

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Cingular Wireless – Constructed Tower)
Section 106 of the National Historic)
Preservation Act)
Hobcaw Barony, South Carolina)
)

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 2005

Released: October 27, 2005

By the Deputy Chief, Spectrum and Competition Policy Division:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, the Spectrum and Competition Policy Division (“Division”)¹ of the Wireless Telecommunications Bureau (“Bureau”) finds that the above-referenced tower (“Cingular tower”) has no adverse effect on Hobcaw Barony, an estate near Georgetown, South Carolina, or any other property listed or eligible for listing on the National Register of Historic Places (“historic properties”). We also find without merit objections in the record relating both to the effect of the Cingular tower and to the sufficiency of our review process for that tower. We further dismiss as moot the motion of Cingular Wireless, LLC (“Cingular”) to rescind our initiation of *de novo* review. We therefore complete the Section 106 review process under the National Historic Preservation Act (“NHPA”)² and find that the Cingular tower complies with the Commission’s rules.³

II. BACKGROUND

2. In 1996, BellSouth Mobility, Inc. (“BellSouth Mobility”), the predecessor-in-interest of Cingular, constructed a 180-foot monopole, located on Hobcaw Barony, a property that is listed on the National Register. The tower is used to provide cellular service to U.S. Route 17, a divided highway, which is a major north/south thoroughfare running from Myrtle Beach to Charleston, South Carolina. Prior to its construction, the South Carolina State Historic Preservation Officer (“SCSHPO”) concurred with the finding of BellSouth Mobility’s consultant that the tower would have no effect on historic

¹ On November 24, 2003, responsibility for this matter was transferred from the Commercial Wireless Division (CWD) to the Spectrum and Competition Policy Division (SCPD) as part of a Wireless Telecommunications Bureau reorganization. As used herein, the term “Division” refers interchangeably to CWD before the reorganization or SCPD after the reorganization.

² 16 U.S.C. § 470f.

³ See 47 C.F.R. §§1.1301-1.1319.

properties.⁴ On September 2, 2003, after reviewing the opening briefs in litigation regarding the Cingular tower⁵ and a letter from the SCSHPO indicating that its concurrence with the no effect determination rested on administrative error,⁶ the Division initiated a review of BellSouth Mobility's no effect determination and the SCSHPO's concurrence. The Division directed Cingular to invite public comment regarding the tower's effect and to provide the Division a copy of its original submission to the SCSHPO, together with any supplementary material.⁷

3. On October 1, 2003, Cingular filed a motion to rescind the September 2 letter, arguing that the Division's initiation of *de novo* review was *ultra vires*.⁸ On October 31, 2003, Cingular filed a study completed by the historian who had prepared the original National Register nomination form for Hobcaw Barony, concluding that the tower has no adverse effect on historic properties.⁹ Cingular published its notice in the *Georgetown Times*, a local newspaper in Georgetown, South Carolina, seeking public comment on the Cingular tower.¹⁰ Several comments were received from members of the public and incorporated into the record of this proceeding.¹¹ On February 18, 2004, Cingular replied to the public comments,¹² and on April 1, 2004, James Tennant filed a response to Cingular's submission.¹³ The Division's Cultural Resources Specialist visited the site on July 19, 2004, and consulted records in the SCSHPO's office on July 21, 2004. On May 31, 2005, the Division sent to the SCSHPO for its comment, with copies to the consulting parties and the Advisory Council on Historic Preservation ("Council"), a proposed Section 106 finding ("Report") of no adverse effect on Hobcaw Barony or any other historic properties, in accordance with the rules of the Council.¹⁴ A copy of the report is incorporated into this

⁴ See Letter from SCSHPO to R.S. Webb Associates (consultant for BellSouth Mobility, Inc.), dated September 10, 1996.

⁵ See Petition for Writ of Mandamus, *In re: Tennant*, No. 02-1060 (D.C. Cir.).

⁶ See Letter from J. Emory Smith, Assistant Deputy Attorney General, South Carolina to Stanley M. Gorinson, Esq., *et al.* (counsel for Cingular), dated August 28, 2003. It is well settled that administrative agencies have the authority to correct inadvertent, ministerial errors. See *Chlorine Institute v. OSHA*, 613 F.2d 120, 123 (5th Cir. 1980), *cert. denied*, 449 U.S. 826 (1980); *Stratophone, LLC, Order*, 16 FCC Rcd. 17,010 (CWD: 2001).

