



THLOPTHLOCCO TRIBAL TOWN

Tribal Historic Preservation Office

Terry Clouthier, Tribal Historic Preservation Officer

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December 8, 2017

THPO File Number: 2017-63

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

Re: Ex Parte Communication via Electronic Submission

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket 17-79

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421

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

Dear Ms. Dortch

The Thlopthlocco Tribal Town Tribal Historic Preservation Officer (THPO) expresses gratitude to the Chairman of the Federal Communications Commission (FCC), Ajit Pai, for circulating this document prior to the December 14th, 2017 meeting. The open dockets on this issue (WT 17-79 and WT 16-421) are considering and proposing changes to the FCC's administration of environmental and cultural resource laws and regulations. As has been expressed previously by Thlopthlocco Tribal Town and the THPO, these are important decisions and rules that could be used as a detrimental precedent for historic preservation by this and other agencies.

Thlopthlocco Tribal Town (Tribe) supports the telecommunication industry efforts to deploy broadband throughout the country and we hope that Indian country will benefit from these efforts as has been stated through numerous responses and requests to the FCC relating to these issues. The Tribe also values preserving and protecting our places of cultural and religious significance and reaffirms the positive history of working with the FCC and industry in supporting both efforts with particular reference to the Tower Construction Notification System (TCNS) in place at the FCC as a positive working partnership between the FCC and the Tribe.

Absence of Tribal Consultation on the Alternate Procedure (program comment):

Pursuant to 36CFR800.14 (a) (1), the agency official shall consult with the Advisory Council on Historic Preservation (ACHP), the National Conference of State Historic Preservation Officers or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures.

Over the past year our tribe has been actively involved in the discussions and proposals to modify the FCC systems in place for your agency to comply with the National Historic Preservation Act (NHPA) by submitting comments to FCC documents and actions being released and conducted without tribal consultation occurring beforehand. The THPO maintains the opinion that the rules and actions proposed by the FCC have the potential to affect properties of religious and cultural significance despite the FCC claims to the contrary. The Tribe maintains that the FCC has not conducted government to government consultation with Thlophlocco Tribal Town as requested by Tribal leadership through multiple requests beginning in 2016 and required under 36CFR800.2 (c) (2) (ii) of the NHPA. The THPO attended a meeting with the FCC in Washington D.C. on October 4th, 2017 and once again requested government to government consultation and received no response by anyone in attendance at the meeting and has received no reply since that meeting. The Tribe considers these meetings to be informational only and not government to government consultation which requires consultation with Tribal leadership and the Business Committee. The THPO is submitting these comments as an Ex-Parte communication because, unfortunately, there has been no other response by the FCC to our requests to conduct government to government consultation regarding these pressing issues.

Lack of Data and Information to Support FCC Claims:

The Tribe requests copies of all data and information that supports the FCC's determination that the activities covered by the program comment will not affect historic properties considering that the FCC does not know the locations of these Twilight Towers and therefore cannot ensure that no historic properties will be affected either by the tower itself or by the collocation on the tower and the associated activities occurring during collocation. To date the THPO is unaware of any such data existing or even being collected by the FCC and by law, an agency cannot arbitrarily decide to exclude certain types of activities without substantive demonstration and proof which, thus far has not been established by the FCC with this draft program comment, nor can it make decisions which are arbitrary and capricious per the Administrative Procedure Act.

Additionally, how is the FCC determining that properties of traditional religious and cultural significance are not being affected by the collocations covered by this program comment which requires consultation per Section 101 (d) (6) (B) of the NHPA and 36CFR800.2 (c) (2) (ii) (D) of its implementing regulations? The THPO is unaware of any agreement or information provided to the FCC which delegates Tribal authority to the FCC to make decisions on behalf of Thlopthlocco Tribal Town as it relates to the identification, interpretation or potential effects to our sites of traditional religious and cultural significance. TCNS enables Tribes to define their areas of interest in relation to potential effects to historic properties, including but not limited to, properties of traditional religious and cultural significance and the TCNS informs the Tribe when an undertaking is taking place in one of those areas. The Tribe then reviews the proposed undertaking and responds with their concerns based on their knowledge of sites and areas of concern within the area of potential effects. However, with this proposed program comment, the specialized expertise relating to the knowledge, interpretation and locations of sites of significance to Tribes and other sites and site types not available in state records or by anyone at the FCC or its applicants on behalf of the FCC is being ignored even though it is a requirement that the Federal Agency consult with Tribes on these issues in the Section 106 process per Section 101 (d) (6) (B) of the NHPA and 36CFR800.2 (c) (2) (ii) (D) of its implementing regulations and that the Tribes possess specialized expertise in assessing the eligibility of historic sites of significance per 36CFR800.4 (c) (1).

