees be required to pay "compensation" for the construction of Twilight Towers that occurred 13-17 years ago potentially by a different entity, but consistent with then-effective Commission rules.<sup>15</sup>

The existence of a Fact Sheet issued by the Wireless Telecommunications Bureau in 2002 and cited by certain commenters<sup>16</sup> does not compel a contrary conclusion. The Fact Sheet on its face fails to identify specific Section 106 consultation and documentation processes and procedures.<sup>17</sup> In many places, it does not even mention consulting with Tribal Nations, and does not reference consultation with Tribal Nations when discussing the "*typical evidence* of a completed section 106 review."<sup>18</sup> Indeed, the use of the phrase "*typical evidence*" in the Fact Sheet reinforces the then-effective Commission rule, which stated in a note that applicants "may"

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<sup>13</sup> See *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Notice of Proposed Rulemaking, 18 FCC Rcd 11664 (2003) (Statement of Chairman Michael K. Powell) ("The proposed agreement seeks to clarify the regulatory muddle and delay that has beset many tower-construction proposals by defining key terms, establishing public-participation standards *and describing how to submit projects to State Historic Preservation Officers.*") (emphasis added) Chairman Powell's statement confirms that the SHPO submission process was only definitively established by rule when the NPA became effective.

<sup>14</sup> See *FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2317 (2012); *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

<sup>15</sup> *FCC v. Fox Television Stations*, 132 S.Ct. at 2317; *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d at 628.

<sup>16</sup> NCSHPO Comments at 1-2 (citing *Fact Sheet, Antenna Collocation Programmatic Agreement*, Public Notice, 17 FCC Rcd 508 (2002) ("Fact Sheet")); NTHP Comments at 3 (same).

<sup>17</sup> Fact Sheet § 5.

<sup>18</sup> *Id.*



(as opposed to “must”) make “inquiries ... to the appropriate State Historic Preservation Officer.”<sup>19</sup>

Likewise, the fact that some SHPOs may have reviewed some proposed facilities during the Twilight period<sup>20</sup> does not mean that the Commission’s rules required licensees to undertake such measures. Again, the Commission’s rules simply stated in a note that “[t]o ascertain whether a proposal affects a historic property of national significance” applicants “may” make “inquiries to the appropriate State Historic Preservation Officer.”<sup>21</sup> The fact that some applicants made inquiries to SHPOs does not convert the permissive “may” in the rules into a mandate.

This same conclusion applies to Twilight Towers constructed in the six-month period between execution of the 2004 Nationwide Programmatic Agreement<sup>22</sup> and the date the 2004 NPA became effective. Arguments that the Commission should exclude these towers from the Draft Program Comment<sup>23</sup> would have the Commission improperly enforce the new rules before they became binding on Commission licensees and applicants, contrary to the terms of the Commission’s order adopting the 2004 NPA and the Administrative Procedure Act.<sup>24</sup>

Further, the Commission’s “muddled” rules aside,<sup>25</sup> the passage of time and changes in the industry argue strongly against the Commission or ACHP trying to penalize current Twilight

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<sup>19</sup> See, e.g., 47 C.F.R. § 1.1307(a)(4), Note (2004).

<sup>20</sup> See, e.g., Comments by Colorado State Historic Preservation Office at 1 (filed Dec. 6, 2017) (“CO SHPO Comments”); OH SHPO Comments at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004); codified at 47 C.F.R. Part 1, App. C (“2004 NPA”).

<sup>23</sup> See NTHP Comments at 3.

<sup>24</sup> 2004 NPA, 20 FCC Rcd at 1075 (“Accordingly, upon the effective date of the rule changes adopted in this *Report and Order*, the provisions of the attached Nationwide Agreement will become binding on affected licensees and applicants of the Commission.”); see also 5 U.S.C. § 553(d).

<sup>25</sup> See *supra* note 13.

