

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

In the Matter of)
)
Proposed Tower KY-03061 Lloyd Rd Near 1621)
Stamping Ground Road, Georgetown, Scott)
County, Kentucky/Choctaw Academy)

ORDER ON RECONSIDERATION

Adopted: October 29, 2018

Released: October 29, 2018

By the Acting Deputy Chief, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau

I. INTRODUCTION

1. On March 8, 2017, the Competition and Infrastructure Policy Division of the Wireless Telecommunications Bureau (WTB) issued a Letter Decision finding that construction of Skyway Towers LLC's (Skyway) proposed tower in Scott County, Kentucky will have no effect on any historic property.¹ On April 7, 2017, William Richardson filed a timely Petition for Reconsideration pursuant to Section 1.106 of our rules, requesting that WTB reconsider the *Decision*.² After the deadline for reconsideration petitions had passed, Richardson and other parties made additional arguments in letters and other submissions that we construe as requests to reopen the Section 106 National Historic Preservation Act review process under Section XI of the Nationwide Programmatic Agreement.³ For the reasons discussed below, we deny Richardson's Petition and the requests to reopen the Section 106 process.

II. BACKGROUND

2. On March 24, 2015, Skyway filed an application with the Commission's Tower Construction Notification System (TCNS 124749 Georgetown KY). On December 10, 2015, Skyway submitted to the Commission's Electronic Section 106 (E-106) system an original application, including FCC Form 620, to construct a 310-foot tower near 1621 Stamping Ground Road in Scott County, Kentucky. Skyway also sent an application and required documents for this proposed tower to the Kentucky Heritage Council (Kentucky SHPO).⁴ On January 12, 2016, Skyway's consultant sent an email to the Kentucky SHPO inquiring about the status of the application. The next day, the Kentucky SHPO responded with an email that included the cover sheet for Skyway's application, date stamped to show receipt by the Kentucky SHPO, on December 14, 2015, and bearing a second stamp stating "CONCUR: No Effect on Historic Properties." The latter stamp includes the signature of a Kentucky SHPO employee and is dated January

¹ *Proposed 199-Foot Tower Near Stamping Ground Road, Georgetown, Scott County, Kentucky*, Letter Decision (WTB/CIPD Mar. 8, 2017) (*Decision*).

² 47 CFR § 1.106; William Richardson Petition for Reconsideration, at 2 (filed Apr. 7, 2017) (Petition).

³ Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App. C, § XI (NPA).

⁴ Skyway FCC Form 620 (filed December 10, 2015) (Skyway Form 620). The Kentucky Heritage Council is the State Historic Preservation Officer (SHPO) for Kentucky pursuant to 54 U.S.C. § 302301.

13, 2016.⁵

3. On March 4, 2016, the Kentucky SHPO wrote a letter to the Skyway consultant acknowledging that the office had previously concurred with Skyway's finding of "No Historic Properties Affected" but informing Skyway that a concerned citizen had notified the Kentucky SHPO that the proposed tower had the potential to negatively impact the Choctaw Academy. Choctaw Academy is listed in the National Register of Historic Places, and located within the 0.75 mile presumptive Area of Potential Effect (APE) for the proposed 310-foot tower.⁶ On March 10, 2016, a Skyway consultant informed the Kentucky SHPO that Skyway would lower the height of the proposed tower to 199 feet, which would reduce the APE from 0.75 to 0.5 miles and place the Choctaw Academy well outside the visual APE.⁷

4. On April 27, 2016, Skyway submitted a revised FCC Form 620 to the Kentucky SHPO for the proposed 199-foot tower.⁸ On June 3, 2016, the Kentucky SHPO acknowledged that because the proposed tower height would be reduced to 199 feet, it was subject to a reduced 0.5 mile APE and, as a result "does not encompass Choctaw Academy."⁹ Nevertheless, the Kentucky SHPO, after considering a balloon test Skyway conducted on March 17, 2016, found that "due to the topography of the area the proposed communications tower will still be visible from the Choctaw Academy."¹⁰ The Kentucky SHPO also asserted that the "viewshed photos highlight the purity of the viewshed."¹¹ For these reasons, the Kentucky SHPO recommended that the proposed tower would have an adverse effect on the nearby Choctaw Academy and suggested that the APE for the proposed 199-foot tower should include the Academy.¹² On October 31, 2016, the Kentucky SHPO again requested that the Choctaw Academy be included within the APE because "of the level of significance of the [academy]."¹³

5. On March 8, 2017, WTB issued the *Decision* finding that the proposed tower would have no effect on the Choctaw Academy or any other historic property, and that the siting of the tower did not warrant an increased APE for visual effects.¹⁴ The *Decision* explained that WTB staff had reviewed the

⁵ Email from Amanda Kincaid, Transportation Architecture Historic Coordinator, State Historic Preservation Office, Kentucky to Mary Seagrave, Sims and Associates LLC (Jan. 13, 2016 10:13 AM).