⁷ See Letter from Jeffrey Steinberg, Esq., Deputy Chief, Commercial Wireless Division, to James Bugel, Cingular Interactive, and Anthony Lehv, Esq., American Tower Corporation, dated September 2, 2003 ("September 2 Letter").

⁸ See Motion to Rescind, filed by Cingular Wireless, LLC, dated October 1, 2003 ("Motion to Rescind").

⁹ See Letter from Craig Gilmore, Esq. (counsel for Cingular) to Jeffrey Steinberg, Esq., dated October 31, 2003 ("October 31 Letter"). The letter contains Attachment C, Report by Historic Preservation Consultants ("HPC") prepared by John Laurens; see also HPC Evaluation of Effect Report, attached to the Letter from Craig Gilmore, Esq., to Jeffrey Steinberg, Esq., dated February 18, 2004 ("February 18 Letter").

¹⁰ See October 31 Letter at 2.

¹¹ Public comments were received from the following parties: Coastal Builders, dated December 3, 2003; James Tennant, dated December 18, 2003 ("Tennant December 18 Comments") and April 1, 2004 ("Tennant April 1 Comments"); Alberta Quattlebaum, dated December 13, 2003 ("Quattlebaum Comments"); Dick Richards, dated December 18, 2003 ("Richards Comments"); Martha Allison, dated January 22, 2004 ("Allison Comments"); and the DeBordieu Colony Community Association, Inc., dated January 30, 2004 ("DeBordieu Comments").

¹² See February 18 Letter.

¹³ Comments of James Tennant, dated April 1, 2004 ("Tennant April 1 Comments").

¹⁴ See 36 C.F.R. §§ 800.1 *et seq.* Copies of the October 31 Letter, the February 18 Letter, and the comments were attached to the Report.

Order and attached hereto.¹⁵ On August 25, 2005, the SCSHPO, based on information in the record, data in its own files, and its own visit to the site, concurred in the proposed finding of no adverse effect.¹⁶

4. Section 106 of the NHPA requires that a federal agency “prior to the approval of the expenditure of any Federal funds on an undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” Such Federal agency must “afford the [Council] . . . a reasonable opportunity to comment with regard to such undertaking.”¹⁷ The Council’s rules provide that, in performing Section 106 reviews, a Federal agency must, among other things, consult with the appropriate State Historic Preservation Officer (“SHPO”) or Tribal Historic Preservation Officer (“THPO”).¹⁸ The Council’s procedural rules further specify the process under which federal agencies shall perform their historic preservation reviews, including requirements for public and local government participation and for participation of and consultation with federally recognized Indian tribes and NHOs, and the extent to which portions of the review process may be performed by an agency’s licensees and applicants.¹⁹

III. DISCUSSION

5. For the reasons set forth below, we find that the Cingular tower has no adverse effect on historic properties and that the Section 106 requirements for the Cingular tower have been satisfied. First, we adopt as final the proposed no adverse effect finding set forth in the Report. Second, we reject objections to the process that has been followed in this matter.

A. Finding of No Adverse Effect

6. We review the Section 106 documentation, the public comments, and other pleadings in the public record to determine whether the Cingular tower has an adverse effect on historic properties within the Area of Potential Effects (“APE”).²⁰ In the Report, the Division proposed to find that the tower has no

¹⁵ See Letter from Jeffrey Steinberg, Esq., Deputy Chief, Spectrum and Competition Policy Division to Mary W. Edmonds, Deputy State Historic Preservation Officer, South Carolina State Historic Preservation Office, dated May 31, 2005 (“Report”). Copies of attachments to the Report and other filings may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail at www.bcpweb.com.

¹⁶ See Letter from Mary W. Edmonds, Deputy State Historic Preservation Officer, South Carolina State Historic Preservation Office, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, dated August 25, 2005 (“August 25 Letter”). Copies were provided to the Council, consulting parties, and commenters. Earlier, the SCSHPO had requested additional information regarding public involvement in review of the tower before rendering an assessment of effect. See Letter from Richard Sidebottom, Review and Compliance Officer, South Carolina State Historic Preservation Office, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, dated July 14, 2005 (“SCSHPO July 14 Letter”). Following discussions between the Division and the SCSHPO regarding the public participation process, the SCSHPO issued the August 25 Letter to supersede its earlier communication.

¹⁷ 16 U.S.C. § 470f.

¹⁸ 36 C.F.R. § 800.4(a).

¹⁹ 36 C.F.R. §§ 800.2, 800.3. See also *National Mining Association v. Slater*, 167 F.Supp.2d 265 (D.D.C. 2001) (*National Mining Association*), *rev’d in part*, 324 F.3d 752 (2003) (upholding most of the Council’s rules as within its statutory authority).

