

Program Comment for the Federal Communications Commission’s Review of Collocations on Certain Towers Constructed Without Documentation of Section 106 Review

Section 106 of the National Historic Preservation Act (Section 106) requires federal agencies to consider the effect of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment on such undertakings. The Advisory Council’s regulations set forth the process through which federal agencies comply with these duties. Those regulations are codified in 36 CFR part 800. Under Section 800.14(e) of those regulations, agencies can request that the Advisory Council issue a “Program Comment” on a category of undertakings in lieu of conducting individual reviews of each undertaking in that category, as set forth in 36 CFR § 800.3 through 800.7. If adopted by the Advisory Council, an agency can meet its Section 106 responsibilities by following the steps set forth in that comment.

The Advisory Council issues this Program Comment, pursuant to 36 CFR § 800.14(e), to establish procedures governing the historic preservation review of collocations 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). This Program Comment provides the Federal Communications Commission (Commission) with an alternative way to comply with its responsibilities under Section 106 and the Advisory Council’s rules, 36 CFR part 800, as supplemented by two nationwide programmatic agreements. Specifically, the Program Comment excludes from Section 106 review the collocation of wireless communications facilities on Twilight Towers provided that these collocations satisfy certain specified conditions.

I. Background

To fulfill its obligations under the National Historic Preservation Act (NHPA), the Commission imposes certain compliance requirements on its applicants and licensees. In particular, Section 1.1320 of the Commission’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.¹ The Collocation NPA, which was adopted and became effective on March 16, 2001,² provides that collocations on towers 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 such collocations satisfy certain conditions.³ 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 and any associated environmental reviews for the

¹ 36 CFR § 800.14(b)(2).

² The Collocation NPA was amended in 2016 and 2020. 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); *Wireless Telecommunications Bureau Announces Execution of Second Amendment to the Collocation Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, DA 20-759 (WTB July 20, 2020).

³ Collocation NPA, § III.

underlying tower have been completed.⁴ Through the Wireless Facilities NPA, which was incorporated into the FCC's rules effective on March 7, 2005, the Commission adopted and codified for the first time detailed procedures for reviewing the effects of communications towers (and, where applicable, collocations) on historic properties.

The Commission's rules, prior to the adoption of the Wireless Facilities NPA, did not explicitly require its licensees and applicants to follow the process set forth in the Advisory Council's rules or any other specified process when evaluating whether their proposed facilities might affect historic properties pursuant to Section 106. The procedures set forth in the Advisory Council's rules define how federal agencies meet their statutory requirements under Section 106 of the NHPA at 36 CFR part 800, and the Advisory Council has authorized FCC licensees and applicants to act on behalf of the Commission when complying with the Advisory Council's rules.⁵ Nonetheless, given that the Commission's related rules were unclear before the adoption of the Wireless Facilities NPA, a 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. 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 itself completed review, licensees or applicants currently cannot collocate on these Twilight Towers unless they complete a separate Section 106 review of each collocation or they complete an individual post-construction Section 106 review of the underlying tower. Given that reviewing parties often decline to evaluate a Twilight Tower or a collocation proposed on a Twilight Tower, licensees and applicants needing to deploy critical telecommunications infrastructure often opt to construct new towers, rather than utilize existing Twilight Towers, even though collocation generally presents less likelihood of adverse effect on historic properties..

II. Public Input

To develop a Program Comment, the Advisory Council requires 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.⁶ Over the past several years, the Commission has engaged with Tribal Nations, Native Hawaiian Organizations (NHOs), State Historic Preservation Officers (SHPOs), 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, Commission 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 policies underlying the NHPA. In October 2015, the Commission circulated a discussion document to SHPOs, Tribal Nations, NHOs, and industry associations, and in January 2016, the Commission 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 Commission circulated to industry associations, SHPOs, and Tribal/NHO contacts a discussion draft term sheet developed as a result of those consultations. Commission staff also held sessions dedicated to Twilight Towers at a summit associated with the 2016 NATHPO Annual Conference as well as at the

⁴ Collocation NPA, § IV.

⁵ Memorandum from Executive Director, Advisory Council on Historic Preservation to Federal Communications Commission, State Historic Preservation Officers, Tribal Historic Preservation Officers (September 21, 2000).

⁶ 36 CFR § 800.14(e)(2).