⁶ Letter from Craig A. Potts, Executive Director and State Historic Preservation Officer, Kentucky to Mary Seagrave, Sims and Associates (March 4, 2016). The NPA defines the APE as the "geographic area or areas within which an Undertaking may directly or indirectly cause alterations in the character or use of Historic Properties, if any such properties exist." NPA § II A.3.

⁷ Email from Mary Seagrave, Sims and Associates LLC, to Amanda Kincaid, Transportation Architecture Historic Coordinator, State Historic Preservation Office, Kentucky (Mar. 10, 2016 11:05 AM).

⁸ *Proposed 199-Foot Tower Near Stamping Ground Road, Georgetown, Scott County, Kentucky*, Order, 32 FCC Rcd 7402, para 2 (Oct. 10, 2017). (*Procedural Order*).

⁹ Letter from Craig A. Potts, Executive Director and State Historic Preservation Officer, Kentucky, to Mary Seagrave, Sims and Associates LLC (June 3, 2016).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Letter from Craig A. Potts, Executive Director and State Historic Preservation Officer, Kentucky, to Mary Seagrave, Sims and Associates LLC (Oct. 31, 2016); *see also* NPA §§ VI.C.4.a (presumed half-mile APE for visual effects for towers 200 feet or less in height), VI.C.6 (Commission may establish an alternative APE upon request if applicant and SHPO/THPO cannot agree).

¹⁴ *Decision* at 1.

balloon test results.¹⁵ A letter from Skyway, which accompanied the balloon test results, stated that the “balloon was extremely difficult to see from the areas surrounding the Choctaw Academy without the aid of binoculars or other magnifying equipment.”¹⁶ The *Decision* also noted that WTB staff considered a letter from Richardson, the owner of Choctaw Academy, and found that the record does not “show that the relatively minimal visibility of the tower, at this distance, will compromise the characteristics that render the Choctaw Academy and its surrounding 3.5 acres eligible for listing on the NRHP.”¹⁷ Therefore, the *Decision* rejected the Kentucky SHPO’s “adverse effect” recommendation and concurred with Skyway’s finding of “No Historic Properties Affected.”¹⁸

6. *Petition for Reconsideration.* On April 7, 2017, Richardson timely filed the Petition, arguing that the proposed tower sits on a bluff approximately 70 feet above the elevation of the Choctaw Academy and that the overall height of the proposed tower should include this additional elevation, making the effective height of the proposed tower 279 feet.¹⁹ Richardson asserts that with the added height, the NPA requires that the APE for visual effects for the proposed tower be three-quarters of a mile instead of half a mile. Further, Richardson asserts that the tower’s site is 0.69 miles from the Choctaw Academy, not 1.6 miles as stated in the *Decision*, and that the Choctaw Academy is thus within the appropriate APE radius.²⁰ Finally, Richardson argues that Skyway did not work with him and the Kentucky SHPO in “good faith” to arrive at an alternative APE as required under the NPA.²¹ The Petition concludes by stating that WTB should reconsider its *Decision* and expand the APE to three-quarters of a mile and find adverse effects.²²

7. *Kentucky SHPO April 2017 Letter.* On April 10, 2017, the Kentucky SHPO wrote WTB stating that “new information has come to [its] attention.”²³ First, the Kentucky SHPO repeated the Petition’s statement that Choctaw Academy was “in fact 0.69 miles away from the proposed tower location.”²⁴ Second, the Kentucky SHPO stated that Ann Bevins, the Scott County Historian, had discovered new information about a site, SC150, that Skyway had already identified in its December 10, 2015 original submission.²⁵ That submission, which relied on the Kentucky SHPO’s records,²⁶ contained a map showing SC 150 as an above ground historic resource very close to the proposed tower but with the

¹⁵ *Id.* at 3.

¹⁶ Letter from Mary Seagrave, Sims and Associates LLC to Dr. Ian Thompson, Choctaw Nation of Oklahoma at 2 (Jun. 3, 2016).

¹⁷ *Decision* at 3-4.

¹⁸ *Id.* at 1.

¹⁹ Petition at 2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1-2.

²³ Letter from Craig A. Potts, Executive Director and State Historic Preservation Officer, Kentucky, to Jeffrey S. Steinberg, Deputy Chief, Competition and Infrastructure Policy Division, Federal Communications Commission (Apr. 10, 2017) (Potts April 2017 Letter to WTB) at 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Skyway Form 620 at Attachment 6 (Historic Properties Identified in the APE for Visual Effect).

note that the site is “no longer extant.”²⁷ According to the Kentucky SHPO, Ms. Bevins stated “that site [SC150], also known as Groverland, is still standing with all of its contributing buildings intact.”²⁸ After the Kentucky SHPO acknowledged that Groverland was omitted from the Kentucky SHPO’s records due to an error, it recommended that the Commission reopen the Section 106 process.²⁹

8. *ACHP Letter.* On May 11, 2017, the Assistant Director of the Advisory Council on Historic Preservation (ACHP) wrote a letter asking WTB staff to consider several procedural issues related to the Commission’s compliance with Section 106 of the National Historic Preservation Act and the Nationwide Programmatic Agreement.³⁰ The issues, which were based on claims made by Richardson and other parties, included: (1) that communications with FCC staff allegedly led parties to believe they needed legal representation to substantively participate in the Section 106 process; (2) the distance between the proposed tower and a historic property was incorrect in the FCC’s *Decision*; (3) the FCC did not grant consulting party status to certain parties that requested it; (4) the FCC and Skyway did not consider Groverland because of errors in the Kentucky SHPO’s GIS database; and (5) tribal outreach conducted by the Applicant was limited to one Indian tribe without including other tribes that had attended the Choctaw Academy.³¹

9. *Procedural Order.* On April 11, 2017, after the statutory 30-day reconsideration period had expired, Richardson had filed a Motion for Leave to File a Supplement to his Petition, and a Supplement to his Petition.³² On October 10, 2017, WTB issued a *Procedural Order* addressing those additional filings. In that order, WTB denied the Motion, dismissed the Supplement as untimely, and reset the pleading cycle for the Petition.³³ In addition, the *Procedural Order* specifically stated that “[a]ny substantive allegations raised in the Motion or Supplement are not part of the record.”³⁴ Because Richardson admitted that he knew about Groverland several days before the April 7 deadline to file a petition, the *Procedural Order* rejected Richardson’s argument that WTB should consider, as part of his Petition, the argument that Skyway failed to consider Groverland.³⁵ The *Procedural Order* noted, however, that the Commission was not precluded from considering the Groverland property under Section XI of the NPA.³⁶

10. *Opposition to Petition and Reply to Opposition.* On October 25, 2017, Skyway filed an Opposition to the Petition, in which it argued that: (1) telecommunications towers are measured using height above ground level and not “effective height;” (2) the Petition concedes that the Choctaw Academy is located outside of the half-mile APE required for the proposed tower under the NPA; (3) the 0.5-mile APE was appropriate as a matter of law; and (4) refusing to accede to a legally groundless

²⁷ Potts April 2017 Letter to WTB at 1-2; *see also* Letter from Ann Bolton Bevins to Jeffrey Steinberg, Deputy Chief, Competition and Infrastructure Division, Wireless Telecommunications Bureau, FCC at 1 (Nov. 13, 2017) (Bevins Letter).

²⁸ Potts April 2017 Letter to WTB at 1-2.

²⁹ *Id.* at 2.

³⁰ Letter from Charlene Vaughn, Assistant Director, Office of Federal Agency Programs, Federal Permitting, Licensing, and Assistance Section, Advisory Council on Historic Preservation to Jeffrey S. Steinberg, Deputy Chief, Competition and Infrastructure Policy Division, Federal Communications Commission at 1-2 (May 11, 2017) (ACHP Letter).

³¹ *Id.*

³² *Procedural Order*, 32 FCC Rcd at 7403, para. 6.

³³ *Id.* at 7405, para. 11.

³⁴ *Id.*

³⁵ *Id.* at 7405, para. 10.

³⁶ *Id.* at 7405, para. 10 n. 36.

demand is not a lack of good faith.³⁷ Finally, Skyway stated that the location of the proposed tower and the elevation of the bluff were known to Richardson before the *Decision* was issued and, therefore, Richardson's good faith argument does not rely on previously unknown facts, as required by the Commission's rules.³⁸

11. On November 5, 2017, Richardson filed a reply arguing that the Kentucky SHPO had retracted its initial finding of no adverse effect and that Skyway's balloon test demonstrates that the Choctaw Academy will be visually impacted by the proposed tower.³⁹ In addition to contesting the height of the proposed tower, Richardson argued that the NPA requires Skyway to examine other factors such as topography, land use, and the known presence of historical properties in the area to determine if there would be adverse impacts.⁴⁰ Richardson speculated that WTB's decision not to expand the APE might have been influenced by the mistaken understanding that the Choctaw Academy is located 1.6 miles away from the proposed tower, instead of its actual location 0.69 miles away, as the former would have required a much greater expansion of the APE in order to consider Choctaw Academy.⁴¹ Richardson concluded that the NPA gives the Commission the ability to modify the APE where circumstances warrant, and that the Commission should grant the Petition and reopen the record in this proceeding.⁴²

12. *Additional Filings.* A number of parties also sent letters and emails to the WTB staff asking the Commission to reopen the Section 106 process based on arguments similar to Richardson's.⁴³ They assert that Skyway's application contained several material omissions because it failed to identify historic properties such as the Choctaw Academy, a Tribal burial site near Choctaw Academy, Groverland, and various other properties. They argue that under the precedent set in *Wireless Properties*,⁴⁴ the Commission should reopen the Section 106 process.⁴⁵ A number of these parties also contend that Tribal outreach was inadequate because students of the Choctaw Academy came from 17 Tribal nations and not all of those Tribal nations were contacted.⁴⁶ Some of the parties further assert that the FCC did not recognize other stakeholders as consulting parties even though they met the criteria for Section 106 consulting parties and submitted formal requests for consulting party status to the FCC and Skyway.⁴⁷ Some also asserted that determinations in the *Decision* were not corrected when factual errors regarding

³⁷ Skyway Towers, LLC's Opposition to Richardson's Petition for Reconsideration at 1-5 (filed Oct. 25, 2017) (Opposition).

³⁸ *Id.* at 6-7; *see also* 47 U.S.C. § 405(a), 47 CFR § 1.106(b).

³⁹ William Richardson's Reply to Skyway's Opposition at 1 (filed Nov. 5, 2017) (Reply).

⁴⁰ *Id.* at 1-2.

⁴¹ *Id.* at 2.

⁴² *Id.* at 2-3.

⁴³ Bevins Letter; Letter from Christina Snyder, Professor, Pennsylvania State University, to Jeffrey Steinberg, Deputy Chief, Competition and Infrastructure Division, Wireless Telecommunications Bureau, FCC (Nov. 13, 2017) (Snyder Letter); Letter from Chad Wallace, Scott County Magistrate, to Jeffrey Steinberg, Deputy Chief, Competition and Infrastructure Division, Wireless Telecommunications Bureau, FCC (Nov. 16, 2017) (Wallace Letter); Letter from Phillip Pratt, State Representative, 62nd Legislative District, Commonwealth of Kentucky, to Jeffrey Steinberg, Deputy Chief, Competition and Infrastructure Division, Wireless Telecommunications Bureau, FCC (Nov. 20, 2017) (Pratt Letter).

⁴⁴ *Wireless Properties (Missionary Ridge)*, Memorandum Opinion and Order, 30 FCC Rcd 7707, 7713, para. 17 (2015) (holding that Section XI of the NPA allows the Commission to reopen the Section 106 process when the applicant has made a material error or omission in the information it submitted).

⁴⁵ Bevins Letter at 1; Snyder Letter at 1; Wallace Letter at 1-2; Pratt Letter at 1-2.

⁴⁶ Bevins Letter at 2; Snyder Letter at 2; Wallace Letter at 1; Pratt Letter at 3.

⁴⁷ Bevins Letter at 2; Snyder Letter at 2; Pratt Letter at 2-3.

the distance between the proposed towers and the historic property were brought to its attention.⁴⁸

13. On July 10, 2018, Skyway sent a letter to WTB staff inquiring about the status of Richardson's petition for reconsideration.⁴⁹ That letter recounted the March 8, 2017 *Decision* in Skyway's favor and urged WTB "to resolve Mr. Richardson's pending Petition for Reconsideration as expeditiously as possible so that Skyway can move forward with construction of the Proposed Tower."⁵⁰ On July 16, 2018, Richardson responded to that letter and restated previous arguments that "Skyway's application and Form 620 contained material errors and omissions with respect to [Groverland] a National Register eligible landmark, specifically Groverland," that it claims is within the APE of Skyway's proposed tower.⁵¹ It also directed WTB's attention to the Commission's 2015 decision in *Wireless Properties* that reopened a Section 106 proceeding because of material error by the applicant.⁵²

III. DISCUSSION

A. Richardson's Petition for Reconsideration.

14. A petition for reconsideration must present facts and arguments that: (1) relate to circumstances that occurred after the issuance of the *Decision*; (2) were unknown to Richardson until after his last opportunity to present them to the Commission, which he could not have learned through the exercise of ordinary diligence; or (3) the public interest requires the Commission to consider.⁵³ We deny the Petition for failure to meet this standard.

15. Richardson's argument that the height of the proposed tower should include the 70-foot bluff on which it will be sited was raised well before the *Decision* and has already been rejected. The *Decision* specifically stated that WTB had taken into consideration a letter from Richardson that made the same claim about the 70-foot bluff.⁵⁴ The Petition does not raise any new facts regarding the height of the tower not already known to Richardson, nor does it relate to something that occurred after the *Decision*. Moreover, Richardson's argument on how tower height should be calculated is substantively incorrect. For purposes of determining the APE, our rules measure proposed towers from their base to their upmost point, including top-mounted attachments such as lightning rods.⁵⁵ This measurement is focused on height above ground level and not "effective height" as referred to in the Petition or "height above average terrain," as referred to in other parts of the Commission's rules pertaining to power and radiation limits of broadcast and wireless transmitters.⁵⁶ It is undisputed that the proposed tower itself without the

⁴⁸ Bevins Letter at 2; Snyder Letter at 2; Pratt Letter at 1.

⁴⁹ Letter from Michele Farquhar to Jeffrey Steinberg, Deputy Chief, Competition and Infrastructure Division, Wireless Telecommunications Bureau, FCC at 1 (Jul. 10, 2018).

⁵⁰ *Id.*

⁵¹ Letter from Chris Clendenen to Aaron Goldschmidt, Acting Deputy Chief, Competition and Infrastructure Division, Wireless Telecommunications Bureau, FCC (Jul. 16, 2018).

⁵² *Id.* at 2.

⁵³ 47 U.S.C. § 405(a); 47 CFR § 1.106(b).

⁵⁴ *Decision* at 3-4.

⁵⁵ See FCC Form 620 at 3 (requesting that applicants provide "Tower height above ground level include top-mounted attachments such as lightning rods"). We observe that accepting Richardson's argument would require us to find that a one-foot tower situated on a 300-foot bluff be considered a 301-foot tower for Section 106 purposes.

⁵⁶ See, e.g., 47 CFR § 22.627 (effective radiated power limits); § 22.659 (effective radiated power limits); § 73.625 (field strength limits); § 73.6010 (Class A TV station protected contour); § 101.1333 (power limits of master stations).

elevation height included is 199 feet.⁵⁷ The NPA states that the presumed APE for visual effects for a tower of 199 feet is a half-mile radius around the tower.⁵⁸ Because it is undisputed that the Choctaw Academy is more than a half-mile away from the proposed tower,⁵⁹ the fact that the *Decision* incorrectly listed the distance to Choctaw Academy as 1.6 miles instead of 0.69 miles is harmless error at best, and not grounds for changing the *Decision*.

16. As to Richardson's request to modify the APE, the *Decision* took into account Skyway's balloon test, finding that "[t]he balloon [used to represent the tower] was extremely difficult to see from the areas surrounding the Choctaw Academy without the aid of binoculars or other magnifying equipment."⁶⁰ From the test result photos, visibility was good on the day of the test, with scattered clouds, no leaves present on the tress, and minimal vegetative cover to interfere with views of the balloon.⁶¹ The consultants who performed the test stated that with leaves on the trees it would be virtually impossible to see the proposed tower.⁶² We agreed with that conclusion, and further note that the *Decision's* conclusion on visual impacts included not just the Choctaw Academy, but also the 3.5 acres surrounding the site.⁶³ This finding by necessity includes other structures in the area surrounding the Choctaw Academy, to the extent that adjacent properties are also historically significant. The Petition's discussion about alleged impacts on Choctaw Academy does not present any new facts or arguments to warrant changing the *Decision*, nor does it present a compelling public interest to modify the APE.⁶⁴

17. Finally, we find unpersuasive Richardson's argument that Skyway did not work in good faith with Richardson and the Kentucky SHPO. The "good faith" that the NPA calls upon parties to exercise when discussing an alternative APE does not require an applicant to agree to an alternative APE when demanded.⁶⁵ Skyway voluntarily lowered the height of the proposed tower from 310 to 199 feet, which resulted in a 0.5 mile APE, and it further commissioned a balloon test for visual effects on property outside the APE, which showed minimal visual effects at the lower height.⁶⁶ Contrary to Richardson's assertions, it appears that Skyway in fact worked in good faith with Richardson and the Kentucky SHPO to reduce the potential visual effects of the proposed tower on the Choctaw Academy and the 3.5 acres surrounding the site. For the foregoing reasons, we deny the Petition.

18. As noted above, Richardson and several other parties submitted letters and emails to WTB staff alleging additional material omissions in Skyway's application and procedural errors that relied on additional facts beyond those in the original Petition. A number of these parties asked WTB to consider

⁵⁷ Opposition at 2; Reply at 1.

⁵⁸ NPA § VI.C.4.a.

⁵⁹ Petition at 2; Opposition at 2; Reply at 2.

⁶⁰ Opposition at Exh. C at 1-2.

⁶¹ *Id.*

⁶² *Id.* at 2.

⁶³ *Decision* at 3-4.

⁶⁴ *Procedural Order*, 32 FCC Rcd at 7405, para. 10 & n.36; *see also* Opposition at 1 & n.1. As we stated in the *Procedural Order*, the only issues that can properly be considered under Section 1.106 are the issues raised in the Petition.

⁶⁵ *See* NPA § VI.C.6 ("If the Applicant and the SHPO/THPO, after using good faith efforts, cannot reach an agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution.")

⁶⁶ Opposition at 4-5, 7.

their new, untimely arguments during our review of Richardson's timely filed Petition.⁶⁷ We reject those requests. As the *Procedural Order* explained, Section 1.106(f) states that a "petition for reconsideration, and any supplement thereto, shall be filed within 30 days from the date of public notice of the final Commission action, and shall be served upon parties to the proceeding."⁶⁸ In this case, the deadline for the Petition and any supplements was April 7, 2017. Moreover, neither Richardson nor those other parties have explained why those submissions could not have been filed by April 7, 2017. Therefore, to the extent letters submitted after April 7, 2017 were intended to be petitions for reconsideration or attempts to supplement Richardson's petition, we dismiss them as untimely pursuant to Section 1.106(f). When addressing Richardson's Petition, the only arguments and evidence we have considered are those that complied with the procedural requirements and were timely filed under our Rules.⁶⁹

B. Review Under Section XI of the NPA.

19. Separate and apart from the reconsideration procedure under Section 1.106 of our rules, Section XI of the NPA gives the Commission authority to reopen a Section 106 review process. It states that "[a]ny member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement ...[and that t]he Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate, take appropriate actions."⁷⁰ Commission precedent establishes that the Commission has the discretion to reopen the Section 106 process under Section XI of NPA "only where there is a material error or omission by the applicant."⁷¹ We evaluate the arguments made by Richardson and other parties under this precedent to determine whether to reopen the Section 106 process here.

20. *Groverland and Other Properties*. Richardson, the Kentucky SHPO, and other parties request that we reopen the Section 106 process because Skyway's original submission did not identify Groverland as a historic resource.⁷² In November 2017, several parties also identified the Johnson-Pence, Julia Chinn, Robert Hall, and Vivion Upshaw houses as additional eligible historic properties.⁷³ With regard to Groverland, the Kentucky SHPO concedes that Skyway's omission of the property was due to an error by the Kentucky SHPO because "[t]he site location of [Groverland] was mapped incorrectly in the GIS database that is used by [the Kentucky SHPO's] office to generate the information for the original file search."⁷⁴ In addition, during an email exchange between March 10 and 14, 2016, Skyway affirmatively inquired whether the Kentucky SHPO or members of the public had identified any

⁶⁷ Bevins Letter at 1; Snyder Letter at 1; ACHP Letter at 1.

⁶⁸ *Procedural Order*, 32 FCC Rcd at 7404, para.7.

⁶⁹ 47 C.F.R. §1.106(f). In III. B., *infra*, however, we consider arguments raised in the additional submissions from Richardson and other parties, filed after April 7, 2017 under Section XI of the NPA and *Wireless Properties*.

⁷⁰ NPA § XI.

⁷¹ *Wireless Properties (Missionary Ridge)*, Memorandum Opinion and Order, 30 FCC Rcd 7707, 7717, para. 24 (2015); *see also AT&T Mobile Services, Inc. (Construction of Tower, Fort Ransom, North Dakota)*, Memorandum Opinion and Order, 30 FCC Rcd 11023, 11026, para. 9 (WTB 2015).

⁷² Potts April 2017 Letter to WTB at 1; Bevins Letter at 1; Snyder Letter at 1; Wallace Letter at 1-2; Pratt Letter at 1-2

⁷³ Bevins Letter at 1; Snyder Letter at 1; Wallace Letter at 1-2; Pratt Letter at 1-2; Email from Ann Bolton Bevins to Amanda Kincaid, to Amanda Kincaid, Transportation Architecture Historic Coordinator, State Historic Preservation Office, Kentucky (Mar. 20, 2017 10:49AM).

⁷⁴ Potts April 2017 Letter to WTB at 2.

properties meeting the NPA's criteria for eligible historic properties.⁷⁵ In response, the Kentucky SHPO assured Skyway that "there are no other historic sites within the reduced ½ mile APE that have been assessed as eligible or listed on the [National Register of Historic Places] that you haven't already identified."⁷⁶

21. The NPA limits applicants' efforts to identify and evaluate historic properties, which it defines as districts, sites, buildings, structures or objects included in or eligible for inclusion in the National Register of Historic Places, to the review of certain records only to the extent they are available at the offices of the SHPO/THPO or can be found in publicly available sources identified by the SHPO/THPO.⁷⁷ There is no allegation that Skyway failed to identify any properties listed by the SHPO or that could be found in public sources identified by the SHPO. In light of the Kentucky SHPO's March 14, 2016 email, it was reasonable for Skyway to conclude that any other possible historic properties near the proposed site were outside the reduced 0.5 mile APE.⁷⁸ We find no reason to reopen the Section 106 process for failure to identify a historic property where the applicant complied with the NPA and only failed to identify a historic property because of erroneous information from the SHPO, particularly where the SHPO twice assured the applicant of no other eligible historic properties within the APE. Under these circumstances, we believe Skyway satisfied its obligation under the NPA to use reasonable and good faith efforts to identify eligible properties within the APE of the proposed tower. Accordingly, we find no material error or omission by the applicant to justify reopening the Section 106 process.⁷⁹

22. Richardson and other parties contend that the Commission's 2015 *Wireless Properties* order requires reopening the Section 106 process here. We disagree and find that our decision here is consistent with *Wireless Properties*. In that case, the Commission reopened the Section 106 process because the Tennessee SHPO's initial concurrence of a no adverse effect resulted from the applicant's failure to list a historic site on the National Register of Historic Places – the Bragg Reservation.⁸⁰ Although the Bragg Reservation was not a stand-alone property in the register, it was part of a larger national military park which was listed in the register, and which the applicant should have reasonably identified during a review of the National Register.⁸¹ In contrast to *Wireless Properties*, Groverland and other properties could not have been identified during a review of the National Register. Skyway satisfied its obligations under the NPA by searching the Kentucky SHPO's records for historic properties within the APE and further obtaining confirmation from the Kentucky SHPO that no eligible historic properties were within the APE.

⁷⁵ Email from Mary Seagrave, Sims and Associates LLC to Amanda Kincaid, Transportation Architecture Historic Coordinator, State Historic Preservation Office, Kentucky (Mar. 10, 2016 11:05 AM).

⁷⁶ Email from Amanda Kincaid, Transportation Architecture Historic Coordinator, State Historic Preservation Office, Kentucky to Mary Seagraves, Sims and Associates LLC (Mar. 14, 2016 1:10 PM).

⁷⁷ NPA § VI.D.1.a

⁷⁸ We also note that the Kentucky SHPO's April 10, 2017 letter requesting that the Commission reopen this Section 106 process because of Groverland did not mention the Johnson-Pence, Julia Chinn, Robert Hall, and Vivion Upshaw houses as eligible historic properties within the APE of the proposed tower. See Potts April 2017 Letter to WTB at 1-2.

⁷⁹ See 36 CFR § 800.4(b) (rules for implementing Section 106 of the NHPA require agency to ensure reasonable and good faith efforts were made to identify eligible historic properties); http://www.achp.gov/docs/reasonable_good_faith_identification.pdf (guidance from ACHP provides that an identification effort is reasonable "when it is logically designed to identify eligible properties that may be affected by the undertaking," and it is in good faith when not compromised by lack of integrity or omission) (last visited Aug. 2, 2018).

⁸⁰ *Wireless Properties (Missionary Ridge)*, 30 FCC Rcd at 7719, para. 28.

⁸¹ *Id.* at 7721, para. 30.

23. *Adequacy of Tribal Outreach.* As grounds for reopening Section 106, certain parties argue that Tribal outreach was inadequate because students of the Choctaw Academy came from 17 Tribal Nations and not all of those Tribal Nations were contacted during the Section 106 process.⁸² The NPA prescribes a procedure for using the Tower Construction Notification System (TCNS) to identify which Tribal Nations to contact for a proposed tower, and there is no dispute that Skyway used TCNS here to identify and appropriately contact all Tribal Nations that registered interest in reviewing towers proposed in Scott County.⁸³ Even if Choctaw Academy were within the APE of the proposed tower, which it is not, Skyway had no obligation under the NPA to contact Tribal Nations that had not indicated in TCNS an interest in the site. Accordingly, we conclude that there was no material error or omission on the part of Skyway during the Tribal outreach process that warrants reopening the Section 106 process.

24. *Requests for Consulting Party Status.* One party contends that although she sent a letter dated April 3, 2017 to the Skyway consultant asking to be made a consulting party, Skyway never responded to that request.⁸⁴ Richardson was a consulting party, but he contends that it took several months for Skyway to grant his request to become a consulting party.⁸⁵ With regard to the April 3, 2017 consulting party request, the March 8, 2017 *Decision* concluded the Section 106 process, so that there was no ongoing, meaningful Section 106 process in which the requester could participate as a consulting party. With regard to Richardson's request, Section V.G of the NPA states that "[c]onsulting parties are entitled to: (1) "[r]eceive notices, copies of submission packets, correspondence and other documents provided to the SHPO/THPO in a Section 106 review; and (2) be provided an opportunity to have their views expressed and taken into account by the Applicant, the SHPO/THPO and, where appropriate, by the Commission."⁸⁶ There is no allegation that Richardson failed to receive any relevant information, and it appears that he had the same opportunities to have his views heard that consulting parties would normally receive, regardless of when consulting party status was granted. We conclude that neither the failure to grant consulting party status as requested in the April 3, 2017 letter, nor the delay in granting Richardson consulting party status, constitutes material error or omission by Skyway to warrant reopening the Section 106 process.

25. *Notice to the Public.* Ann Bevins, a member of the Scott County Historical Society, complains that the society did not receive relevant notifications because Skyway's Form 620 packet listed an incorrect address for the Scott County Historical Society.⁸⁷ With regard to Ms. Bevins' argument, the mailing address for the Scott County Historical Society that is listed in that organization's web page matches the mailing address that Skyway used in its 620 submission – Scott County Historical Society,

⁸² Bevins Letter at 2; Snyder Letter at 2; Wallace Letter at 1; Pratt Letter at 3.

⁸³ When an Indian tribe or Native Hawaiian Organization (NHO) has voluntarily provided information to the Commission's Tower Construction Notification System (TCNS) regarding the geographic areas in which Historic Properties of religious and cultural significance to that Indian tribe or NHO may be located, reference to the TCNS shall constitute a reasonable and good faith effort at identification with respect to that Indian tribe or NHO. NPA, § IV B. We note that all 573 federally recognized Tribes have identified their areas of interest in TCNS, so use of TCNS is presumed to constitute adequate Tribal outreach.

⁸⁴ Snyder Letter at 2.

⁸⁵ ACHP Letter at 3.

⁸⁶ NPA § V(G).

⁸⁷ Bevins Letter at 2; Pratt Letter at 2-3. Another party complains that she only learned of the Skyway tower project on March 19, 2016 because Skyway did not properly inform the public. Letter from Christina Snyder, Professor, Pennsylvania State University, to Mary Seagrave, Sims and Associates LLC (April 3, 2017).

229 East Main Street, Georgetown, KY 40324-1759.⁸⁸ The Subject Line of the letter, dated December 4, 2015, listed the address of the proposed tower as 1621 Stamping Ground Road and noted it was a “Proposed 300-foot (up to 310-foot overall height) Self-Supporting Lattice Tower Facility,” in addition to other information, including coordinates. Based on this letter, we conclude there was no material error or omission on Skyway’s part.

26. As for the claim of inadequate public notice, Section V of the NPA states that “[o]n or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide written notice to the public of the planned Undertaking. Such notice may be accomplished (1) through the public notification provisions of the relevant local zoning or local historic preservation process for the proposed Facility; or (2) by publication in a local newspaper of general circulation.”⁸⁹ In its submission packet, Skyway states that, on December 8, 2015, it published notice of the proposed tower in a local Georgetown, Kentucky newspaper, the Georgetown News Graphic.⁹⁰ Therefore, Skyway complied with the NPA’s public notice provisions and we find no material error or omission to warrant reopening the Section 106 process.

27. *Distance of Choctaw Academy*. As stated above, the Choctaw Academy is not within the 0.5-mile APE. Therefore, arguments that the March 8, 2017 *Decision* incorrectly listed the distance as 1.6 miles as opposed to 0.69 miles is harmless error at best and does not constitute material error or omission by Skyway sufficient to require reopening the Section 106 process.

28. *Miscellaneous Issues in ACHP May 2017 Letter*. In addition to the other issues already considered above and by the *Procedural Order*, the ACHP suggested in its May 11, 2017 letter that, if the Commission decided to reopen this Section 106 proceeding, the applicant and consulting parties might consider whether the standard Section 106 process, set forth in its rules, might be more beneficial in this circumstance than the NPA.⁹¹ We have thoroughly reviewed all the allegations and arguments made by Richardson, and other parties. We find that the applicant properly and in good faith followed the historic review procedures in the NPA and there is no reason to reopen this Section 106 proceeding. Where there is a program alternative for the Section 106 process such as the NPA here, the agency “shall follow the program alternative” and we therefore conclude that use of the standard Section 106 procedure would not benefit the public interest.⁹²

IV. CONCLUSION

29. Based on our review of the record before us, we deny the Petition and deny requests to reopen the Section 106 process for the tower proposed to be sited at 1621 Stamping Ground Road, Georgetown, KY.

V. ORDERING CLAUSES

30. Accordingly, based on the foregoing, and pursuant to Section 106 of the National Historic

⁸⁸ Scott County Historical Society, Inc., <http://scottcohistory.org/contact.htm> (last visited Sep. 10, 2018), listing mailing address as Scott County Historical Society c/o Georgetown & Scott County Museum, 229 East Main Street, Georgetown, KY 40324-1759.

⁸⁹ NPA § V(B)

⁹⁰ Skyway Form 620 at 44, Attachment 9, Public Notice in Georgetown News-Graphic on Dec. 8, 2015.

⁹¹ ACHP Letter at 2.

⁹² 36 CFR § 800.3(a)(2). The ACHP letter also asked the FCC to review the allegation that communications with FCC staff led parties to believe they might need legal representation. On its face, this claim does not allege material error or omission on the part of Skyway. It is also well-established precedent that parties before the Commission should not rely on informal representations from the staff. *See, e.g., Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Order on Reconsideration, 31 FCC Rcd 1367, 1373 para. 10 & n.44 (2016).

Preservation Act, 54 U.S.C. § 306108, and Sections 1.1307(a) and (c) of the Commission's rules, 47 CFR §§ 1.1307(a),(c), 17.4(c), Section 405(a) of the Communications Act of 1934, 47 U.S.C. § 405(a), and Section 1.106(j) of the Commission's rules, 47 CFR §1.106(j), the Richardson Petition for Reconsideration is DENIED. Pursuant to Section 1.106(f) of the Commission Rules, 47 CFR § 1.106(f), to the extent any communication from an outside party, which was filed after April 7, 2017 was intended to be a petition for reconsideration, such petition is DISMISSED. The requests to reopen the Section 106 process are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jiaming Shang
Acting Deputy Chief
Competition and Infrastructure Policy Division
Wireless Telecommunications Bureau