

**FEDERAL COMMUNICATIONS COMMISSION  
DRAFT PROGRAM COMMENT FOR TWILIGHT TOWERS  
SUMMARY OF PUBLIC OUTREACH, TRIBAL CONSULTATION, AND COMMENTS**

**August 24, 2020**

The Federal Communications Commission (FCC) requests that the Advisory Council on Historic Preservation (ACHP) issue a Program Comment that would exclude from Section 106 review the collocation of wireless communications facilities on “Twilight Towers” (*i.e.*, communications towers for which construction commenced after March 16, 2001, and before March 7, 2005 that cannot be documented to have completed Section 106 review), provided that these collocations satisfy certain conditions. This document, submitted pursuant to Sections 800.14(e)(1) and 800.14(f)(2) of the ACHP’s rules, summarizes the FCC’s extensive efforts over several years to solicit the views of stakeholders and the public, and to consult with federally recognized Tribal Nations and Native Hawaiian Organizations (NHOs), in developing the proposed Program Comment. This document also summarizes the FCC’s response to the comments received from various parties. The proposed Program Comment is attached. The full written comments are available at [http://apps.fcc.gov/ecfs/comment\\_search/input?=&xp0x](http://apps.fcc.gov/ecfs/comment_search/input?=&xp0x) under proceeding 17-79.

**Public Outreach and the Tribal Consultation Process**

Over the past several years, FCC staff has engaged with Tribal Nations, NHOs, State Historic Preservation Officers (SHPOs), ACHP staff, and industry by holding many face-to-face meetings, sponsoring webinars and workshops, participating in conferences, and distributing written materials. Some of these events were exclusively dedicated to Twilight Towers, some included sessions dedicated to addressing Twilight Towers, and others were designed to address a range of issues of interest to stakeholders, including Twilight Towers. In 2014, FCC staff began Section 106 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 objectives 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, solely 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. FCC staff also held sessions dedicated to Twilight Towers at a summit associated with the 2016 National Association of Tribal Historic Preservation Officers’ (NATHPO) Annual Conference as well as at the 2016 *To Bridge a Gap* conference. Follow up calls with Tribal and SHPO representatives and other interested parties, including the Advisory Council staff, were held throughout 2016 and into 2017.

Further, in the Wireless Infrastructure NPRM, adopted in April 2017, the FCC sought public comment on how to resolve Section 106 issues associated with collocation on Twilight Towers, and it received numerous comments on these issues.<sup>1</sup> The NPRM was published in the Federal Register and the FCC emailed copies to Tribal leaders and historic preservation contacts at Tribal Nations and NHOs, as well as to the National Conference of State Historic Preservation Officers (NCSHPO) for distribution to its members. The FCC staff held conference calls with SHPOs to discuss Twilight Towers and other historic

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<sup>1</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).

preservation issues on May 22, 2017 and February 1, 2018. On May 25, 2017, the FCC held a similar conference call with representatives of 52 Tribal Nations and NHOs and three intertribal organizations.

Over the following months, the FCC facilitated several consultations between Chairman Pai and Tribal representatives at which Twilight Towers were discussed. These events occurred on the Rosebud Sioux Reservation on June 8, 2017; at the Mid-Year Conference of the National Conference of American Indians (NCAI) on June 14, 2017; on the Navajo Reservation on August 22, 2017; and in Washington, DC on October 4, 2017. Representatives of more than 50 Tribal Nations, associations, or Tribally affiliated entities participated in one or more of these meetings. Invitations to these consultations were sent to Tribal leaders and to cultural resources representatives of Tribal Nations and NHOs. FCC Commissioners accepted consultation requests and held meetings with individual Tribal Nations to discuss NPRM issues, including Twilight Towers, between April 2017 and February 2018.