Tower owners. These towers have existed for 13-17 years, and the original tower owners are not likely to be the current tower owners. Thus, continuing to preclude collocations on Twilight Towers will not, in any meaningful way, punish the supposed “wrong doer.”

Finally, the calls for identifying and reviewing the Twilight Towers themselves effectively ignore the fact that these structures have been in place and providing service to the public for more than a decade. These towers are likely to be foundational in their communities, having provided reliable wireless service for years. They have enabled communications during natural disasters and emergency situations. Some accommodate public safety facilities, providing critical links for first responders. While the Draft Program Comment would not retroactively clear these towers, at the same time the Commission should not ignore the public interest benefits they have provided and can provide in the future.

### **III. REQUIRING A TOWER-BY-TOWER SECTION 106 REVIEW WOULD UNDERMINE THE FUNDAMENTAL PURPOSE OF PROGRAM ALTERNATIVES.**

The ACHP’s rules permit agencies to pursue “program alternatives,” including program comments, to reduce the scope of, or entirely eliminate, the Section 106 review process.<sup>26</sup> The primary purpose for such alternative processes is to allow Section 106 compliance through a single action for a class of undertakings rather than addressing each undertaking as a single action.<sup>27</sup> It is well settled that the effects on historic properties of collocations of antennas on towers, buildings, and structures are likely to be minimal and not adverse.<sup>28</sup> It follows that,

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<sup>26</sup> 36 C.F.R. § 800.14.

<sup>27</sup> ACHP Guidance, <http://www.achp.gov/altguidance/qa.html> (last visited Feb. 20, 2018).

<sup>28</sup> See, e.g., *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 16 FCC Rcd 5574 (2001); codified at 47 C.F.R. Part 1, App. B (“2001 Collocation Agreement”) (“WHEREAS, the parties hereto agree that the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse . . .”).

because there is a minimal potential for collocations on Twilight Towers to affect a historic property, the use of a program alternative here is consistent with the ACHP rules and Section 106, and the Commission is not required to ensure that each and every Twilight Tower, or future collocation on a Twilight Tower, has absolutely no effect on historic properties.<sup>29</sup>

Indeed, the 2001 Collocation Nationwide Programmatic Agreement is an excellent example of the benefits and proper function of such program alternatives.<sup>30</sup> There, the Commission and the ACHP agreed “that the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse.”<sup>31</sup> Further, the 2001 Collocation Agreement established standards and procedures to assure that “in the cases where an adverse effect might occur,” the Commission will take such effects into account.<sup>32</sup> To that end, the 2001 Collocation Agreement excludes from Section 106 review certain collocations on existing structures constructed before March 16, 2001, without regard to whether the underlying structures completed Section 106 review. This process has worked well for 17 years, and no commenter before the Commission has challenged the efficacy of the 2001 Collocation Agreement.

Collocations on Twilight Towers, just like collocations on towers constructed before March 16, 2001, are well-suited to be the subject of a program alternative. Indeed, the Draft Program Comment applies the same limited exclusion established in the 2001 Collocation

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<sup>29</sup> See AT&T Comments at 3 (stating that a program alternative “need not individually consider every potential impact, regardless of how remote”); Association Comments at 8; *compare* NTHP Comments at 3 (stating “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.”).

<sup>30</sup> 2001 Collocation Agreement, 16 FCC Rcd 5574.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Agreement to cover Twilight Towers. Just as the Commission and the ACHP concluded in the 2001 Collocation Agreement, the potential effects on historic properties of collocations of antennas on Twilight Towers are likely to be minimal and not adverse.<sup>33</sup> The Draft Program Comment also establishes the same processes and standards contained in the 2001 Collocation Agreement, to ensure that, in the cases where an adverse effect might occur, the Commission will take such effects into account.<sup>34</sup>

If the Commission and ACHP mirror the processes and standards established in the 2001 Collocation Agreement to exclude from Section 106 review collocations on Twilight Towers, there is no reason to conclude that such a process will not protect historic properties just as they do for collocations on towers constructed prior to March 16, 2001. Thus, the Draft Program Comment is well suited to process collocations on Twilight Towers. Requiring that each collocation on a Twilight Tower be reviewed individually runs counter to the purpose of program alternatives.<sup>35</sup>

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<sup>33</sup> Verizon Comments at 5; AT&T Comments at 2-3; T-Mobile Comments at 3; Mobile Future Comments at 5-6; NTHP Comments at 3; Association Comments at 3-4.

<sup>34</sup> See AT&T Comments at 3; T-Mobile Comments at 3; Verizon Comments at 4; Association Comments at 6-8.

<sup>35</sup> This approach would also drain significant resources. As Commissioner O’Rielly stated, “it would take millions of dollars and years to create a list of all the twilight towers and have them individually reviewed.” See Public Notice, 32 FCC Rcd at 10722 (Statement of Commissioner Michael O’Rielly).

#### **IV. THE DRAFT PROGRAM COMMENT WILL PROTECT HISTORIC RESOURCES.**

In addition to the public policy and legal justifications for moving forward with the relief contemplated here, it is noteworthy that the Draft Program Comment will promote the goal of protecting historic properties by carefully limiting this exclusion to those circumstances in which collocations on Twilight Towers have only a minimal potential to affect a historic property.<sup>36</sup> The exclusion is identical to the exclusion created in the 2001 Collocation Agreement, and no commenter has suggested that this long-standing exclusion has not been effective in protecting historic properties.

The Draft Program Comment establishes procedures that will assist in identifying, reviewing, and mitigating (where appropriate) any collocations on Twilight Towers that are identified as having an adverse effect on one or more historic properties. Specifically, the Draft Program Comment will exclude collocations on Twilight Towers from Section 106 review, *unless*:

- (1) The proposed antenna will increase the existing height of the tower by more than 10 percent, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; *or*
- (2) The proposed antenna will involve the installation of more than four new equipment cabinets or more than one new equipment shelter; *or*
- (3) The proposed antenna will 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; *or*
- (4) The proposed antenna will involve excavation outside the current tower 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 formally mitigated; *or*

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<sup>36</sup> Draft Program Comment, 32 FCC Rcd at 10728-29.

- (6) The tower is the subject of a pending proceeding before the FCC involving compliance with Section 106; *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 that the collocation has an adverse effect on one or more historic properties.<sup>37</sup>

If any of the above-listed criteria is satisfied, a collocation on a Twilight Tower will be subject to Section 106 review.

Moreover, by making Twilight Towers available for collocation, the Draft Program Comment will potentially reduce the need for additional towers.<sup>38</sup> More importantly, the Draft Program Comment does not protect Twilight Towers that are shown to have intentionally adversely affected a historic property with intent to avoid the requirements of Section 106.<sup>39</sup> The Public Notice makes clear that Section 110(k) of the National Historic Preservation Act will continue to apply to Twilight Towers that were constructed with the intent to adversely affect a historic property, and allows for mitigation in appropriate situations.<sup>40</sup>

The Draft Program Comment complies with the ACHP's rules and the Commission's trust responsibilities to Tribes.<sup>41</sup> Section 800.14(e) of the ACHP's rules, governing Program Comments, requires that the Commission identify the category of undertakings, specify the likely effects on historic properties, specify the steps the Commission will take to ensure the effects are taken into account, and solicit public comment on the Draft Program Comment. The

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<sup>37</sup> *Id.*

<sup>38</sup> See Verizon Comments at 3-4; T-Mobile Comments at 3 (stating the Draft Program Comment would "promot[e] the more effective use of existing infrastructure"); Mobile Future Comments at 5; *see also* Association Comments at 6-7.

<sup>39</sup> Public Notice, 32 FCC Rcd at 10718.

<sup>40</sup> *Id.* at 10718 n.16 (citing 54 U.S.C. § 306113); *see also* 2004 NPA, 47 C.F.R. Part 1 Appendix C, § X.