²⁰ See 36 C.F.R. §§ 800.3-800.13. The Subpart B rules set forth specific procedures for initiating the Section 106 process, identifying historic properties, assessing adverse effects on historic properties, and resolving adverse effects.

adverse effect on historic properties, explained the basis for this proposed finding, and addressed arguments in the record to the contrary. The Report was provided to the SCSHPO, which has undertaken its own investigation and concurred in the proposed finding for reasons consistent with those set out in the Report.²¹ The Division also provided copies of the Report to the consulting parties, and no party has asserted or provided evidence in response that the tower has an adverse effect. We therefore adopt the proposed finding as final for the reasons set forth in the Report.

7. Our finding of no adverse effect also addresses the contentions of Mr. Tennant and other commenters that Cingular should replace the existing monopole with a “stealth” tower similar to a pine tree and/or lower it to the treeline.²² Because there is no adverse effect on historic properties, Cingular is not required to mitigate any effects or develop alternative tower designs. For similar reasons, it is unnecessary for us to consider technology options to reduce the number of antenna arrays, or the asserted inadequacy of the tower to support needed services.²³

B. Process Issues

8. In addition to the comments raised about potential adverse effects to historic properties, Mr. Tennant also raises several other arguments. First, Mr. Tennant suggests that Cingular’s photographs of the tower are misleading, and he urges the Commission to make a site visit to inform its judgment.²⁴ As discussed above, after Mr. Tennant submitted his comments, the Division’s Cultural Resources Specialist visited the site and took photographs, some of which are reproduced in the Report. These photographs demonstrate that the Division’s judgment is informed and belie the claim that Cingular’s photographs were misleading.”

9. Second, Mr. Tennant asserts that the public notice of the Cingular tower published in the Georgetown Times, a local newspaper, was misleading and false because Cingular failed to reference the SCSHPO’s August 28, 2003 letter stating that its 1996 concurrence with BellSouth’s no effect finding was erroneous. The SCSHPO also raised a concern about the adequacy of Cingular’s public notice.²⁵ In terms of completeness, it may have been better for Cingular to have included the August 28 letter. We are not persuaded, however, that the failure to describe the earlier history of this proceeding or to provide a copy of the August 28 letter in the notice inviting public comment in any way restrained public opportunity to comment on the tower’s effect on historic properties. Nor is it apparent that the omitted material was essential to piquing public interest in this issue.²⁶ And apart from the adequacy of the notice itself, we find that Cingular has made available its Section 106 documentation as required, accepted any public comments, and submitted them into the record of this proceeding. Finally, regarding Tennant’s opportunity to comment, we note that Cingular has made available its Section 106 documentation as

²¹ See August 25 Letter at 1-3. We note that the SCSHPO did refer in this letter to a concern it had earlier expressed regarding the public participation process, which it believed had not been adequately addressed. *Id.* at 3. This issue is discussed at para. 9, *infra*.

²² See Tennant April 1 Comments at 3; Quattlebaum Comments; Richards Comments; Allison Comments; and DeBordieu Comments.

²³ See Tennant April 1 Comments at 4-5.

²⁴ See Tennant December 18 Comments at 14; Tennant April 1 Comments at 2.

²⁵ See Letter from Mary W. Edmonds, Deputy State Historic Preservation Officer, South Carolina State Historic Preservation Office, to Ben C. Almond, Vice-President – Federal Regulatory Affairs, Cingular, dated December 4, 2003; see also August 25 Letter at 3.

²⁶ See 36 C.F.R. 800.2(d)(2) (requiring that the public be provided with information about an undertaking and its effects on historic properties).

required, accepted any public comments, and submitted them into the record of this proceeding. We also note that the SCSHPO copied its August 28 letter to Mr. Tennant when it sent the letter to the Commission. The Commission and Cingular have invited full public participation, and the Commission has allowed Mr. Tennant to file comments twice in this proceeding.²⁷ Given the thorough nature of the materials made available to the public as a whole, we find the lack of a specific reference to the SCSHPO's withdrawal of its earlier concurrence to be immaterial. Therefore, we determine that the public notice and public participation processes in this matter satisfy the requirements of Section 106 and the Council's rules.

