



**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

DA 13-191

February 20, 2013

VIA FACSIMILE, ELECTRONIC MAIL, AND U.S. MAIL

RETURN RECEIPT REQUESTED

Joseph Kroboth, III
Director of Public Works
Washington County Division of Public Works
100 Washington Street, Room 238
Hagerstown, MD 21740-4735

Re: Proposed communications tower
19005 Miller Avenue, Washington County, MD
Washington County Public Safety System

Dear Mr. Kroboth:

By this letter, the Spectrum and Competition Policy Division (Division) of the Wireless Telecommunications Bureau finds that the tower that Washington County, Maryland (County) proposes to erect at 19005 Miller Avenue (Miller Avenue tower) will have no adverse effect on properties that are listed or eligible for listing on the National Register of Historic Places (historic properties) under Section 106 of the National Historic Preservation Act (NHPA).¹ As discussed below, the West Virginia Division of Culture and History (WVSHPO) asserts that the presumptive Area of Potential Effects (APE) for the Miller Avenue tower should be expanded due to its potential adverse effect on historic properties. Two National Park Service units, Harpers Ferry National Historical Park and Appalachian National Scenic Trail (NPS Units), also assert that the County should expand the APE. The WVSHPO and the NPS Units further assert that the Miller Avenue tower will have an adverse effect on historic properties due to its visibility from two locations in Harpers Ferry National Historical Park (Harpers Ferry NHP). In addition, the Virginia Department of Historic Resources (VASHPO) belatedly contends that the tower's visibility from two vantage points will likely create an adverse effect on historic properties in Virginia. The County argues that the APE should not be expanded and disputes that the Miller Avenue tower will have an adverse effect on historic properties.

On March 22, 2012, we directed the County to cease construction until the Section 106 review was completed. We stated that we would review the matter based on the record.²

¹ See 16 U.S.C. § 470f.

² See Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau and Zenji Nakazawa, Deputy Chief, Licensing Division, Public Safety and Homeland Security Bureau, to Joseph Kroboth, III, Director of Public Works, Washington County, dated March 22, 2012 (*Stop Work Letter*).

We find that notwithstanding the County's consistent position that the APE should not be expanded, the County has fully addressed the proposed Miller Avenue tower's impact on historic properties outside the presumptive APE. We further find, based on the record, that the tower will have no adverse effect on historic properties. The Section 106 process is therefore complete, the *Stop Work Letter* is lifted, and the County may resume construction of the Miller Avenue tower.

Background

Under Section 106 of the NHPA, federal agencies are required to take into account the effects of their proposed undertakings on properties included in or eligible for inclusion in the National Register of Historic Places. Construction of a facility to support FCC-licensed antennas constitutes a Commission undertaking within the meaning of the NHPA.³ Accordingly, the Commission's rules require a licensee or an applicant, prior to constructing a facility, to determine whether the facility may affect historic properties.⁴

To determine whether a proposed facility may affect historic properties, an applicant must follow procedures specified in the Nationwide Agreement that has been incorporated into the Commission's rules.⁵ Prior to any new tower construction activity, an applicant must, among other things, submit an FCC Form 620 and accompanying submission packet to the pertinent State Historic Preservation Officer (SHPO).⁶ The Form 620 evaluates the proposed facility's effects on historic properties within the APE. For a tower under 200 feet, the presumed APE for visual effects is one half mile.⁷ However, the SHPO may recommend, and the parties may agree to, an alternative APE.⁸

Under the Nationwide Agreement, the SHPO's concurrence with an applicant's determination of no adverse effect is ordinarily conclusive and completes the Section 106 process.⁹ Similarly, the SHPO's period to review the FCC Form 620/submission packet is generally limited to 30 days from receipt, during which period the SHPO may request additional information if it determines that the submission packet is inadequate.¹⁰ The Nationwide Agreement is designed to achieve finality in the determination of an undertaking's effect within

³ See Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd. 1073, 1079, para. 19 (2004).

⁴ See 47 C.F.R. § 1.1307(a)(4).

⁵ See *id.*; Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, 47 C.F.R. Pt. 1, App. C (Nationwide Agreement).

⁶ See Nationwide Agreement, § VII.A.1; see also 16 U.S.C. § 470a(b)(i)(A) (providing for designation of a SHPO to participate in Section 106 review in each state). The Maryland Historical Trust, the West Virginia Division of Culture and History, and the Virginia Department of Historic Resources are the designated SHPOs for Maryland, West Virginia, and Virginia, respectively.

⁷ See Nationwide Agreement, § VII.C.4.a.

⁸ *Id.* § VI.C.5.

⁹ *Id.*, § VII.C.1.

¹⁰ *Id.*, § VII.A.2, 4.

specific time frames, and a completed Section 106 review is not subject to reopening because the SHPO changes its view regarding the information before it.¹¹

Since at least 2006, the County has sought to erect a tower near Pleasant Valley that will support emergency communications for the County's first responders, the County's microwave system, and space for a future antenna for a statewide 700 MHz public safety system.¹² The County originally proposed a site on Keep Tryst Road near the Potomac River. In the face of community opposition, the County sought an alternative to minimize the tower's impact while meeting coverage needs.¹³ Ultimately, the County selected the site at 19005 Miller Avenue, also known as "Himes Farm." This site is located close to the junction of Maryland, Virginia, and West Virginia, just under one mile from the nearest point in Virginia and a little over one mile from the nearest point in West Virginia.¹⁴ It is undisputed that the Miller Avenue site, which is located in a wooded area, is less visible from historic and scenic areas than the originally proposed Keep Tryst Road site.¹⁵

On December 13, 2010, the County submitted FCC Form 620 to the Maryland Historical Trust (MDSHPO), the VASHPO, and the WVSHPO. The Form 620 stated that the APE for visual effects was one-half mile and that the tower would have no adverse effect on historic properties. The VASHPO recommended that the tower would have no effect on historic properties in Virginia.¹⁶ On February 2, 2011, the MDSHPO found no adverse effect on historic properties in Maryland.¹⁷ The MDSHPO also recommended that the County should protect the nearby historic ruins associated with the Himes Property/Easton Domestic site from any potential direct effects during the construction of the Miller Avenue tower.¹⁸

¹¹ In the Matter of Wireless Properties, LLC Petition for Declaratory Ruling, Proposed Tower, Missionary Ridge, Chattanooga, Tennessee, *Order*, 22 FCC Rcd. 9299, 9304, para.13 (WTB/SCPD 2007), *app. for review pending (Chattanooga Order)*.

¹² See Letter from Joseph Kroboth, III, Director of Public Works, Washington County, to Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, dated March 19, 2012, at 1 (stating that site "is needed to provide coverage in the rural southern portion of the county and the Potomac River recreational corridor where significant emergency response activity occurs).

¹³ See Letter from Joseph Kroboth, III, Director of Public Works, Washington County, to Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, dated May 4, 2011 (May 2011 Washington County Letter).

¹⁴ *Id.* at 1.

¹⁵ See Letter from Rebecca L. Harriett, Superintendent, Harpers Ferry National Historical Park and Pamela Underhill, Park Manager, Appalachian National Scenic Trail, to Tina Rupert, Documents Coordinator, Washington County Division of Public Works, dated Jan. 14, 2011 (January 2011 NPS Units Letter).

¹⁶ See Memorandum from Chris Novelli, Architectural Historian, Virginia Department of Historic Resources, to Joseph Kroboth, III, Director of Public Works, Washington County, dated October 14, 2010.

¹⁷ See Letter from J. Rodney Little, Director and State Historic Preservation Officer, Maryland Historical Trust, to Joseph Kroboth, III, Director of Public Works, Washington County, dated Feb. 2, 2011 (February 2011 MDSHPO Letter); see also E-mail from Beth Cole, Maryland Historical Trust, to Stephen DelSordo, Federal Preservation Officer, FCC, dated June 3, 2011 (reaffirming the MDSHPO's finding).

¹⁸ See February 2011 MDSHPO Letter at 2.

On January 14, 2011, the WVSHPO requested an enlarged APE to assess whether the Miller Avenue tower would adversely affect historic resources in Harpers Ferry NHP in West Virginia.¹⁹ On March 9, 2011, the County declined to extend the APE, stating that the tower would be visible in West Virginia only from points that are not recognized as historic.²⁰ On April 12, 2011, the WVSHPO requested further photo simulations from two overlooks in Harpers Ferry NHP.²¹ The County provided the further simulations, acknowledging that the tower would be visible from these locations but again disputing that it would adversely affect historic properties.²² On June 9, 2011, the WVSHPO disagreed with the County's no adverse effect recommendation and asked the County to develop mitigation in consultation with the NPS Units.²³ Neither party asked the Commission to resolve the disagreement over expanding the APE.²⁴ Accordingly, the APE definition and the tower's potential effect remained unresolved.

In March 2012, the Division received information that, notwithstanding the incomplete Section 106 review, the County had begun construction on the Miller Avenue tower. Accordingly, the Division and the Licensing Division of the FCC Public Safety and Homeland Security Bureau ordered the County to stop work pending completion of the Section 106 review.²⁵ We stated that we would review the record to determine whether the APE should be expanded and to consider the tower's potential effect on historic properties.

In addition to the WVSHPO, the NPS Units, which are consulting parties to the Section 106 review, have also requested an expanded APE.²⁶ In a January 2011 letter addressed to the

¹⁹ See Letter from Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, to Joseph Kroboth, III, Director of Public Works, Washington County, dated Jan. 14, 2011.

²⁰ See Letter from Joseph Kroboth, III, Director of Public Works, Washington County, to Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, dated March 9, 2011.

²¹ See Letter from Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, to Joseph Kroboth, III, Director of Public Works, Washington County, dated April 12, 2011.

²² See Letter from Joseph Kroboth, III, Director of Public Works, Washington County, to Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, dated May 4, 2011 (May 2011 Washington County Letter).

²³ See Letter from Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, to Joseph Kroboth, III, Director of Public Works, Washington County, dated June 9, 2011 (June 2011 WVSHPO Letter); see also Letter from Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer, to Joseph Kroboth, III, Director of Public Works, Washington County, dated April 17, 2012 (April 2012 WVSHPO Letter) (reiterating the WVSHPO's position).

²⁴ See Nationwide Agreement, § VI.B.6 (when an Applicant and a SHPO cannot agree on the APE definition, either party may ask the Commission to determine the appropriate APE).

²⁵ See *Stop Work Letter*, dated March 22, 2012.

²⁶ See 36 C.F.R. § 800.2(c)(5) (permitting individuals and organizations with a demonstrated interest in the undertaking to participate in review as consulting parties); Nationwide Agreement, §§ V.F, G (describing process for interested individuals and organizations to become consulting parties and rights of consulting parties). Although the NPS Units did not formally request consulting party status, the parties have consistently treated them as consulting parties throughout the review and accordingly we do so here. The Chesapeake and Ohio Canal National Historical Park (C&O Canal) was also identified as a consulting party

County, the NPS Units contended that the APE should be expanded because the tower would be visible from several vantage points in three states.²⁷ On May 11, 2011, the NPS Units asked the MDSHPO to reconsider its decision not to expand the APE, stating that the MDSHPO had not fully considered sites outside the half-mile radius.²⁸ On June 4, 2012, the NPS Units for the first time addressed the Commission with their concerns. The NPS Units state that the APE should be expanded because there are known historic resources outside the presumed APE that the NPS Units say would be adversely affected, that they disagree with the decisions of the VASHPO and MDSHPO not to expand the presumed APE, that the County should negotiate a Memorandum of Agreement in response to the WVSHPO's recommendation of adverse effect, and that the County has not adequately explained why it cannot shorten the tower or move it to a less conspicuous location.²⁹

On July 3, 2012, the VASHPO for the first time asserted that, notwithstanding its earlier finding of no effect, it now believed the proposed tower would likely have an adverse effect on historic resources in Virginia. In support of this position, the VASHPO cites photographs from a March 2010 balloon test, which the VASHPO states only recently came to its attention, that show the tower will be visible above the tree line from one location in Harpers Ferry NHP in Virginia and below the tree line from another location. The VASHPO also states that in January 2012 it determined the area between these locations to be a potentially eligible Rural Historic District, and that the visual impact on this area would likely be similar to that on one of the vantage points in Harpers Ferry NHP. The VASHPO asks the Commission to encourage the County to consider ways to reduce or avoid the project's likely adverse effects.³⁰

Discussion

As required under the Commission's rules, the County prior to construction completed FCC Form 620 to consider the proposed undertaking's effects on historic properties. The County's Form 620 and submission packet consider effects on historic properties in Maryland, Virginia, and West Virginia, and the County submitted it to the SHPOs in all three states. The VASHPO found that the tower would have no effect on historic properties in Virginia, and the MDSHPO found no adverse effect on historic properties in Maryland. Under the Nationwide Agreement, these determinations concluded the Section 106 review for effects in Maryland and

during Section 106 review for the proposed Keep Tryst Road site. However, the C&O Canal has not participated in review of the Miller Avenue site.

²⁷ See January 2011 NPS Units Letter. Although the NPS Units copied the Commission's Federal Preservation Officer, Stephen DelSordo, on this letter, they did not request any action from the Commission at this time.

²⁸ See Letter from Pamela Underhill, Park Manager, Appalachian National Scenic Trail, and Rebecca L. Harriett, Superintendent, Harpers Ferry National Historical Park, to J. Rodney Little, Director and State Historic Preservation Officer, Maryland Historical Trust, dated May 11, 2011. The NPS Units did not copy the Commission on this letter. The MDSHPO responded to this communication in its e-mail of June 3, 2011. See note 17, *supra*.

²⁹ See Letter from Rebecca L. Harriett, Superintendent, Harpers Ferry National Historical Park, and Pamela Underhill, Park Manager, Appalachian National Scenic Trail, to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated June 4, 2012.

³⁰ See Letter from Christopher V. Novelli, Virginia Department of Historic Resources, to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated July 3, 2012.

Virginia.³¹ Although the VASHPO has now indicated that the proposed tower would “likely” have an adverse effect on historic properties in Virginia, the only items of “new information” it cites to support its reconsidered position are the results of balloon tests from more than two years ago and its own recent identification of a potentially eligible Rural Historic District. These events do not establish a material omission by the County or other failure to complete the foundational steps of the Section 106 process such as to overcome the earlier determination’s finality.³² Similarly, although the NPS Units state that they “disagree” with the MDSHPO’s finding, they have not alleged any misrepresentation or other material defect in the submission that might invalidate the MDSHPO’s determination. In any event, even if we were to review the MDSHPO’s and VASHPO’s determinations, we would find no error in their conclusions.

The WVSHPO timely requested that the County expand the presumptive APE to include properties in Harpers Ferry NHP. The County declined to expand the APE because, it concluded, the tower would not be visible from any known or recorded historic properties outside the presumptive APE in West Virginia. If the applicant and the SHPO cannot reach an agreement on the use of an alternative APE, either party may submit the issue to the Commission for resolution.³³ Although neither party in this instance has asked the Commission to resolve their disagreement over the APE, we find that the issue is fully joined and that it is in the public interest for us to consider the matter.

Nonetheless, on these facts, we find that it is unnecessary for us to resolve whether the APE should be expanded. Although the County stated in its Form 620 that the APE was one-half mile and has consistently argued against expanding the APE, the Form 620 did fully address the proposed tower’s effects on properties outside the presumptive APE, including its visibility from the two lookouts that the WVSHPO has identified. Among other things, the Form 620 discussed the results of balloon test observations from these locations. Furthermore, in response to the WVSHPO’s request, the County subsequently created photo simulations from these locations and provided them to the WVSHPO. Based on this record, the WVSHPO has rendered its opinion that the tower will have an adverse effect on historic properties. The County has contested this conclusion. The NPS Units have also had an opportunity to address such effects. While we do not decide whether the record compels expansion of the presumptive APE, we find that the APE has in effect been expanded as the WVSHPO requests.

We therefore proceed to address the dispute regarding the proposed tower’s effect on historic properties.³⁴ Based on our Federal Preservation Officer’s review of the record, we find

³¹ See Nationwide Agreement §§ VII.B.1, VII.C.1. We note that the MDSHPO did not render its determination within 30 days of receiving the Form 620 Submission Packet. See *id.*, § VII.A.2. However, the County did not choose to forward the Submission Packet to the Commission for review after 30 days, see *id.*, § VII.C.2, and it is undisputed that the MDSHPO’s delayed concurrence with the County’s determination of no adverse effect is valid.

³² See *Chattanooga Order*, 22 FCC Rcd. at 9304-05, para. 14.

³³ See Nationwide Agreement, § VI.C.5.

³⁴ *Id.* at § VII.C.4 (if the applicant and the SHPO do not resolve their dispute as to whether a proposed facility may have an adverse effect on historic properties, the applicant may submit the matter to the Commission). Although the County has not formally requested that we resolve the tower’s effect, the record is complete and the parties’ positions are clear. Given the procedural posture and the tower’s public safety implications, we find it appropriate and in the public interest to resolve the parties’ dispute.

that the proposed tower will not have an adverse effect on historic properties. The WVSHPO states that the relatively pristine landscape around Harpers Ferry NHP and the Appalachian National Scenic Trail “remain[s] an important aspect of their historic integrity,”³⁵ and that the tower’s visibility from the overlooks in question “will have a significant visual impact.”³⁶ However, while the lookouts are located within Harpers Ferry NHP, there is no indication that they are themselves of historic significance. Therefore, the tower’s visibility from these locations will not diminish the characteristics that qualify any property for listing on the National Register of Historic Places.³⁷ Because the proposed tower will not have an adverse effect on historic properties, there is no requirement under the NHPA or the Commission’s rules to consider alternatives or to complete a Memorandum of Agreement.

Conclusion

The Division has reviewed the County’s Form 620 and submission packet. We have also reviewed the comments and correspondence from the WVSHPO, VASHPO, MDSHPO, and consulting parties. The Division finds that the Miller Avenue tower will have no adverse effect on historic properties. Therefore, the Section 106 process is complete. The Division lifts the *Stop Work Letter* and allows the County to resume construction on the Miller Avenue tower. The Division also concurs with the MDSHPO that the County should protect the Himes property from any direct effect during construction through appropriate safeguards. This action is taken pursuant to delegated authority under 47 C.F.R. § 0.331.

For additional information, please contact Don Johnson at (202) 418-7444.

Sincerely,

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

³⁵ See April 2012 WVSHPO Letter at 1.

³⁶ See June 2011 WVSHPO Letter. The NPS Units similarly rely on the tower’s visibility from various vantage points, without providing details of how the tower would diminish the qualifying characteristics of historic properties.

³⁷ See Nationwide 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.”); see also 36 C.F.R. § 800.5(a)(1) (similar). Since the visibility of the Miller Avenue tower from these vantage points does not diminish any character-defining feature of eligibility, we do not need to consider the WVSHPO’s argument that the possibility of future towers or collocations in the area may create a cumulative adverse effect. See June 2011 WVSHPO Letter. We note that any future towers in the Pleasant Valley area will be required to complete Section 106 review.

cc: Beth Cole, Maryland Historic Trust
Susan M. Pierce, West Virginia Deputy State Historic Preservation Officer
Christopher V. Novelli, Virginia Department of Historic Resources
Pamela Underhill, Superintendent, National Park Service, Appalachian Trail
Rebecca Harriett, Superintendent, National Park Service, Harpers Ferry National
Historical Park