During the same time period, FCC staff, including representatives of the Chairman's office, discussed a number of issues, including Twilight Towers, with Tribal historic preservation officials in Eugene, Oregon, on July 20, 2017, and in Broken Arrow, Oklahoma, on July 24, 2017. Representatives of more than 50 Tribal Nations participated in one or more of these meetings. FCC staff also addressed questions relating to Twilight Towers and other issues of interest to Tribal Nations during NATHPO's annual conference in Pala, California, on August 10-11, 2017 and at a listening session held at the NCAI Annual Conference in Milwaukee, Wisconsin, on October 16, 2017. On November 8, 2017, Commissioner Brendan Carr discussed Twilight Towers and other issues at a meeting of ACHP's Federal Agency Programs Committee.

On December 14, 2017, the FCC adopted a Public Notice seeking public comment on a draft Program Comment.<sup>2</sup> That draft would exclude collocations on Twilight Towers from historic preservation review under certain specified conditions. The Public Notice sought comment on the draft and indicated that, if adopted, the Program Comment would establish procedures for expediting collocations on Twilight Towers. The Public Notice was published in the Federal Register, and the FCC emailed copies to Tribal and NHO historic preservation contacts and to NCSHPO for distribution to its members.

On January 22, January 24, and February 5, 2018, FCC staff held teleconferences with representatives of numerous Tribal Nations during which the agency invited discussion of Twilight Towers. Representatives of 64 Tribal Nations and NATHPO participated in one or more of these calls. In addition, on February 7, 2018, Commissioner Carr discussed Twilight Towers with the United South and Eastern Tribes (USET) Board of Directors at its Washington Impact Week. On February 21, 2018, Commission staff traveled to Albuquerque, New Mexico, and met with representatives of 26 Tribal Nations and organizations, including elected leaders, to discuss Twilight Towers and other issues.

On February 1, 2018, the FCC conducted a conference call with SHPOs to discuss the draft Program Comment. Representatives of 17 SHPOs and NCSHPO participated in this call. On February 6, 2018, FCC staff discussed the draft Program Comment with a representative of the National Trust on Historic Preservation (NTHP). FCC staff has maintained an open invitation to meet in person and by phone with Tribal representatives, SHPOs, and other interested parties throughout this process, and several Tribal Nations have availed themselves of this invitation.

Comments on the draft Program Comment were due February 9, 2018, and reply comments were due February 26, 2018. The FCC received comments from nine SHPOs: Alaska, Arkansas, Colorado, Georgia, Missouri, Montana, New Mexico, Ohio, and Oklahoma. In addition, the FCC received

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<sup>2</sup> *Comment Sought on Draft Program Comment for the Federal Communications Commission's Review of Collocation on Certain Towers Constructed Without Documentation of Section 106 Review*, Public Notice, FCC 17-165 (rel. Dec. 14, 2017).

comments (including comments received during the weeks immediately prior to release of the Public Notice that have been incorporated into the record) from 12 Tribal Nations and Tribal Historic Preservation Officers (THPOs): Cheyenne River Sioux Tribe, Chippewa Cree Tribe, Choctaw Nation of Oklahoma, Confederated Tribes of the Umatilla Indian Reservation, Crow Creek Sioux Tribe, Forest County Potawatomi Community, Muscogee (Creek) Nation, Nez Perce Tribe, Omaha Tribe of Nebraska, Santa Clara Pueblo, Skull Valley Band of Goshute Indians, and Thlopthlocco Tribal Town. NCSHPO, NATHPO, and NTHP also filed comments, along with several service providers and industry organizations.

Finally, FCC staff has worked closely with ACHP staff on how to resolve the issues associated with Twilight Towers over the past six years. FCC and ACHP staff have held numerous face-to-face meetings and conference calls, and they have exchanged many e-mails throughout the process. FCC staff have continued to meet in person and by phone with SHPOs and Tribal representatives, the National Trust for Historic Preservation, and industry representatives since release of the draft Program Comment. Most recently, FCC staff invited ACHP staff to listen in when representatives of all 574 Federally recognized Tribal Nations, including both Tribal leaders and THPO staff, were invited to participate in a virtual meeting to discuss Twilight Towers on August 20, 2020. ACHP staff also attended a virtual meeting to which FCC staff invited SHPO representatives, NCSHPO, and NTHP to discuss Twilight Towers on Monday, August 24, 2020. The feedback that the FCC received during these meetings was consistent with responses that the FCC received from Tribal Nations, SHPOs, and NTHP up to and after the draft was put on public notice in December 2017.

### **Disposition of Comments**

- NTHP states that the FCC should create and publicize a clear process for reporting, monitoring, and raising objections to Twilight Towers. Several SHPOs also request that the proposed Program Comment include a complaint process.
  - The proposed Program Comment has been revised to include a new section outlining a complaint process. The new section explains that any Tribal Nation, SHPO, local government, or member of the public may raise concerns regarding a Twilight Tower that may have adverse effects on a historic property. It states that the FCC will consider public comments and consult with the tower owner, potentially affected Tribal Nations, SHPOs, and ACHP, as appropriate and will take appropriate action. In addition, the FCC will notify the objector of the outcome of its actions.
- SHPOs and Tribal Nations argue that the FCC should not rely on the lack of filed complaints as evidence that Twilight Towers have caused no adverse effects because SHPOs, Tribal Nations, and the public do not know where these towers are located or with whom to file complaints. Some commenters cite examples of towers constructed without Section 106 review that were found to have affected historic properties.
  - The proposed Program Comment acknowledges that lack of complaints filed with the FCC does not guarantee that none of the Twilight Towers have caused, or continue to cause, adverse effects on historic properties. It states that such cases, however, are likely to be few given the passage of time and absence of objections. Twilight Towers have been in place for 15 to 19 years, which is a considerable period of time for interested parties to report adverse effects to the FCC. Yet, few instances of adverse effects from Twilight Towers have been brought to the FCC's attention.

- The proposed Program Comment also provides that “[a] Tribal Nation may request direct government-to-government consultation with the Commission at any time with respect to a Twilight Tower or any collocation thereon by submitting a request in writing to the Commission’s Office of Native Affairs and Policy.”
- Further, to the extent the owner of any Twilight Tower is shown to have intentionally adversely affected a historic property with intent to avoid the requirements of Section 106, Section 110(k) of the NHPA would continue to apply.
- SHPOs and Tribal Nations assert that they should be provided a list of Twilight Towers with their locations so that they can have a fair opportunity to evaluate whether there have been adverse effects on historic properties and to pursue mitigation, if necessary. The Choctaw Nation suggests that these should be prioritized, and Tribal/industry teams sent to visit the priority sites and provide recommendations.
  - The proposed Program Comment explains that, “[g]iven the large number of Twilight Towers and potential collocations that could be installed on those towers,” identification and review of Twilight Towers would impose “burdens on all participants that . . . are not commensurate with [the] historic preservation benefits.”
  - The FCC does not have a list of all the Twilight Towers or of their locations. The FCC authorizes the use of spectrum for mobile wireless services primarily through geographic area licenses, which permit the licensee to select sites for its wireless infrastructure without pre-approval by the FCC, except in circumstances triggered by the FCC’s rules on environmental compliance, historic preservation, and antenna structure registration. Accordingly, the FCC does not routinely approve the construction of individual towers and does not have a list of Twilight Tower locations. Given the diversity of ownership among many types of entities, changes in ownership over time, and absence of standardizations of tower record keeping and information, it would be infeasible to develop a list. Because any such effort is unlikely to be comprehensive, the FCC favors the Program Comment’s approach.
  - In the past five months, during the COVID-19 pandemic, the country has relied on wireless communications services to an unprecedented extent, which has strained existing infrastructure. This national emergency has highlighted the need to provide broadband connections to people across the country to ensure access to telehealth, education, and economic opportunity, as well as an ongoing need to support public safety and critical infrastructure initiatives. The Twilight Towers Program Comment will help address these problems by facilitating the deployment of communications facilities across the country on these towers, without imposing the costs, delays and potential impact of new tower constructions.
- SHPOs, Tribal Nations, and NTHP argue that collocations should not be permitted on a Twilight Tower until the tower is reviewed by Tribal Nations and the relevant SHPO. They contend that in the absence of review, the Program Comment would not meet ACHP requirements that a Program Comment specify steps the agency will take to ensure that adverse effects are taken into account. Some further contend that a collocation may compound any adverse effects caused by the underlying tower. Some of these commenters suggest that the review process could be streamlined or subject to strict deadlines.
  - The FCC favors excluding collocations on Twilight Towers from review under the conditions stated in the proposed Program Comment. The FCC believes that this proposal appropriately

- balances the need both to open Twilight Towers to collocation and to ensure historic properties receive adequate protection. As noted in the draft Program Comment, “[t]he exclusion will rapidly make available thousands of these existing towers to support wireless broadband deployment without causing adverse impacts. In particular, among other things, the exclusion will facilitate the deployment of public safety services by enabling the First Responder Network Authority (FirstNet), an independent authority within the National Telecommunications Information Administration, to collocate antennas on Twilight Towers as part of the National Public Safety Broadband Network. 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.” (footnotes omitted).
- Even if the process were streamlined, the uncertainty and delay created by review of every tower, in light of the minimal likelihood of discovering adverse effects, would impose unacceptable burdens on broadband deployment and discourage environmentally beneficial collocations.
  - NTHP asserts that because it is possible to demonstrate adverse effects from towers that were constructed many years ago, there is benefit in reviewing collocations proposed on Twilight Towers.
    - Given the limited number of likely adverse effects and the absence of complaints over the past decades, the FCC believes it makes sense to treat Twilight Towers consistent with how the NPAs regard towers constructed prior to March 15, 2001. The diminished likelihood of discovering adverse effects 15-19 years after construction further supports a resolution that does not require routine review when collocations are proposed.
  - Tribal Nations argue that the FCC has failed to engage in government-to-government consultation, as required by law. Some contend that consultation requires a face-to-face meeting between FCC decision-makers and Tribal leadership.
    - As explained above, FCC leadership and staff have consulted with Tribal Nations over the past several years by holding many face-to-face meetings, sponsoring webinars and workshops, and participating in conferences. Tribal leaders as well as their staff have been invited to and participated in many of these events. The FCC believes that this process has fulfilled its consultation obligations.
  - Several SHPOs and Tribal Nations argue that it is misleading to state that lack of clarity in the FCC’s rules created the Twilight Towers problem, because most of the thousands of towers that were built between March 2001 and March 2005 complied with Section 106. NTHP contends that, even if the expected process was unclear during much of this period, there should have been no uncertainty after the Wireless Facilities NPA was released in October 2004.
    - Although the Wireless Facilities NPA was adopted in September 2004 and released in October 2004, it did not become effective until March 7, 2005, and thus its requirements were not binding on the FCC’s applicants until that date.
    - As the proposed Program Comment states, “during the years between the adoption of the Collocation NPA in 2001 and the Wireless Facilities NPA, the Commission’s environmental rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties, [but] these rules were not clear and did not explicitly require that parties perform historic preservation review by following the Advisory Council’s rules or any other

specific process.” Accordingly, “it was unclear whether the Commission’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, or any other particular procedures” before the effective date of the Wireless Facilities NPA.