10. Finally, Mr. Tennant asserts that the Cingular tower was constructed and operations from the tower have occurred illegally, and he questions the Commission's ability to conduct effective Section 106 review after the fact.²⁸ He further argues that his rights under the 1st, 5th, and 14th amendments to the United States Constitution have been abridged by the failure of the Commission, Cingular, and the SCSHPO to allow for public comment and participation prior to the tower's construction.²⁹ We note that BellSouth Mobility obtained the SCSHPO's apparently valid concurrence with its no effect finding prior to construction, consistent with the Commission's rules. Under the unique circumstances of this case, we subsequently determined to initiate *de novo* review. While we agree that Section 106 and the Council's rules contemplate that all review and public participation should be completed prior to the commencement of an undertaking, this fact does not delegitimize later review where necessary as a result of past events. Moreover, our decision to initiate *de novo* review, based on the pleadings and the SCSHPO's withdrawal of its earlier concurrence as erroneous, does not equate to a finding that Cingular's past construction and operation were unlawful. In any event, even if there were a past violation of the Commission's rules, that violation would be immaterial to the current review of the tower's effect, and would be appropriately addressed, if at all, in a separate enforcement proceeding.³⁰ We therefore reject these arguments.

IV. CONCLUSION

11. For the reasons stated above, after review of the entire record, the Division finds that the Cingular tower has no adverse effect on the Hobcaw Barony estate or any other historic property. Because we find in favor of Cingular on the merits, it is unnecessary to decide the merits of Cingular's Motion to Rescind the Division's September 2, 2003 letter initiating a Section 106 review *de novo* on the tower. Therefore, we dismiss the Motion as moot.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 303(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(a), and Section 1.1307(a)(4) of the Commission's Rules, 47 C.F.R. § 1.1307(a)(4), Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, and the rules of the Advisory Council on Historic Preservation, 36 C.F.R. §§ 800.1 *et seq.*, that the Division FINDS that the Section 106 Review Process is complete and that the tower constructed by Cingular Wireless, LLC has no adverse effect on Hobcaw Barony or any other historic properties.

²⁷ Indeed, the Division extended the period of time for comments on the Cingular materials so as to increase the opportunity for public participation. See Letter from Jeffrey Steinberg, Esq., Deputy Chief, Commercial Wireless Division to Mr. James Tennant, dated November 13, 2003.

²⁸ Tennant December 18 Comments at 14; Tennant April 1 Comments at 2.

²⁹ Tennant April 1 Comments at 2-3.

³⁰ We note that any enforcement action would have to comply with the relevant statutory limitations period. See 47 U.S.C. § 503(b)(6)(b) (forfeiture penalty may not be determined against a person other than a broadcast licensee if the violation occurred more than one year prior to issuance of the notice of apparent liability).

13. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Motion to Rescind the Division's September 2, 2003 letter, filed by Cingular Wireless, LLC, IS DISMISSED AS MOOT.

14. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

Federal Communications Commission

Jeffrey S. Steinberg
Deputy Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau

ATTACHMENT



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554

May 31, 2005

Re: Constructed tower - Cingular Wireless, LLC,
Hobcaw Barony, Georgetown, South Carolina

Mary W. Edmonds
Deputy State Historic Preservation Officer
South Carolina State Historic Preservation Office
Archives & History Center
8301 Parklane Road
Columbia, SC 29223

Dear Ms. Edmonds:

The Spectrum and Competition Policy Division (“Division”)³¹ of the Wireless Telecommunications Bureau, Federal Communications Commission (“Commission”), provides this proposed Section 106 finding to the South Carolina State Historic Preservation Officer (SCSHPO), regarding the above-referenced tower. Section 106 of the National Historic Preservation Act (“NHPA”)³² requires federal agencies (*e.g.*, the Commission) to take into account the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (“Council”) a reasonable opportunity to comment on such undertakings. The Council is statutorily charged with promulgating rules to govern the Section 106 process,³³ and the procedures implementing that process are set forth in Subpart B of the Council’s rules.³⁴ The Council’s rules provide that, in performing Section 106 reviews, a Federal agency must, among other things, consult with the appropriate State Historic Preservation Officer (“SHPO”) or Tribal Historic Preservation Officer.³⁵ These rules authorize

³¹ On November 24, 2003, responsibility for this matter was transferred from the Commercial Wireless Division (CWD) to the Spectrum and Competition Policy Division (SCPD) as part of a Wireless Telecommunications Bureau reorganization. As used herein, the term “Division” refers interchangeably to CWD before the reorganization or SCPD after the reorganization.

³² 16 U.S.C. § 470f.

³³ 16 U.S.C. § 470s (“The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety.”)