<sup>41</sup> See Verizon Comments at 4-5 (explaining that the exclusion would not apply if there are any adverse effects); AT&T Comments at 3; Association Comments at 7.

Commission has satisfied each of these requirements, contrary to some arguments.<sup>42</sup> It has identified a narrow category of undertakings – specifically, certain collocations on Twilight Towers; specified that they have minimal potential to impact historic properties; provided mechanisms to consider potential effects (by requiring review of collocations that do not meet all of the requirements to be excluded from Section 106 review and allowing Tribes and others to raise concerns); and taken public comment through a formal comment and reply comment cycle in addition to ex parte presentations. And the Public Notice, Draft Program Comment, and Commissioner statements demonstrate the degree to which the Commission consulted with Tribal Nations regarding possible solutions to the problem of Twilight Towers.<sup>43</sup> The Associations and the wireless industry have also been actively engaged for years with other stakeholders in an effort to resolve the Twilight Towers issue.

In short, the Draft Program Comment is the product of multiple years of discussion between Tribes, SHPOs, the Commission, the ACHP, and industry regarding an appropriate resolution of the Twilight Towers issue.<sup>44</sup> Further, the Draft Program Comment confirms Tribal

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<sup>42</sup> See NCSHPO Comments at 2; OH SHPO Comments at 2; National Association of Tribal Historic Preservation Officers Comments at 1 (filed Feb. 9, 2018).

<sup>43</sup> See Draft Program Comment, 32 FCC Rcd at 10717 (stating the Draft Program Comment is “informed by comments received in response to the Wireless Infrastructure NPRM, as well as several years of engagement with affected parties, ... holding face-to-face meetings, sponsoring webinars and workshops, participating in conferences, and distributing written materials. ... [Recently] [t]he Commission has met with Tribal representatives numerous times with a focus on issues related to Section 106 review, including meetings with the Chairman and commissioners, as well as conference calls and meetings between staff and SHPOs, Tribal representatives, and others.”). See also Public Notice, 32 FCC Rcd at 10720 (Statement of Chairman Ajit Pai) (“After many discussions with Tribal representatives, industry, and other interested stakeholders, it is now clear that it is up to the FCC ... to finally solve this problem”); *id.* at 10722 (Statement of Commissioner Michael O’Rielly) (“I know there have been endless discussions, consultations, negotiations, workshops and conferences with staff and stakeholders over the years that never resolved the problem”); *id.* at 10723 (Statement of Commissioner Brendan Carr) (stating that for “more than a decade, the FCC and a broad range of stakeholders have debated the best approach” to Twilight Towers); *id.* at 10721 (Statement of Commissioner Mignon Clyburn) (“I am glad that this program comment makes clear that a Tribal Nation may request direct government-to-government consultation with the FCC, at any time, with respect to a twilight tower or collocation.”).

<sup>44</sup> See *supra* note 43.

consultation rights going forward. A Tribe may request government-to-government consultation with the Commission any time it finds that a Twilight Tower or any collocation on a Twilight Tower may affect a historic property of significance to the Tribe.<sup>45</sup>

All of these elements of the Draft Program Comment demonstrate that it is consistent with the letter and spirit of the National Historic Preservation Act and the ACHP's rules and should be adopted expeditiously.

## **V. CONCLUSION.**

The Draft Program Comment serves the dual goals of delivering advanced communications services and technologies nationwide *and* promoting historic preservation. For the foregoing reasons, the Associations support the Draft Program Comment and urge the Commission to work with the ACHP to expeditiously adopt and implement it.

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<sup>45</sup> AT&T Comments at 3 (“[T]he Program Comment would continue to protect Tribal properties by allowing Tribal Nations, at any time, to raise individualized concerns with respect to a Twilight Tower or any collocation thereon through a request for direct government-to-government consultation.”); Association Comments at 7-8.



Respectfully submitted,

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