- Because the Commission’s rules during the Twilight Tower period did not specify any Section 106 process, companies followed a variety of different procedures, which may have been less rigorous than what is required today. Any attempt to sort through which of these procedures constituted sufficient Section 106 review would be extremely burdensome, and in some cases impossible, and would inevitably create controversy and delay deployment.
- Even providers whose processes did fully comport with ACHP rules may not have proper documentation for a number of reasons: they may have had paper records that were not retained beyond a company’s document retention schedule, or documentation may have been lost due to a change in ownership.
- Several SHPOs object to language asserting that the lack of documentation demonstrating compliance with Section 106 is “an issue exacerbated by the limitations of State Historic Preservation Officers’ record-keeping.” Multiple factors led to the Twilight Towers issue, and SHPOs should not be singled out for inadequate record keeping. To the contrary, they assert, recordkeeping is the federal agency’s responsibility.
  - It was not the FCC’s intention to disparage SHPOs or imply that they have failed to fulfill a responsibility, but simply to observe that SHPO records of reviews during this period are often unavailable. The proposed Program Comment has been revised to clarify this point.
- The Arkansas SHPO contends that, at a minimum, review should be required for collocations on Twilight Towers in historic districts.
  - If a Twilight Tower is located in a designated historic district, it is particularly likely that any adverse effects it may have caused would have been identified during the 13 or more years it has been standing. Moreover, as the proposed Program Comment recognizes, these adverse effects may be brought to the FCC’s attention at any time, and if they are, this would remove collocations on the tower from the exclusion until the matter is resolved. Furthermore, collocations on a tower in a historic district, are unlikely in and of themselves to create adverse effects. For this reason, the Collocation NPA ordinarily excludes collocations on towers from review regardless of whether the tower is in a historic district.
- The Missouri SHPO advocates that an archeological investigation should be required if a collocation on a Twilight Tower will cause new or additional ground disturbance.
  - The exclusion in the proposed Program Comment would not apply if mounting the proposed antenna would expand the boundaries of the current tower site by more than 30 feet in any direction or involve excavation outside these expanded boundaries. The current tower site is 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. This provision is consistent with the recent Second Amendment to the Collocation NPA and the replacement tower exclusion in the Wireless Facilities NPA.

- Competitive Carriers Association (CCA) argues that the Program Comment should require complaints about collocations on Twilight Towers to include specific, articulated facts about the claimed impact on historic properties. CCA also supports a short window to file such complaints and an abbreviated timeline for their resolution.
  - The proposed Program Comment treats complaints in a manner consistent with the NPA’s Section XI.
  - The FCC does not believe that complaints about the effects of collocations on Twilight Towers should be treated any differently than historic preservation complaints about other proposed FCC undertakings.
- CCA asks that the Program Comment include accelerated review deadlines for collocations on Twilight Towers that do not qualify for the exclusion.
  - As set forth in the draft Program Comment, collocations on Twilight Towers would be excluded from Section 106 review unless they trigger one of the conditions in Paragraph IV.C of the draft Program Comment. These are the same conditions that apply to collocations on towers constructed before March 16, 2001, under the Collocation NPA. The FCC believes that procedures and timelines for review of collocations that are not excluded from review should be the same under both of those circumstances. If a collocation on a Twilight Tower does not qualify for exclusion from review, then it would be subject to the same review procedures as other collocations.
- Colorado SHPO suggests that the Program Comment include a definition of “tower.”
  - The proposed Program Comment has been revised to clarify that it incorporates the same definition of “tower” as is used in the Collocation NPA.
- Missouri SHPO states that if undiscovered adverse effects are to be accepted without review, some mitigation should be offered. Ohio SHPO specifically advocates a mitigation fund. Otherwise, Ohio SHPO contends, the proposed Program Comment would give a competitive advantage to those who ignored Section 106 requirements.
  - Given the diverse ownership of Twilight Towers and the fact that many owners of these towers may not be fully aware of their status, the task of developing an industrywide fund or other mitigation plan would be daunting. Moreover, it is impossible to assess fully the extent of undiscovered adverse effects in order to calibrate the amount of mitigation, although the likelihood of such effects at any individual site is low.
  - Because many of the Twilight Towers are no longer in the hands of their original owners, any competitive advantages the original owners may have gained have long since been realized. To the best of the FCC’s information and belief, current ownership of these towers is spread across the industry.