³⁴ 36 C.F.R. §§ 800.3-800.13. The Subpart B rules set forth specific procedures for initiating the Section 106 process, identifying historic properties, assessing adverse effects on historic properties, and resolving adverse effects.

³⁵ *See, e.g.*, 36 C.F.R. §§ 800.4(a), 800.5(a).

applicants to undertake many of the tasks required by the Section 106 process, subject to the federal agency's ultimate responsibility for all findings and determinations.³⁶

As discussed below, we propose to find, subject to the SCSHPO's comments, that the Cingular tower has no adverse effect on Hobcaw Barony or any other property listed or eligible for listing in the National Register of Historic Places ("historic properties"). This proposed finding is based on a review of the material submitted by Cingular, public comments, and a site visit by the Division's Cultural Resources Specialist. Consistent with Section 800.5(c) of the Council's rules,³⁷ we request review from the SCSHPO within 30 days.

Background: In 1996, BellSouth Mobility, Inc., the predecessor-in-interest of Cingular Wireless, LLC ("Cingular"), constructed the 180-foot monopole at issue near Georgetown, South Carolina. The tower is located on the Hobcaw Barony estate ("Hobcaw Barony"), which is listed in the National Register of Historic Places ("National Register"). The noted 20th century financier, Bernard Baruch, combined several existing plantation properties into Hobcaw Barony and used it as a vacation retreat. The tower site is situated in a heavily wooded area of the estate with 40-60 foot pine trees. The tower is located about 50 feet from U.S. Route 17, a divided highway, which is a major north/south thoroughfare running from Myrtle Beach to Charleston, South Carolina.

On September 2, 2003, after reviewing the opening briefs in litigation regarding the Cingular tower,³⁸ the Division initiated a review of BellSouth Mobility's determination and the SCSHPO's concurrence in 1996 that the tower has no effect on historic properties.³⁹ In this letter, the Division directed Cingular to invite public comment regarding the tower's effect and to provide the Division a copy of its original submission to the SCSHPO, together with any supplementary material.⁴⁰ On October 31, 2003, Cingular filed a study prepared by the historian who had prepared the original National Register nomination form for Hobcaw Barony, concluding that the tower has no adverse effect on historic properties.⁴¹ Cingular published

³⁶ 36 C.F.R. § 800.2(a)(3); *see also* Memorandum from John Fowler, Advisory Council on Historic Preservation, to Federal Communications Commission, State Historic Preservation Officer and Tribal Historic Preservation Officers, dated August 21, 2000, regarding *Delegation of Authority for the Section 106 Review of Telecommunications Projects*. In general, the Commission requires its applicants to undertake the steps necessary to determine whether an undertaking will have an adverse effect on historic properties. *See* 47 C.F.R. §§ 1.1307(a)(4), 1.1312. Due to the unique circumstances of this case, the Division is directly requesting the SCSHPO's views.

³⁷ 36 C.F.R. § 800.5(c).

³⁸ Petition for Writ of Mandamus, *In re: Tennant*, No. 02-1060 (D.C. Cir.).

³⁹ *See* Letter from SCSHPO to R.S. Webb Associates (consultant for BellSouth Mobility, Inc.), dated September 10, 1996.

⁴⁰ *See* Letter from Jeffrey Steinberg, Esq., Deputy Chief, Commercial Wireless Division to James Bugel, Cingular Interactive, and Anthony Lehy, Esq., American Tower Corporation, dated September 2, 2003.

⁴¹ *See* Letter from Craig Gilmore, Esq. (counsel for Cingular), to Jeffrey Steinberg, Esq., dated October 31, 2003 ("October 31 Letter"). The letter contains Attachment C, Report by Historic Preservation Consultants ("HPC") prepared by John Laurens ("Laurens Report"); *see also* HPC Evaluation of Effect Report, attached to the Letter from

(continued....)

notice of the Section 106 review in the *Georgetown Times*. Several comments were received from members of the public.⁴² On February 18, 2004, Cingular replied to the public comments.⁴³ Finally, the Division's Cultural Resources Specialist visited the site on July 19, 2004, and consulted records in the SCSHPO's office on July 21, 2004 ("site visit").

This proposed finding is based on the Cultural Resources Specialist's (1) review of the Section 106 documentation submitted by Cingular to the Division (including photographs, site descriptions, and maps); (2) review of the public comments; (3) visual survey of the area; (4) discussion with the SCSHPO; (5) review of the files located in the SCSHPO office and South Carolina State Archives relating to the Hobcaw Barony estate; and (6) assessment of whether any unidentified historic properties would be adversely affected by the tower.

Discussion: We analyze the effect of this tower on historic properties under the Council's rules.⁴⁴ First, we propose to find that the tower has no direct effect on any historic property. The tower is located in a utility right-of-way from which the surrounding trees were previously cleared and where the ground was previously disturbed. There is no evidence in the record or from the site visit of any direct effect, and no party contends that the tower has any direct effect.

Second, we assess whether the tower has an adverse visual effect on any historic property. As an initial matter, given the height of the trees (40-60 feet) and the heavily wooded nature of the area, the tower is not readily visible from most vantage points other than U.S. Route 17. Moreover, we only consider visual effect on historic properties, not general aesthetic impact from the tower. Unless the view of a tower has an effect on a historic property, any aesthetic detriment is immaterial under Section 106.

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Craig Gilmore, Esq., to Jeffrey Steinberg, Esq., dated February 18, 2004 ("February 18 Letter"). Copies of these documents are attached.

⁴² Public comments were received from the following parties: Coastal Builders, dated December 3, 2003; James Tennant, dated November 18, 2003; Alberta Quattlebaum, dated December 13, 2003; Dick Richards, dated December 18, 2003; Martha Allison, dated January 22, 2004; and the DeBordieu Colony Community Association, Inc., dated January 30, 2004. Copies of the comments are attached.

⁴³ See February 18 Letter.

⁴⁴ See 36 C.F.R. Part 800.



This view of the tower site is taken from about a mile away. Note the forest cover. This is typical throughout the APE.

The first step in identifying historic properties that may be affected by an undertaking is to determine the Area of Potential Effects (APE).⁴⁵ On our site visit, we examined whether there were potential visual effects on historic properties within a radius of approximately one mile from the tower. This one-mile APE is consistent with the SCSHPO's general recommendations,⁴⁶ and we believe it is conservative taking into account the size and design of the tower, the surrounding topography and vegetation, and the known presence of historic properties.⁴⁷ We note that Cingular's consultant prepared its report using a two-mile APE, and found no adverse effect on any historic property within this larger area.

Within this APE, the only historic property that might potentially be affected by the tower is Hobcaw Barony. Mr. Tennant suggests that the tower has adverse impacts from several

⁴⁵ See 36 C.F.R. § 800.4(a)(1).

⁴⁶ See SCSHPO, Guidance for Cell Tower Review at 1 (Attachment C, February 18 Letter).

⁴⁷ Under the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, 47 C.F.R. Part 1, Appendix B ("Nationwide Programmatic Agreement or NPA"), the presumptive APE for visual effects for a tower that is 200 feet or less in height is one-half mile, subject to use of an alternative APE if warranted by the facts. Nationwide Programmatic Agreement, § VI.C.4.a. The Nationwide Programmatic Agreement is not binding on review of the Cingular tower, which was submitted for review to the SCSHPO and constructed prior to the NPA's effective date. See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, FCC 04-222 at 61-62, ¶¶ 165-167 (rel. Oct. 5, 2004) (Nationwide Programmatic Agreement applies prospectively); Nationwide Programmatic Agreement, § X.A (provisions governing facilities constructed prior to compliance with Section 106 apply to construction after the effective date of the Agreement). Nonetheless, its provisions are instructive as representing principles to which the Commission, the Advisory Council, and the National Conference of State Historic Preservation Officers have agreed. We express no opinion as to whether the circumstances of this case would support use of an APE greater than one-half mile under the Nationwide Programmatic Agreement.

other vantage points, including Arcadia plantation, the Waccamaw River, the Waccamaw River bridge, and various historic markers.⁴⁸ We have reviewed Mr. Tennant's assertions. Arcadia is a property listed on the National Register, which is outside the one-mile APE. According to the Laurens report, the Arcadia plantation is a 90-acre property approximately 1¼ miles from the tower site.⁴⁹ Mature pines surround the property to U.S. Route 17. The Report concludes that the tower is not visible from the Arcadia plantation,⁵⁰ and based on the evidence in the Laurens Report and our site visit, we concur. As for the other locations that Mr. Tennant references, there is no showing that these properties are listed or eligible for listing in the National Register, nor any showing of adverse effect beyond generalized assertions that the tower is out of place with the surroundings.

Hobcaw Barony is a National Register listed property. Substantial portions of the property lie within the one-mile APE. Hence, we consider whether the Cingular tower alters any of the characteristics of the property that qualify the property for inclusion in the National Register in a manner that diminishes the integrity of the property's location, design, setting, materials, workmanship, feeling or association.⁵¹ We note that the Trustees of the Hobcaw Barony estate, who have responsibility for preserving the estate, approved the construction of the tower.⁵² Nonetheless, consistent with the Council's rules, we conduct a full *de novo* review.

The National Register nomination for Hobcaw Barony states that it is eligible under Criteria A, B, and C.⁵³ In general, adverse visual effects are most likely to features of eligibility under Criterion C, "that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction."⁵⁴ We therefore first evaluate the tower's effects on features that render Hobcaw Barony eligible for the National Register under Criterion C.

⁴⁸ See Comments from James Tennant, dated November 18, 2003.

⁴⁹ See Laurens Report at 6.

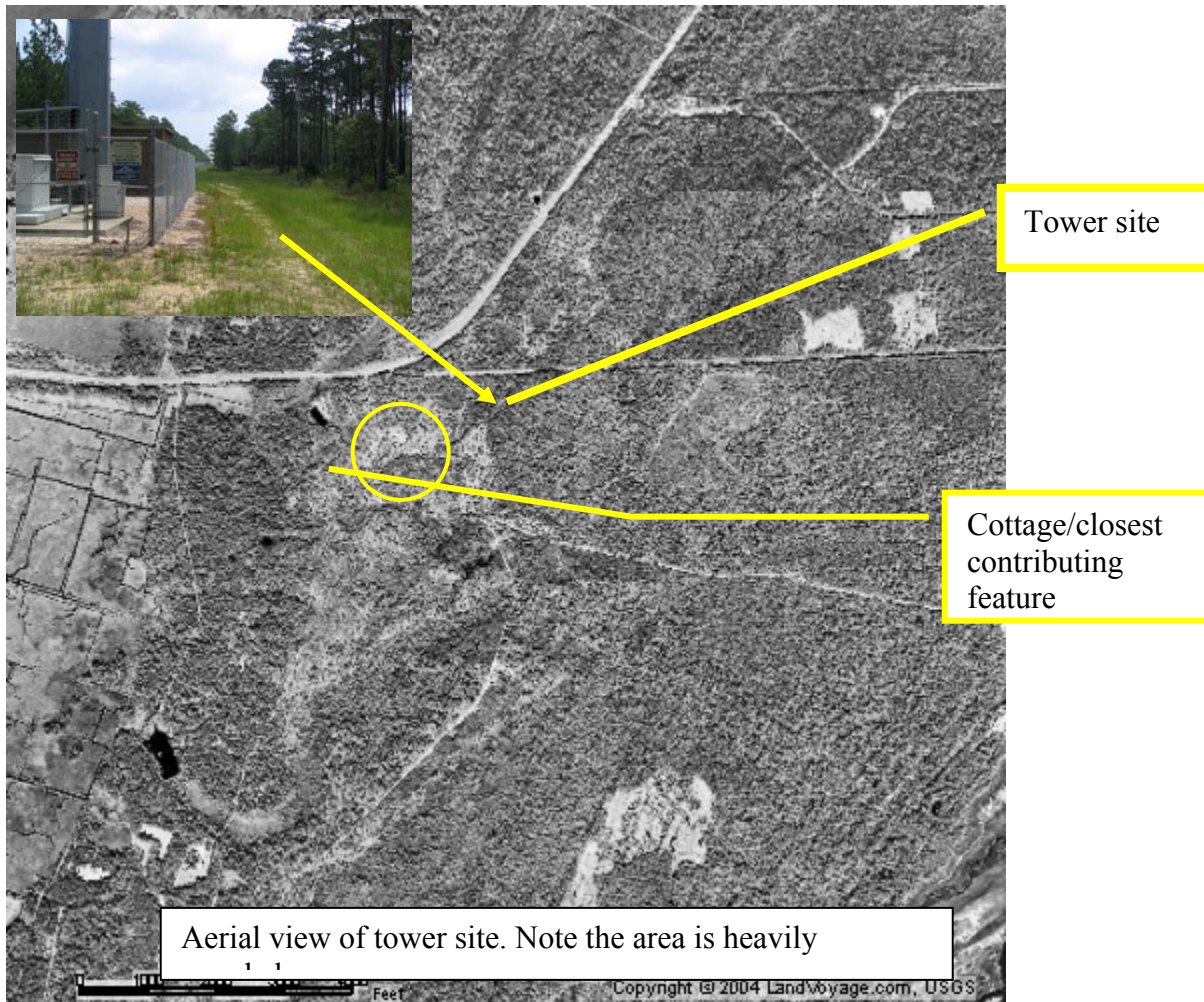
⁵⁰ See Laurens Report at 6; see also February 18 Letter, Attachment C, Laurens Report at 2.

⁵¹ See 36 C.F.R. § 800.5(a)(1); cf. Nationwide Programmatic Agreement, § VI.E.3. ("An undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register.").

⁵² See February 18 Letter, Attachment C, Laurens Report at 2.

⁵³ See National Register of Historic Places Nomination Form for Hobcaw Barony, dated November 2, 1994, sections 5 and 8.

⁵⁴ See <http://www.cr.nps.gov/nr/listing.htm>.



In considering effects on Criterion C features of eligibility, we afford particular attention to those portions of the historic property that are specifically identified on the National Register nomination as features that contribute to its eligibility. In this instance, the nearest contributing historic structure to the tower is the “Gate Cottage” with its associated features (*i.e.*, parking lot, fence and landscape). While the tower and Cottage are in close proximity, approximately 200 yards from each other, the density and height of the surrounding pine forest, as shown in the accompanying photographs, effectively screens the view of the tower from ground level during all seasons. Since the tower has no visible presence in the vicinity of the Cottage, there is no adverse visual effect on this element of the Hobcaw Barony property. We also examined other areas within the one-mile APE, and similarly determined that the tower has minimal, if any, visible presence from each of these locations.



Typical view of forest at ground level near tower.

View of tower showing surrounding trees

In addition to asserted effects on specific features of the property, Mr. Tennant suggests that the tower adversely affects the entire site at Hobcaw Barony.⁵⁵ He quotes from the nomination form that the plantation’s features form “a system that continues to undergo organic change,” and that the “relationships of its spaces” convey “a sense of time and place – of an entirely managed area – with relatively few buildings.”⁵⁶ However, the nomination also makes clear that the landscape consists of a variety of types of features from different eras.⁵⁷ The area has evolved from a plantation in the 18th and 19th centuries to forest preserve in the 20th century, altering most of the landscape associated with the plantation period. To the extent 18th and 19th century features such as rice fields survive, the tower is not visible or minimally visible from these features. Twentieth century management did make efforts to conserve certain older features as part of the whole property. However, the landscape in the vicinity of the tower is of no special historic importance, and the highway, power lines, and other modern intrusions are already present in the area. Visibility of a communications tower where these other modern features are already present does not further diminish any historical importance of the landscape. Therefore, the tower does not diminish characteristics of the property that make it eligible under Criterion C, and it has no adverse effect on the general design of the plantation.

We also evaluate the tower’s effects on features of eligibility for Hobcaw Barony under Criteria A and B. Under Criterion A, association with events that have made a “significant contribution to the broad patterns of our history,”⁵⁸ the Nomination identified a number of places

⁵⁵ See Comments from James Tennant.

⁵⁶ *Id.* at. 7-8.

⁵⁷ See Nomination Form, attached to the Laurens Report (“Nomination Form”).

⁵⁸ *Id.*

within the boundaries of the site associated with slavery, military, transportation, and agricultural history. The tower is either not visible or its presence is minimal at these places. Therefore, even assuming that a plainly visible tower would diminish the association of these locations with these historical events, there is no adverse effect on features of eligibility under Criterion A.

The National Register nomination also indicates that the property is eligible under Criterion B because it is “associated with the lives of persons significant in our past,”⁵⁹ namely Bernard Baruch. In particular, Mr. Tennant argues in this regard that the tower is inconsistent with, and detracts from the property’s ability to convey, Baruch’s commitment to conservation.⁶⁰ Our review indicates that the tower either is not visible or its presence is minimal from the main house and grounds used by Baruch and his guests. There is no evidence that the tower interferes with the features of these specific sites that allow them to communicate their association with the events and patterns of our history. With regard to conservation, as discussed above, the tower is in an area that was previously disturbed as a utility right-of-way. To the extent the tower is visible from certain points on the property, the tower does not materially detract from the property’s ability to convey Baruch’s commitment to conservation. Hence, the tower does not diminish the property’s integrity with respect to features of eligibility under Criterion B.

Conclusion: For the reasons stated above, after review of the entire record, the Division proposes to find that the Cingular tower has no adverse effect on the Hobcaw Barony estate or any other historic property.

We look forward to your comments. If you have any questions, please call Don Johnson at 202-418-7444.

Sincerely,

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⁵⁹ *Id.*

⁶⁰ *See* Comments of James Tennant at 10.