



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

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**COMMENT SOUGHT ON DRAFT PROGRAM COMMENT FOR THE
FEDERAL COMMUNICATIONS COMMISSION'S REVIEW OF COLLOCATIONS ON
CERTAIN TOWERS CONSTRUCTED WITHOUT DOCUMENTATION OF SECTION 106
REVIEW**

WT Docket No. 17-79

Comment Date: 30 days after publication in Federal Register
Reply Comment Date: 45 days after publication in Federal Register

By this Public Notice, the Commission takes another step towards promoting the deployment of wireless infrastructure. In particular, we set out a definitive solution for so-called “Twilight Towers,” which, if adopted, would create a new exclusion from routine historic preservation review under Section 106 of the National Historic Preservation Act (NHPA)¹ and its implementing regulations.² This action would open up potentially thousands of existing towers for collocations without the need for either the collocation or the underlying tower to complete an individual historic review, thus ensuring that these towers are generally treated the same as older towers that are already excluded from the historic review process. Facilitating collocations on these towers will make additional infrastructure available for wireless deployments, reduce the need for new towers, and decrease the need for new construction. After more than a decade of debate over the best approach for Twilight Towers, we welcome the chance to advance this concrete path forward.

Twilight Towers are towers whose construction commenced between March 16, 2001, and March 7, 2005, that either did not complete Section 106 review or cannot be documented to have completed such review. As the FCC has previously stated, Section 1.1307(a)(4) of the Commission’s rules directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the Advisory Council on Historic Preservation’s (ACHP’s) rules or an applicable program alternative, including the *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas* (2001 Collocation NPA), 47 CFR Part 1, App. B, and the *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (2005 Wireless Facilities NPA), 47 CFR Part 1, App. C.³ Under

¹ 54 U.S.C. § 306108.

² 36 CFR Part 800.

³ See 47 CFR § 1.1307(a)(4). The Commission recently restated and recodified this requirement in new rule Section 1.1320, which will become effective 30 days after the Commission’s action is published in the Federal Register. See

the 2001 Collocation NPA, collocations on towers whose construction commenced on or before March 16, 2001, are generally excluded from routine historic preservation review, regardless of whether the underlying tower has undergone Section 106 review.⁴ The 2001 Collocation NPA provides that collocations on towers whose construction commenced on or after March 16, 2001, by contrast, are excluded from historic preservation review only if the Section 106 review process for the underlying tower and any associated environmental reviews has been completed.⁵ The 2005 Wireless Facilities NPA, which became effective on March 7, 2005, establishes detailed procedures for reviewing the effects of communications towers on historic properties.

As indicated above, there are a large number of towers that were built between the adoption of the 2001 Collocation NPA and the effective date of the 2005 Wireless Facilities NPA that either did not complete Section 106 review or for which documentation of Section 106 review is unavailable. Although during this time the Commission's environmental rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties,⁶ the text of the rule did not at that time require parties to perform this evaluation by following the ACHP's rules or any other particular process. Thus, some in the industry have argued that, prior to the 2005 Wireless Facilities NPA, it was unclear whether the Commission's rules required consultation with the relevant SHPO and/or Tribal Historic Preservation Officer (THPO), Tribal engagement, or any other procedures, and that this uncertainty was the reason why many towers built during this period did not go through the clearance process.⁷ Because the successful completion of the Section 106 process is a predicate to the exclusion from review of collocations on towers completed after March 16, 2001, licensees cannot collocate on these Twilight Towers unless either each collocation completes Section 106 review or the underlying tower goes through an individual post-construction review process.

By this Public Notice, the Commission finally identifies a path forward for these Twilight Towers. In particular, we seek public comment on the attached draft Program Comment addressing the historic preservation review requirements for collocating communications equipment on Twilight Towers.

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Report and Order, FCC 17-153 (released Nov. 17, 2017).

⁴ 2001 Collocation NPA, § III. Collocations on towers whose construction commenced on or before March 16, 2001 are excluded from Section 106 review unless (1) the mounting of the antenna will result in a substantial increase in size of the tower; or (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; or (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a State Historic Preservation Officer (SHPO) or the ACHP, that the collocation has an adverse effect on one or more historic properties.

⁵ 2001 Collocation NPA, § IV.

⁶ See 47 CFR 1.1307(a)(4) (2004) (requiring environmental assessment if facility may affect property listed or eligible for listing in the National Register of Historic Places).