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 Commission sought public comment on how to resolve Section 106 issues associated with collocation on Twilight Towers, and it received numerous comments on these issues.⁷ The Commission staff held conference calls with SHPOs to discuss Twilight Towers and other historic preservation issues on May 22, 2017 and February 1, 2018. On May 25, 2017, the Commission held a similar conference call with Tribal Nations. Twilight Towers were among topics discussed when the Commission facilitated consultations with Tribal representatives on the Rosebud Sioux Reservation on June 8, 2017; at the Mid-Year Conference of the National Congress of American Indians (NCAI) on June 14, 2017; on the Navajo Reservation on August 22, 2017; in Washington, DC on October 4, 2017; and in Albuquerque, New Mexico, on February 22, 2018. 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, Commission 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. Commission staff also addressed questions relating to Twilight Towers and other issues of interest to Tribal Nations during the National Association of Tribal Historic Preservation Officers' (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. Commissioner Brendan Carr discussed Twilight Towers and other issues at meetings of ACHP's Federal Agency Programs Committee in November 2017 and February 2018.

On December 14, 2017, the Commission unanimously adopted a public notice seeking public comment on a draft Program Comment addressing Section 106 review of collocations on Twilight Towers.⁸ Comments on the draft Program Comment were due February 9, 2018, and reply comments were due February 26, 2018. The Commission received over 30 comments and reply comments in response to this Public Notice. Finally, Commission 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, Commission staff invited representatives of all 574 Federally recognized Tribal Nations, including both Tribal leaders and Tribal Historic Preservation Officer (THPO) staff, to participate in a virtual meeting on August 20, 2020 to discuss Twilight Towers. Commission staff also invited SHPO representatives, NCSHPO, and the National Trust for Historic Preservation to discuss Twilight Towers in a virtual meeting on Monday, August 24, 2020. The feedback that the Commission received during these meetings was consistent with responses that the Commission received from Tribal Nations and SHPOs up to and after the draft was put on public notice in December 2017.

⁷ 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).

⁸ Comment Sought on Draft Program for the Federal Communications Commission's Review of Collocations on Certain Towers Constructed Without Documentation of Section 106 Review, WT Docket No. 17-79, Public Notice, 32 FCC Rcd 10715 (2017).

III. Need for Program Comment to Address Twilight Towers

In August 2000, the Advisory Council established a Telecommunications Working Group to provide a forum for the Commission, 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 when governed by certain safeguards. Further, the Collocation NPA states 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.

Consistent with an exclusion in the Collocation NPA that applies to towers constructed prior to March 16, 2001, this Program Comment adopts an exclusion under Section 106 for certain collocations on Twilight Towers. Although the responsibility of federal agencies under the Advisory Council’s rules was clear during this period, this approach is warranted due to a number of unique factors associated with towers whose construction commenced during the period from March 16, 2001 through March 6, 2005. These factors include: (1) the lack of procedural specificity in the Commission’s rules regarding licensees’ and applicants’ Section 106 review responsibilities during that time period; (2) the limited availability of Section 106 review documentation from that time period; (3) the limited likelihood that Section 106 review today could identify undiscovered adverse effects from these towers that have been in place 15 years or more; and (4) the significant public interest in making these towers readily available for collocation.

Although it is the responsibility of federal agencies, including the Commission, to comply with Section 106 of the NHPA, the Advisory Council and other stakeholders recognized, during consultations to develop the Collocation NPA in 2000, that there are challenges in ensuring the review of wireless facilities constructed by private industry rather than by a government agency. In particular, while the FCC licenses the use of spectrum, it does not construct towers or design the networks of its licensees. The Commission only issues site specific approvals or registrations in limited contexts. Under this regulatory framework, licensees and applicants take steps to facilitate the Section 106 review of wireless facilities under the Commission’s rules. 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. These rules, however, 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. Thus, prior to the effective date of the Wireless Facilities NPA, it was unclear whether the Commission’s rules required consultation with the relevant SHPO and/or THPO, engagement with Tribal Nations to identify historic properties off Tribal land, or any other particular procedures. This lack of clarity may explain why there is no documentation of such process for many towers built during this period. Even providers whose processes did fully comport with the Advisory Council’s rules may not have proper documentation for a number of reasons. For example, 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 tower ownership. Further, to the extent that there was SHPO review of those towers, many SHPO records may not have been retained.

IV. Final Text of the Program Comment

The following is the text of the Program Comment as issued by the ACHP:

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

A. Introduction

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 (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. Specifically, this Program Comment excludes 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 the conditions specified below.