Public Notice:

The industry and FCC assert that the Twilight Towers are unlikely to have adverse effects on historic properties that have not been detected over the last 12 years. This statement is misleading as the locations of the Twilight Towers have never been provided to the Tribes or any other individuals despite repeated requests to access that information for Section 106 compliance. It is therefore impossible to know if there has been an adverse effect or report on one to the FCC since comparison with known sites, including but not limited to, sites of religious and cultural significance to Tribes cannot be undertaken nor can any survey be conducted post construction to determine if a historic property was adversely affected during construction. This assertion by the FCC and industry is a circular argument which should be ignored by everyone considering this program comment.

The FCC states that they do not anticipate taking any enforcement action or imposing any penalties based on good faith deployment during the Twilight Tower period. Comment 16 on page 4 of the public notice specifies that "to the extent the owner of any Twilight Tower is shown to have intentionally adversely affected a historic property with the intent to avoid the requirements of Section 106, Section 110 (k) of the NHPA would continue to apply". How is the FCC defining "good faith" with respect to constructing Twilight Towers? Twilight towers were all constructed out of compliance with Section 106 therefore there is no "good faith"

construction. There is no feasible method of determining intent during construction in relation to Section 110 (k) short of an obvious disregard for well-known public historic properties and any subsequent construction on them during the Twilight Tower period. Additionally, how will the FCC apply Section 110 (k) to a Twilight Tower when they do not know the locations of the Twilight Towers to enforce that Section? This comment reads very well and sounds encouraging however it amounts to nothing when considered with the comments of this paragraph and is being used as a means for the FCC to avoid taking responsibility and action on the lack of Section 106 consultation during the Twilight Tower period.

Page 4 of the public notice states that the FCC welcomes additional meetings with Tribal Nations, Native Hawaiian Organizations, SHPOs and industry during the comment period. Thlopthlocco Tribal Town requests government to government consultation on this program comment which requires face to face meetings with the FCC, Thlopthlocco Tribal Town Business Committee, Tribal Leadership and potentially the THPO.

Draft Program Comment:

I: Background

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

As stated in the Program Comment the FCC's rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties, the rules did not specifically state that licensees and applicants must perform those evaluations by following the Advisory Council's rules or any other specific process which would require consultation with SHPO/THPO and Tribal Nations. However, responsibility for Section 106 compliance would remain with the federal agency per 36CFR800.2 where it is not defined and assigned to another agency, licensee or applicant through an alternative agreement adopted pursuant to 36CFR800.14. The FCC should be accepting responsibility for the lack of compliance with Section 106 and enforcement or penalties should be levied against the agency for non-compliance instead of the FCC self-regulating this issue and deciding that they won't take action against industry when industry was not the guilty party of these 4000 plus infractions. It is the opinion of the THPO that this compliance issue needs to be addressed and properly assigned to the FCC before approval of any program comment which misrepresents and misplaces compliance with Section 106 and the agency subsequently absolves itself of any wrong-doing in relation to construction of the Twilight Towers.

“Finally, the FCC facilitated consultations with Tribal representatives...in Washington, DC on October 4, 2017”.

The THPO attended the meeting on October 4, 2017 and there was no substantive discussion of Twilight Towers during this meeting as it was focused primarily on Tribal concerns with the Notice of Proposed Rulemaking and Notice of Inquiry. The THPO does not recall any mention of Twilight Towers during this informational meeting and it is a mis-characterization of that meeting to include it as part of the Tribal discourse on Twilight Towers.

II: Need for Program Comment to Address Twilight Towers

“..(1) the limited reliability of Section 106 review documentation from that time period;... ”

What data is the FCC using to determine that Section 106 review documentation from that time period is unreliable? Please provide the data used to make this apparently unsubstantiated assertion as justification for the need for a program comment. The regulations concerning Section 106 documentation (36CFR800.11 and its subsections) have not changed since 1992, almost a full decade prior to the Twilight Tower period and it is the opinion of the THPO that this statement has no base data to support it. How is the documentation limited in terms of reliability? I can confidently state that as of 2014, the THPO office where I formally worked, which was one of the first THPO offices ever established, has documentation on every undertaking it has ever consulted on within its records in either electronic or paper format since its inception in 1995 including all NAGPRA documents. A blanket statement such as this is insulting to the many Tribes, THPO's and SHPO's who have accurately kept track of Section 106 documentation as part of their requirements and office standards. Perhaps the FCC is lamenting on its own lack of documentation standards or that of their licensees and applicants subject to review under 36CFR800.11 during the Twilight Tower period.

“..(2) the lack of specificity in the FCC's rules regarding Section 106 review at the time the Twilight Towers were constructed;... ”

See paragraph above under I: Background beginning with “As stated in the Program Comment...”. The THPO will reiterate once again that the lack of specificity and Section 106 compliance was the FCC's fault and they should not be self-regulating and absolving themselves of any wrong-doing associated with construction of these Twilight Towers

“... (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;...”

What data is being used to determine that there is limited likelihood that Section 106 review could identify adverse effects? Addressing adverse effects is one of the primary functions of the

Section 106 process and is an essential component of it (36CFR800.4-36CFR800.7). The assumption that Tribe's or SHPO's cannot identify adverse effects relating to the construction of 12-year old towers is not the fault of either entity. The fault lies with FCC's failure to notify Tribes and SHPO's on the location of the Twilight Towers. Tribal Nations were forcibly removed and relocated to other parts of the country or onto reservations yet still maintain historic interests and rights within their ancestral homelands and lands ceded through treaties. Most of these ancestral lands are located at considerable distance from present-day tribal governments and Tribal Nations have relied on the FCC to notify them via TCNS of any proposed towers. However, the Twilight Towers have not been entered into TCNS and thus the notification process has not been initiated therefore it is incumbent upon the FCC to initiate Section 106 consultation to address potential adverse effects to historic properties from Twilight Towers starting with notification through TCNS for all Twilight Towers as it was their responsibility during the Twilight Tower period.

"... (4) the significant public interest in making these towers readily available for collocation."

As has been stated through Thlophlocco Tribal Town and THPO attempts at consultation for these rules, comments and actions, we support the public interest in deploying broadband and making it easier for deployment by industry. We are opposed to conducting it in a manner which ignores Tribal views and historic preservation in support of lobbyists and industry which profit billions each year.

"...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."

It is the recommendation of the THPO that the FCC should refocus its efforts into bringing these Twilight Towers into compliance and developing a system for tracking compliance and Section 106 clearances from Tribes and state SHPO so that duplication of Section 106 compliance for multiple collocations at a single location are unnecessary. This would relieve the burden on industry to conduct multiple historic preservation efforts for multiple collocations at a single tower location. This should be the focus of the Program Comment which would more accurately reflect historic preservation under Section 106 instead of attempting to circumvent it. The THPO recommends that this alternative approach outlined in this paragraph be considered as an alternative to this draft Program Comment by the ACHP as it more accurately reflects historic preservation values while still addressing and relieving the apparent "heavy burdens" imposed on participants which are overdramatized by the industry and FCC as is eluded to in the following paragraph.

“...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 process is undertaken for every new tower construction. The Twilight Towers were constructed out of compliance and would have required review if the FCC would have properly conducted Section 106 review during the Twilight Tower period. The individual towers can be submitted to TCNS just like a new construction tower and be reviewed under the same guidelines. The current process has not slowed down development of any technology or deployment as the THPO reviews approximately 200 -250 towers a month. The addition of the fraction of approximately 4,300 Twilight Towers would not appreciably increase the workload or review time for my office. The THPO finds this statement to be without merit when considering the number of reviews currently conducted and the number of reviews which would be added to our monthly total if review of Twilight Tower were included. The approximate total number of towers when divided evenly across every state equals 83. The THPO has concerns with two entire states and specific counties within nine other states. If the THPO applies full consideration to the eleven states instead of partial it would result in a net increase of approximately 76 reviews per month for one year as a single one time increase. This is not an unreasonable workload nor would it be considered a heavy burden by my office and is not even reflective of the actual total which would be considerably lower and more spread out over time.

IV: Exclusion of Twilight Towers

Part 5, 6 and 7

How is the FCC determining any of these adverse effects if they do not know the location of these Twilight Towers as has been repeatedly stated to Tribes when they have requested this information? If the Twilight Towers are not subject to historic preservation review, how then will the FCC be notified that there is an adverse effect as there is no mechanism for addressing or conducting consultation on the Twilight Towers nor is there a requirement that the licensee or applicant initiate review as it is expressly exempt from review by this Program Comment. These sections read very well and sound encouraging but essentially equal absolutely nothing when examined under the context that there will be no historic preservation requirement for Twilight Towers and therefore no mechanism for the Tribes or FCC to address these adverse effects.

V. Additional Provisions Relating to Tribal Nations

Tribal Nations have no mechanism for knowing when a collocation will occur on a Twilight Tower unless it is submitted through TCNS or the FCC develops a mechanism for informing Tribes when and where collocations are occurring in relation to Twilight Towers. Once again, this section reads very well and sounds encouraging but essentially equals absolutely nothing when examined under the context that there will be no historic preservation requirement for

Twilight Towers and therefore no mechanism for Tribes to be informed when a collocation is occurring or has occurred.

VI. Administrative Provisions B: Duration

Tribes should be included as consultants for withdrawal of the Program Comment in both subsections of this Section.

Please feel free to contact the THPO at thpo@tttown.org or (918) 560-6113 if you have any questions or comments.

Please refer to THPO file number 2017-63 in all correspondence for this undertaking.

Sincerely,

A handwritten signature in blue ink, appearing to read "T ~ C l", with a long horizontal stroke extending to the right.

Terry Clouthier
Thlopthlocco Tribal Town
Tribal Historic Preservation Officer