⁷ See, e.g., Letter from Brian M. Josef, Ass't Vice Pres. Reg. Affairs, CTIA and D. Zachary Champ, Dir. Gov't. Affairs, PCIA-The Wireless Infrastructure Assoc. to Chad Breckinridge, Assoc. Chief, Wireless Telecommunications Bureau (filed Feb. 19, 2016, available in WT Docket No 17-79) at 3-4; but see "Fact Sheet, Antenna Collocation Programmatic Agreement," Public Notice, 17 FCC Rcd 508, 511 (2002) ("this evaluation process includes consultation with the relevant [SHPO] and/or [THPO], as well as compliance with other procedures set out in the ACHP rules, 36 C.F.R. Part 800, Subpart B").

If adopted by the ACHP, the draft Program Comment would establish procedures for permitting collocations on Twilight Towers.

The ACHP's rules contain general procedures for considering effects on historic properties, but they also provide a means of establishing customized or streamlined alternative review procedures called "program alternatives."⁸ Where the ACHP determines that a defined program or activity has minimal potential to affect or adversely affect historic properties, a program alternative may reduce the scope of or entirely eliminate the review process. One type of program alternative is the Program Comment.⁹

Given the record before us, we believe that a Program Comment is a suitable vehicle for specifying how Twilight Towers can be appropriately made available to facilitate broadband deployment. Therefore, we seek comment on the attached draft consistent with the ACHP's process for developing and issuing a Program Comment. After considering input from all interested parties, the Commission will revise the draft Program Comment as appropriate, summarize the comments for the ACHP,¹⁰ and formally request that the ACHP issue the Program Comment. The ACHP's rules specify that it will then decide whether to issue the Program Comment within 45 days, and the Commission will publish notice of any Program Comment that the ACHP provides in the Federal Register.¹¹

This draft Program Comment is informed by comments received in response to the *Wireless Infrastructure NPRM*,¹² as well as several years of engagement with affected parties, including Tribal Nations, NHOs, SHPOs, and industry, by conducting government-to-government consultation with Tribal Nations, holding face-to-face meetings, sponsoring webinars and workshops, participating in conferences, and distributing written materials. In addition, since the release of the *Wireless Infrastructure NPRM*, the Commission has met with Tribal representatives numerous times with a focus on issues related to Section 106 review, including meetings with the Chairman and commissioners, as well as conference calls and meetings between staff and SHPOs, Tribal representatives, and others.

Commenters on the *Wireless Infrastructure NPRM* generally concur that the Commission should take affirmative steps to develop a regime governing the circumstances and procedures under which collocations will be permitted on Twilight Towers. In general, industry commenters assert that the Commission should grandfather, exempt, or exclude these towers from any historic preservation review, arguing that the towers are unlikely to have adverse effects on historic properties that have not been detected, that current ambiguities in the process are preventing widespread collocations, that there was no clear process for historic preservation review of proposed towers prior to 2005, and that many of the towers are no longer in the possession of their original owners.¹³ Other commenters, including SHPOs and Tribal Nations and their associations, as indicated above, advocate requiring a review process and

⁸ 36 CFR § 800.14.

⁹ 36 CFR § 800.14(e).

¹⁰ See 36 CFR § 800.14(e)(1); see also 36 CFR § 800.14(f)(2) (agency shall summarize views of and provide copies of written comments of Tribal Nations and Native Hawaiian Organizations (NHOs)).

¹¹ 36 CFR § 800.14(e)(5).

¹² *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017) (*Wireless Infrastructure NPRM*).

¹³ See, e.g., Verizon comments at 62; Sprint comments at 33; AT&T comments at 39-41; Competitive Carriers Association comments at 50-51.

mitigation of adverse effects before collocations on these towers can be permitted, contending that failure to perform Section 106 review for these towers should not be forgiven retroactively, that collocations on existing towers can increase any adverse effects of the towers, that removal should be considered for towers with particularly egregious adverse effects, and that collocations that involve any ground disturbance must be subject to Section 106 review before the Commission can allow collocations.¹⁴ We seek comment on the extent to which the draft Program Comment, as described below, effectively addresses these concerns.

In the *Wireless Infrastructure NPRM*, the Commission stated that we do not anticipate taking any enforcement action or imposing any penalties based on good faith deployment during the Twilight Tower period.¹⁵ In light of the additional comments we have received on this issue, and our recognition in this Public Notice that the FCC did not provide specific guidance regarding the procedures for conducting historic preservation review, we now make clear that the FCC will not take enforcement action relating to the construction of Twilight Towers based on the failure to follow any particular method of considering historic preservation issues or otherwise based on the good faith deployment of Twilight Towers.¹⁶

Comments are due on or before 30 days after publication in the Federal Register and Reply Comments are due on or before 45 days after publication in the Federal Register.¹⁷

As established in the *Wireless Infrastructure NPRM*, this is a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules, but with a limited modification in light of the Commission’s trust relationship with Tribal Nations and Native Hawaiian Organizations (NHOs).¹⁸ *Ex parte* presentations involving elected and appointed leaders and duly appointed representatives of federally-recognized Tribal Nations and NHOs are exempt from the disclosure requirements in permit-but-disclose proceedings, as well as the prohibitions during the Sunshine Agenda period. Nevertheless, Tribal Nations and NHOs, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record in order to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process.

We note that some commenters urge the Commission to hold additional meetings with Tribal

¹⁴ See, e.g., National Conference of State Historic Preservation Officers comments at 6-7; Delaware Historical and Cultural Affairs comments at 5; Missouri State Historic Preservation Office comments at 5; State of California Office of Historic Preservation, Dept. of Parks and Recreation comments at 3 (advocating review of Twilight Towers under same process used for proposed new towers); National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers (NATHPO) joint comments at 24 (NCAI Joint comments); Mohegan Tribe – Connecticut comments at 3; The Chickasaw Nation comments at 7; NATHPO comments at 5-6; The Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission reply comments at 12.

¹⁵ *Wireless Infrastructure NPRM*, 32 FCC Rcd at 3360, para. 84.

¹⁶ To the extent the owner of any Twilight Tower is shown to have intentionally adversely affected a historic property with intent to avoid the requirements of Section 106, Section 110(k) of the NHPA would continue to apply. See 54 U.S.C. § 306113.

¹⁷ We note that the Commission has received *ex parte* comments filed between the public release of the draft text of this Public Notice and its adoption by the Commission on December 14, 2017. To the extent that they have not been addressed here, these comments will be considered along with any comments filed in response to this Public Notice.

¹⁸ See *Wireless Infrastructure NPRM*, 32 FCC Rcd at 3367, para. 103.

Nations regarding Twilight Towers before moving forward¹⁹—we welcome additional meetings with Tribal Nations, Native Hawaiian Organizations, SHPOs, and industry during this comment period.

Filing Instructions: Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before the date indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Wireless Telecommunications Bureau contact: Daniel Margolis, Attorney Advisor, Daniel.Margolis@fcc.gov, 202-418-1377.

Media contact: Cecilia Sulhoff, Cecilia.Sulhoff@fcc.gov, 202-418-0587.

Action taken on December 14, 2017: By Chairman Ajit Pai and Commissioners Mignon L. Clyburn, Michael O’Rielly, Brendan Carr, and Jessica Rosenworcel issuing statements.

– FCC –

¹⁹ See NCAI Joint comments at 24; The Muscogee (Creek) Nation comments at 12; The Seminole Nation of Oklahoma comments at 21.

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Comment Sought on Draft Program Comment for the Federal Communications Commission's Review of Collocations on Certain Towers Constructed without Documentation of Section 106 Review, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Similar to the vampires in the *Twilight* series, for many of us at the Commission, Twilight Towers has seemed like an issue that would never die. But no more. Today, I am pleased that after more than a decade, the FCC is finally moving forward to address this longstanding problem.

By way of background, Twilight Towers were erected between 2001 and 2005, when there were no clear Commission guidelines for adherence to historic preservation laws. Since then, wireless providers have been unable to collocate new antennas on these towers without going through extensive historic preservation review. This is because they lack the documentation to prove the underlying tower is compliant with guidelines that were put in place after they were erected and therefore cannot qualify for an exemption for new collocations. This is unfair and costly, and it also makes it more difficult for service providers to improve wireless coverage.

Despite efforts by my predecessors over the years to make progress on this issue, the Commission previously had not taken the concrete action necessary to moving forward. So earlier this year, we teed up the issue again in an NPRM looking at various ways to reduce barriers to wireless infrastructure deployment.

And today, we break the logjam.

After many discussions with Tribal representatives, industry, and other interested stakeholders, it is now clear that it is up to the FCC, working with our colleagues at the Advisory Council on Historic Preservation (ACHP), to finally solve this problem. And none too soon; the more rapidly we enable additional use of this infrastructure, the sooner consumers everywhere can benefit from next-generation wireless services. It is my hope that this issue will be wrapped up, at long last, by the middle of next year.

I appreciate the engagement of ACHP staff on this issue and look forward to working with them as we advance this and other wireless infrastructure issues. I also would like to thank my colleagues for their support of this item. In particular, thanks to Commissioner O'Rielly, who has long called for a resolution to this issue, and to Commissioner Carr for his continued leadership on our wireless infrastructure reform docket. And last but certainly not least, thanks to the staff who worked on this item: Paul D'Ari, Garnet Hanly, Eli Johnson, Daniel Margolis, Dana Shaffer, Jill Springer, Jeffrey Steinberg, Donald Stockdale, Cecilia Sulhoff, Suzanne Tetreault, and Mary Claire York from the Wireless Telecommunications Bureau; Janet Sievert from the Consumer and Governmental Affairs Bureau; and Deborah Broderson, Linda Oliver, and Bill Richardson from the Office of General Counsel.

**STATEMENT OF
COMMISSIONER MIGNON. L CLYBURN**

Re: *Comment Sought on Draft Program Comment for the Federal Communications Commission's Review of Collocations on Certain Towers Constructed without Documentation of Section 106 Review, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Our best estimates show that today, there are just over four thousand “Twilight Towers” across the United States. To those outside the world of the communications bar, these are wireless towers for which the historic preservation review process may or may not have been completed.

I am sure those who worked on the 2001 and 2005 nationwide programmatic agreements could not have imagined that mysterious and frustrating questions about the legality of these towers would remain. Nevertheless, the approach we are taking through today's Public Notice seeks to resolve what has become a confounding issue. Program comments present an alternative, streamlined procedure for a collocation applicant to comply with historic preservation review requirements. In 2013, as Acting Chairwoman, I saw firsthand how effective program comments could be when I directed the staff of the Wireless Telecommunications Bureau to prepare and release one to address towers to deploy positive train control communications.

It is important that we design program comments to ensure that Tribal Nations have a full opportunity to participate in the review of a proposed collocation. In our April 2017 NPRM on Facilitating Wireless Infrastructure Deployment, we discussed how Tribal Nations have expressed concern that some of the twilight towers, which were constructed between 2001 and 2005, may have effects on properties of religious and cultural significance. So, I am glad that this program comment makes clear that a Tribal Nation may request direct government-to-government consultation with the FCC, at any time, with respect to a twilight tower or collocation. I thank the Bureau for their work on this proceeding.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Comment Sought on Draft Program Comment for the Federal Communications Commission's Review of Collocations on Certain Towers Constructed without Documentation of Section 106 Review, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

None of us currently on the Commission caused the Twilight Towers situation, which originated back in the early 2000s. Instead, we get the job of cleaning up the mess. Today, we take a decisive first step to do just that. Once complete, our resulting actions will expedite certain antenna collocations, reduce the need for additional macro tower construction and placement, facilitate the expansion of wireless networks (including FirstNet), and improve the wireless experience for consumers.

Having toiled on this issue for several years, I am well aware of some differing perspectives and views on what best to do with Twilight Towers. Over that time, I have explored assorted options and participated in countless conversations over possible solutions, seeking resolution while demanding a realization of the realities. I have pushed Commission staff – many of whom are no longer here to see this to conclusion – to expedite consultations and craft a draft order expeditiously. And, I know there have been endless discussions, consultations, negotiations, workshops and conferences with staff and stakeholders over the years that never resolved the problem. All of this preceding work, however, has led us to this Public Notice (PN), and I want to thank the Chairman and Commissioner Carr for their leadership in making this issue one of the early action items for removing infrastructure barriers.

This PN is an incredibly positive step forward to address the regulatory purgatory faced by those owning so-called Twilight Towers. These towers – some 4,300 or so by most estimates – have been in operation bringing wireless service to the America people for somewhere between *twelve and sixteen years*. At the same time, owners of these towers, many of which may have since been sold, have been stuck, unable to accept collocating partners while policymakers wrestle with the fact that the requisite historic preservation reviews were not documented. In fact, it is estimated that these towers could accommodate an additional 6,500 antennas. Consumers have been prevented from the many benefits from fully loaded towers, including increased network coverage.

Since I am aware of no one that possesses a time machine in order to go back and conduct the reviews pursuant to Commission rules in place today and not back then, we must operate in the present with the facts as they are, not how we may like them to be. Basically, these towers already exist and, in most cases, were never the subject of a complaint; it would take millions of dollars and years to create a list of all the twilight towers and have them individually reviewed; and in the meantime, these towers would continue to be underutilized, to the detriment of consumers.

With this in mind, as well as the realization that the Commission will not undertake enforcement actions against tower owners for the uncertainty caused by our own doing, the PN takes the most appropriate action by establishing a draft Program Comment for consideration by the ACHP. Specifically, the contents of the draft Program Comment would exclude collocations of wireless facilities on Twilight Towers from Section 106 review. In effect, we are moving forward and closing this sad chapter in regulatory history.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Comment Sought on Draft Program Comment for the Federal Communications Commission's Review of Collocations on Certain Towers Constructed without Documentation of Section 106 Review, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Today, we take another significant step in our ongoing effort to streamline and accelerate the deployment of wireless infrastructure. Specifically, we propose a plan to resolve the longstanding issue of Twilight Towers. These are towers that were built 12-16 years ago that did not necessarily undergo review pursuant to Section 106 of the National Historic Preservation Act because the FCC had yet to provide clear guidance on compliance with that provision.

The approach we adopt today would culminate in the Advisory Council on Historic Preservation adopting a document known as a "Program Comment" that would exclude collocations of communications equipment on Twilight Towers from routine historic preservation review. This action could open up thousands of towers for the deployment of new wireless facilities. As such, these towers would be treated similarly to older towers that are already excluded from historic preservation review. In today's Public Notice, we also make clear that the agency will not take enforcement action against Twilight Towers that were constructed in good faith. This clarification further removes the regulatory uncertainty that has hung over these deployments for far too long.

I am grateful for the engagement we have seen on this issue. In response to public input, we make clear in the Draft Program Comment that where a proposed collocation on a Twilight Tower is not excluded from historic preservation review, such review will be limited to the collocation and not the underlying tower. We also clarify the standard under which the FCC will treat a request for direct government-to-government consultation by a Tribal Nation as a complaint against a proposed collocation. These clarifications will provide stakeholders with additional regulatory certainty, and I thank my colleagues for their willingness to incorporate these changes into the Draft Program Comment.

For more than a decade, the FCC and a broad range of stakeholders have debated the best approach for resolving the regulatory status of Twilight Towers. So I am glad that this Commission is moving forward with a concrete solution that can open up these structures for additional wireless deployments. Doing so will help bring advanced wireless offerings to even more Americans.

I thank the staff of the Wireless Telecommunications Bureau for their hard work on this item and for their broader efforts to streamline the deployment of wireless infrastructure. I look forward to continuing to make progress on these issues in the months to come.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL,
CONCURRING**

Re: *Comment Sought on Draft Program Comment for the Federal Communications Commission's Review of Collocations on Certain Towers Constructed Without Documentation of Section 106 Review, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

For too long, towers built during the Twilight Period have been caught in a regulatory quagmire. During this four-year period—from 2001 to 2005—both the Commission and the Advisory Council on Historic Preservation were adjusting their rules to accommodate the need to facilitate the nationwide building of wireless infrastructure. But before any new policies were put in place, towers were put in the ground and ever since these facilities have been stuck in regulatory limbo. Today's proposal seeks to bring an end to this ambiguity and make these towers available for collocation without sacrificing the ability to entertain meaningful objections or engage in tower-specific mitigation. This approach can benefit the First Responder Network Authority and other broadband providers seeking to swiftly deploy new infrastructure. It also can further historic preservation goals by limiting the need for additional towers.

But we still have a long way to go to honor our federal trust responsibility to Tribal communities impacted by towers constructed during the Twilight Period. I concur today because I believe that our effort here is well-intended but falls short of what is required. If we proceed with this draft proposal we need to simultaneously update the Commission Statement of Policy on establishing a government-to-government relationship between the agency and federally-recognized Tribes. This document has not been revisited since it was adopted more than a decade and a half ago. It is time to take on this task and do it in conjunction with resolving these longstanding issues of tower construction. In doing so, we can set a clear and updated course for Commission policy while also giving substance to Tribal self-determination. And that, I believe, is worth the effort.

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

This Program Comment was issued by the Advisory Council on Historic Preservation (Advisory Council) on [insert date], pursuant to 36 CFR § 800.14(e), and went into effect on that date. It provides the Federal Communications Commission (FCC or Commission) with an alternative way to comply with its responsibilities under Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, and its implementing regulations, 36 CFR part 800 (Section 106), as supplemented by two nationwide programmatic agreements. In particular, this Program Comment excludes from Section 106 review the collocation of wireless communications facilities on “Twilight Towers” (*i.e.*, certain communications towers for which construction commenced after March 16, 2001, and before March 7, 2005), provided that these collocations satisfy the conditions specified below.

I. Background

To fulfill its obligations under the NHPA, the FCC imposes certain compliance requirements on its applicants and licensees, but the ultimate responsibility for compliance with the NHPA remains with the FCC. In particular, Section 1.1320 of the FCC's rules (47 CFR § 1.1320) directs licensees and applicants, when determining whether a proposed action may affect historic properties, to comply with the Advisory Council's rules, 36 CFR Part 800, or an applicable program alternative, including the *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas* (Collocation NPA), 47 CFR Part 1, App. B, and the *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (Wireless Facilities NPA), 47 CFR Part 1, App. C. These programmatic agreements, which were executed pursuant to Section 800.14(b) of the Advisory Council's rules, substitute for the procedures that Federal agencies ordinarily must follow in performing their historic preservation reviews.¹

The Collocation NPA, adopted and effective on March 16, 2001,² provides that collocations on towers³ constructed on or before the effective date of that agreement are excluded from routine historic preservation review regardless of whether the underlying tower has undergone Section 106 review provided that they satisfy the specified conditions.⁴ By contrast, the Collocation NPA provides that collocations on towers whose construction commenced after March 16, 2001, are excluded from historic preservation review only if the proposed collocation meets specified conditions and the Section 106 review process for the underlying tower and any associated environmental reviews has been completed.⁵ Through the Wireless Facilities NPA, which was incorporated into the FCC's rules effective on March 7, 2005, the FCC adopted and codified for the first time detailed procedures for reviewing the effects on historic properties of communications towers and those collocations that are subject to review.

Prior to the adoption of the Wireless Facilities NPA, the FCC's rules did not require its licensees and

¹ 36 CFR § 800.14(b)(2).

² The Collocation NPA was amended in 2016 to establish further exclusions from review for small antennas. *See Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 4617 (WTB 2016).

³ The Collocation Agreement defines “tower” as “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.” Collocation NPA, § I.E.

⁴ Collocation NPA, § III.

⁵ Collocation NPA, § IV.

applicants to follow the ACHP's rules or any other specified process when evaluating whether their proposed facilities might affect historic properties as mandated under Section 106. Accordingly, a large number of towers constructed during the period between the effective dates of the two NPAs – that is, those for which construction began after March 16, 2001, and before March 7, 2005 - do not have documentation demonstrating compliance with the Section 106 review process (an issue exacerbated by the limitations of State Historic Preservation Officers' (SHPOs') record-keeping as well as subsequent changes in tower ownership). These towers are referred to as "Twilight Towers." And because collocation on towers whose construction began after the effective date of the Collocation NPA is excluded from Section 106 review only if the tower was itself subject to review, licensees or applicants cannot currently collocate on these Twilight Towers unless each collocation completes a separate Section 106 review or the underlying tower completes an individual post-construction review process.

To develop a Program Comment, the rules of the Advisory Council require federal agencies to arrange for public participation appropriate to the subject matter and the scope of the category of covered undertakings and in accordance with the standards set forth in the Advisory Council's rules.⁶ Over the past several years, the FCC has engaged with Tribal Nations, Native Hawaiian Organizations (NHOs), SHPOs, and industry, by holding many face-to-face meetings, sponsoring webinars and workshops, participating in conferences, and distributing written materials. In 2014, FCC staff began consultations with relevant parties to discuss possible solutions to make Twilight Towers broadly available for collocations in a manner consistent with the requirements of and policies underlying the NHPA. In October 2015, the FCC circulated a discussion document to SHPOs, Tribal Nations, NHOs and industry associations, and in January 2016, the FCC facilitated a summit in Isleta Pueblo, New Mexico, devoted to discussion of Twilight Towers. Industry, Tribal, and SHPO representatives participated in this meeting. Following the meeting, the FCC sought written comments from the summit participants. In August 2016, the FCC circulated to industry associations, SHPOs, and Tribal/NHO contacts a discussion draft term sheet developed as a result of those consultations. Follow up calls with Tribal and SHPO representatives and other interested parties, including the Advisory Council staff, were held throughout 2016.

Further, in the Wireless Infrastructure NPRM, adopted in April 2017, the FCC sought public comment on how to resolve remaining Section 106 issues associated with collocation on Twilight Towers, and it received numerous comments on these issues.⁷ Finally, the FCC facilitated consultations with Tribal representatives on the Rosebud Sioux Reservation on June 8, 2017; at the annual meeting of the National Conference of American Indians on June 14, 2017; on the Navajo Reservation on August 22, 2017; and in Washington, DC on October 4, 2017. FCC staff have also continued to meet in person and by phone with SHPOs and Tribal representatives since release of the Wireless Infrastructure NPRM.

II. Need for Program Comment to Address Twilight Towers

This Program Comment adopts an exclusion under Section 106 for certain collocations on Twilight Towers. This exclusion is warranted due to a number of unique factors associated with towers whose construction commenced during the period from March 17, 2001 through March 6, 2005, including: (1) the limited reliability of Section 106 review documentation from that time period; (2) the lack of specificity in the FCC's rules regarding Section 106 review at the time the Twilight Towers were

⁶ 36 C.F.R. § 800.14(e)(2).

⁷ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3358-3361, paras. 78-86 (2017) (Wireless Infrastructure NPRM).

constructed; (3) the limited likelihood that Section 106 review could identify adverse effects from these towers that are not yet known after 12 years or more; and (4) the significant public interest in making these towers readily available for collocation.

Although during the time between the Collocation NPA and the Wireless Facilities NPA the FCC's environmental rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties, the rules did not then state that parties must perform this evaluation by following the Advisory Council's rules or any other specific process. Thus, prior to the effective date of the Wireless Facilities NPA, it was unclear whether the FCC's rules required consultation with the relevant SHPO and/or Tribal Historic Preservation Officer (THPO), engagement with Tribal Nations to identify historic properties off Tribal land (including government-to-government consultation), or any other particular procedures, and this lack of clarity may explain why many towers built during this period apparently did not obtain required clearance.

Routine Section 106 review of Twilight Towers is likely to provide little benefit in preserving historic properties. Twilight Towers have been in place for 12 to 16 years. In the vast majority of cases, no adverse effects from these towers have been brought to the FCC's attention. While the lack of objections filed with the FCC does not guarantee that *none* of the Twilight Towers have caused, or continue to cause, adverse effects on historic properties, such cases are likely few given the passage of time and absence of objections. In addition, any effects on historic properties that may have occurred during construction may be difficult to demonstrate so many years after the fact.

Further, an exclusion for collocations on Twilight Towers under the conditions specified below is in the public interest. The exclusion will rapidly make available thousands of existing towers⁸ to support wireless broadband deployment, including the FirstNet public safety broadband network,⁹ without causing adverse impacts. Importantly, facilitating collocations on existing towers will reduce the need for new towers, thereby avoiding the impact of new tower construction on the environment and on locations with historical and cultural significance.

A Program Comment is necessary to facilitate collocation on Twilight Towers. While the Wireless Facilities NPA contemplates a process for review of proposed collocations on towers that were built without required review, review of each collocation only satisfies the Section 106 requirement for that collocation; it does not clear the tower for future collocations. Given the large number of Twilight Towers and potential collocations that could be installed on those towers, the existing review process imposes burdens on all participants that, in the context of the other considerations discussed herein, are not commensurate with its historic preservation benefits.

Accordingly, an approach different from the standard Section 106 review process is warranted to make Twilight Towers readily available for collocations. Given the significant public benefits to be realized by making these facilities available for collocation, together with the other considerations discussed above,

⁸ The members of two major industry associations have collectively reported owning 4,298 towers that could be classified as Twilight Towers. Letter from Brian Josef, Assistant Vice President, Regulatory Affairs, CTIA – The Wireless Association, and D. Zachary Champ, Assistant Vice President, Regulatory Affairs, PCIA – The Wireless Infrastructure Association, to Chad Breckinridge Associate Chief, WTB, FCC (dated June 4, 2015). There may be more Twilight Towers owned by entities that are not members of these associations or that did not participate in their survey.

⁹ See 47 U.S.C. § 1426(c)(3) (providing that “the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure”).

requiring each licensee or applicant to review each tower individually before collocating is not an effective or efficient means for the FCC to comply with its obligations under Section 106. This Program Comment is responsive to the unusual set of factors surrounding the use of these Twilight Towers for the limited purpose of collocation.

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

Other federal agencies are not required to comply with Section 106 with regard to the effects of collocations on Twilight Towers that are excluded from review under this Program Comment. When other federal agencies have broader undertakings that include collocations on Twilight Towers, they must, however, comply with Section 106 in accordance with the process set forth at 36 CFR 800.3 through 800.7, or 800.8(c), or another applicable program alternative under 36 CFR 800.14 for aspects of the undertaking not involving the collocations.

IV. Exclusion for Twilight Towers

In August 2000, the Advisory Council established a Telecommunications Working Group to provide a forum for the FCC, industry representatives, SHPOs, THPOs, other Tribal representatives, and the Advisory Council to discuss improved coordination of Section 106 compliance regarding wireless communications facilities affecting historic properties. The Advisory Council and the Working Group developed the Collocation NPA, which recognized that the effects on historic properties of collocations on buildings, towers, and other structures are likely to be minimal and not adverse provided that certain premises and procedures are taken into consideration, including limitations on the extent of new construction and excavation. Further, the Collocation NPA stated that its terms should be “interpreted and implemented wherever possible in ways that encourage collocation.” Consistent with that directive, this Program Comment serves to resolve a long standing impediment to collocation on Twilight Towers within the broader protective framework established by the Collocation NPA.

We intend the exclusion here to mirror the exclusion in the Collocation NPA that applies to collocations on towers for which construction commenced on or before March 16, 2001. And so, pursuant to the exclusion adopted here, an antenna may be mounted on an existing tower for which construction commenced between March 16, 2001, and March 7, 2005, without such collocation being reviewed through the Section 106 process set forth in the Wireless Facilities NPA, unless:

- (1) The mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
- (2) The mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
- (3) The mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this

paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

- (4) The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site; or
- (5) The tower has been determined by the FCC to have an adverse effect on one or more historic properties, where such effect has not been avoided or mitigated through a conditional no adverse effect determination, a Memorandum of Agreement, a programmatic agreement, or a finding of compliance with Section 106 and the Wireless Facilities NPA; or
- (6) The tower is the subject of a pending environmental review or related proceeding before the FCC involving compliance with Section 106 of the NHPA; or
- (7) The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a Tribal Nation or NHO, a SHPO, or the Advisory Council that the collocation has an adverse effect on one or more historic properties. Any such complaint must be in writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register.

In the event that a proposed collocation on a Twilight Tower does not meet the conditions specified above for this exclusion, the collocation must undergo historic preservation review as required by the rules of the Advisory Council as revised or supplemented by the Wireless Facilities NPA and the Collocation NPA. As provided in the Wireless Facilities NPA, such review is limited to effects from the collocation and shall not include consideration of effects on historic properties from the underlying tower.

V. Additional Provisions Relating to Tribal Nations

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

A Tribal Nation may request direct government-to-government consultation with the FCC at any time with respect to a Twilight Tower or any collocation thereon. The FCC will respond to any such request in a manner consistent with its responsibility toward Tribal Nations. When indicated by the circumstances, and if the request is in writing and supported by substantial evidence as described in paragraph IV.7., the FCC shall treat a request for consultation as a complaint against the proposed collocation and shall notify the tower owner accordingly.

A Tribal Nation may provide confidential supporting evidence or other relevant information relating to a historic property of religious or cultural significance. The FCC shall protect all confidential information consistent with Section IV.I of the Wireless Facilities NPA.

VI. Administrative Provisions

- A. Definitions. Unless otherwise defined in this Program Comment, the terms used here shall

have the meanings ascribed to them under 36 CFR part 800 as modified or supplemented by the Collocation NPA or Wireless Facilities NPA.

- B. Duration. This Program Comment shall remain in force unless terminated or otherwise superseded by a comprehensive Programmatic Agreement or the Advisory Council provides written notice of its intention to withdraw the Program Comment pursuant to Section VI.B.1, below, or the FCC provides written notice of its intention not to continue to utilize this Program Comment pursuant to Section VI.B.2, below.

1. If the Advisory Council determines that the consideration of historic properties is not being carried out in a manner consistent with Section 106, the Advisory Council may withdraw this Program Comment after consulting with the FCC, the National Conference on State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers, and thereafter providing them with written notice of the withdrawal.

2. In the event the FCC determines that this Program Comment is not operating as intended, or is no longer necessary, the FCC, after consultation with the parties identified in Section VI.B.1 above, shall send written notice to the Advisory Council of its intent to withdraw.

- C. Periodic Meetings. Throughout the duration of this Program Comment, the Advisory Council and the FCC shall meet annually on or about the anniversary of the effective date of this Program Comment. The FCC and the Advisory Council will discuss the effectiveness of this Program Comment, including any issues related to improper implementation, and will discuss any potential amendments that would improve its effectiveness.
- D. Complaints Regarding Implementation of this Program Comment. Members of the public may refer any complaints regarding the implementation of this Program Comment to the FCC. The FCC will handle those complaints consistent with Section XI of the Wireless Facilities NPA.