Routine Section 106 review of Twilight Towers is likely to provide little benefit in preserving historic properties. Any adverse effects from the construction of these towers would have occurred at the time the towers were built, and collocating new equipment on these towers after the passage of 15 to 19 years, subject to the conditions set forth in this Program Comment, is unlikely to cause new adverse effects. To the extent that a Twilight Tower may have caused an adverse visual effect, the visual effect on historic properties may be ongoing and objections may be raised to the Commission. In the vast majority of cases, however, no adverse effects from these towers have been brought to the Commission's attention. While the lack of objections filed with the Commission does not guarantee that *none* of the Twilight Towers have caused, or continue to cause, adverse effects on historic properties, such cases are likely limited in number given the passage of time and absence of objections. The direct effects on historic properties that may have occurred during construction likely would be difficult to demonstrate in most cases decades after the fact.

Further, an exclusion for collocations on Twilight Towers under the conditions specified below is in the public interest. During the 15 or more years that Twilight Towers have been in place, they have become integral to existing wireless networks that provide important communications services. The 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.⁹ 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

⁹ 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").

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, requiring each licensee or applicant to review each tower individually before collocating is not an effective or efficient means for the Commission 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.

B. Exemption from Duplicate Review of Effects of Collocations by Other Federal Agencies

Other federal agencies, including FirstNet, land and property management agencies, and funding 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.

C. Exclusion for Twilight Towers

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. Therefore, pursuant to the exclusion adopted here, an antenna¹⁰ may be mounted on an existing tower¹¹ 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

¹⁰ Consistent with the Collocation NPA, an antenna is defined as “an apparatus designed for the purpose of emitting radio frequency (“RF”) radiation, to be operated or operating from a fixed location pursuant to FCC authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna. For purposes of this Agreement, the term Antenna does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the FCC's rules.” Collocation NPA, § I.A.

¹¹ Consistent with the Collocation NPA, this Program Comment 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.

- 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 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; or
 5. The tower has been determined by the Commission 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 Commission 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 Commission 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 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.

In the event that a proposed collocation on a Twilight Tower does not meet the conditions for exclusion specified above, any proposed 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. In the event a SHPO, THPO, or consulting Tribe declines to review a collocation proposed on a Twilight Tower, the Commission Federal Preservation Officer may complete the review and provide comment on the undertaking to fulfill the Commission's Section 106 obligations.

D. Complaint Process

Any Tribal Nation or NHO, SHPO/THPO, or member of the public at any time may notify the Commission and the Advisory Council of any concerns it has regarding a Twilight Tower that may have adverse effects on historic properties. Comments or complaints should include the tower location (city, state, street address, and coordinates if known), and all relevant information about why the filer believes that the Twilight Tower may have adverse effects. The Commission will consider public comments and will consult with the tower owner, the SHPO/THPO, potentially affected Tribal Nations or NHOs, and/or the Advisory Council, as appropriate, and will then take any appropriate actions, including actions to resolve adverse effects. The Commission will handle these complaints consistent with Section XI of the Wireless Facilities NPA. The Commission shall notify the commenter or complainant of the resolution of

the matter.

E. Additional Provisions Relating to Tribal Nations

This Program Comment does not apply on Tribal lands unless the relevant Tribal Nation has provided the Commission with a written notice agreeing to its application on Tribal lands.¹²

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. The Commission will respond to any such request in a manner consistent with its responsibility toward Tribal Nations and will acknowledge the request within 30 days of its receipt. When indicated by the circumstances, and if the request is in writing and supported by substantial evidence as described in Section C.7., the Commission 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 Commission shall protect all confidential information consistent with Section IV.I of the Wireless Facilities NPA.

F. Administrative Provisions

1. 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.
2. 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 F.2.a, below, or the Commission provides written notice of its intention not to continue to utilize this Program Comment pursuant to Section F.2.b, below.
 - a. 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 Commission, 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.
 - b. In the event the Commission determines that this Program Comment is not operating as intended, or is no longer necessary, the Commission, after consultation with the parties identified in Section F.2.a above, shall send written notice to the Advisory Council of its intent to withdraw.
3. Periodic Meetings. Throughout the duration of this Program Comment, the Advisory Council and the Commission shall meet annually on or within 30 days of the anniversary of the effective date of this Program Comment. The Commission and the Advisory Council will

¹² Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities. 36 CFR § 800.16(x).

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. The Commission may, and will if requested by the Advisory Council, also invite the National Conference on State Historic Preservation Officers, the National Association of Tribal Historic Preservation Officers, Tribal representatives, and industry representatives to these meetings or any portion thereof.

4. Amendments. The Chairman of the Advisory Council may amend this Program Comment after coordinating with the Commission and other parties as appropriate, and will provide written notice about the amendment to the Commission, the National Conference of State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers.