

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Accelerating Wireless Broadband)	WT Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TRIBAL HISTORIC
PRESERVATION OFFICERS**

The National Association of Tribal Historic Preservation Officers (“NATHPO”), by its counsel, the Institute for Public Representation, submits the following reply comments concerning the FCC’s *Draft Program Comment for the Federal Communications Commission’s Review of Collocations on Certain Towers Constructed Without Documentation of Section 106 Review (“Draft Program Comment”)* released on December 14, 2017.

At the outset, NATHPO notes that comments filed by Tribal Nations agree with NATHPO that the FCC has failed to conduct consultations as required by law.¹ Moreover, comments supporting the *Draft Program Comment* have not shown that the *Draft Program Comment* is even needed, much less that it would satisfy the requirements of the National Historic Preservation Act (“NHPA”). Finally, NATHPO strongly objects to proposed changes in the *Draft Program Comment* sought by the Competitive Carriers Association. If adopted, those changes would effectively eliminate the opportunity for Tribes and others to file complaints concerning any Twilight Towers even when they have documented adverse effects on historic properties. For these reasons, the Commission should not move forward with the *Draft Program*

¹ See, e.g., Comments of Nez Perce Tribe, WT Docket No. 17-79 (filed Feb. 7, 2018) at 1; Comments of Cheyenne River Sioux Tribe, WT Docket No. 17-79 (filed Feb. 6, 2018) at 5.

Comment until Tribes have been told the locations of all the Twilight Towers so they can make an informed decision on the process to follow, and a proper government-to-government consultation has been completed.

I. The Comments Do Not Show a Need for a Program Comment

The Public Notice seeking comment on the *Draft Program Comment* asserts that the *Program Comment* is needed because the Twilight Towers were constructed at a time when “it was unclear whether the Commission’s rules required consultation with the relevant SHPO [state historic preservation officer] and/or Tribal Historic Preservation Officer (THPO), Tribal engagement, or any other procedures,” and that therefore, many towers built during this time did not go through the clearance process.² Some comments supporting the *Draft Program Comment* agree with this statement.³ However, the premise that the legal requirements were unclear is not supported by the facts.

The tower industry has long had a duty to consult with Tribes on the effects of proposed wireless facilities on historic properties.⁴ Indeed, the Commission published a fact sheet entitled *Antenna Collocation Programmatic Agreement* to accompany the 2001 Collocation NPA.⁵ This fact sheet stated that if a collocation is not exempt from Section 106 review, “the applicant must make a good faith effort to identify Indian tribes and Native Hawaiian organizations whose

² Public Notice, *Comment Sought on Draft Program Comment for the FCC's Review of Collocations on Certain Towers Constructed without Documentation of Section 106 Review*, FCC Docket No. 17-165 (Dec. 14, 2017) at 2.

³ See, e.g., Joint Comments of CTIA and the Wireless Infrastructure Ass’n, WT Docket No. 17-79 (filed Feb. 9, 2018) at 2-3 (“CTIA/WIA Comments”).

⁴ 36 C.F.R. § 800.2.

⁵ *Fact Sheet: Antenna Collocation Programmatic Agreement*, 17 FCC Rcd 508, 511 (2002).

historic properties may be affected and involve those entities in the Section 106 process as provided in the ACHP rules.”⁶

Following this guidance, legally sophisticated entities in the industry created best practices to fulfill their Section 106 obligations. During the twilight period, Verizon states that its consultants approached SHPOs and Tribes to determine the effect of their facilities on historic properties and Verizon “heard from other national carriers and tower owners that they followed a similar process.”⁷ Similarly, in its prior comments, Sprint acknowledged that the Advisory Council on Historic Preservation (“ACHP”) “adopted a detailed set of rules regarding the consultative process for THPOs and Indian tribes” and that “there is no reason for the Commission to reinvent the wheel and adopt different procedures.”⁸ Several SHPOs verify that these best practices were often followed during the twilight period and provided precise data about the Section 106 reviews performed at the request of industry.⁹

II. The Draft Program Comment is Inconsistent with Section 106

The purpose of Section 106 review is to uncover and mitigate adverse effects, even for federal undertakings that have been completed.¹⁰ The *Draft Program Comment* should serve as a streamlined alternative to full Section 106 review, not as an exemption to any review.

⁶ *Id.* at 9.

⁷ See Comments of Verizon, WT Docket No. 17-79 (filed Feb. 9, 2018) at 4; Comments of Verizon Wireless, WT Docket No. 03-128 at 9 (filed Aug. 8, 2003).

⁸ Sprint Reply Comments, WT Docket No. 03-128 at 21 (filed Sep. 8, 2003).

⁹ See, e.g. Comments of The National Conference of State Historic Preservation Officers, WT Docket No. 17-79 at 1 (filed Feb. 9, 2018); Comments of The Colorado State Historic Preservation Office, WT Docket No. 17-79 at 1 (filed Dec. 5, 2017); Comments of The Ohio State Historic Preservation Officers, WT Docket No. 17-79 at 2 (filed Feb. 9, 2018).

¹⁰ *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991) (holding that historic preservation review under the NHPA is still applicable to a completed, federally-licensed undertaking and that an agency can mitigate adverse effects while the undertaking is under federal license).

Some industry comments argue that Section 106 review is not needed because if there were any adverse effects from the Twilight Towers, complaints would have been filed. CTIA/WIA, for example, assert that they are not aware of any formal complaints filed by a SHPO, THPO, or Tribe claiming that a Twilight Tower had an adverse effect, and therefore, collocations on Twilight Towers do not present a risk of adversely affecting historical properties.¹¹ This claim, however, ignores the fact that adverse effects are typically reported to local governments or agencies and may not reach the Commission or a historic preservationist who would be aware of the process to report such effects.¹² It also ignores the difficulties of filing a complaint under the existing rules. To file a complaint, a Tribe first needs to know the location of the tower. Without the knowledge of whether a tower is a non-compliant Twilight Tower, the onus is put upon the Tribe to visit and ascertain a tower identification and request the FCC research identifier. Thus, the paucity of complaints so far cannot serve as the basis for exempting sites from review under Section 106.

III. The Commission Should Reject Proposals that Would Make It Even More Difficult to File a Complaint

NATHPO opposes the proposals of some commenters that, if adopted, would essentially eliminate the opportunity for historical preservation reviews. For example, the Competitive Carriers Association (“CAA”) asks the Commission to raise the evidentiary standard for complaints.¹³ CCA also wants to require that any complaint be submitted within 90 days after

¹¹ CTIA/WIA Comments, WT Docket No. 17-79 at 3 (filed Feb. 9, 2018).

¹² See Comments of The Colorado State Historic Preservation Office, WT Docket No. 17-79 at 2 (filed Dec. 5, 2017); Comments of The Missouri State Historic Preservation Office, WT Docket No. 17-79 (filed Feb. 8, 2018).

¹³ Specifically, CCA seeks to modify the Draft Program Comment “to clarify . . . that the evidentiary standard applicable to such complaints poses a very high bar, and requires specific, articulated facts about the claimed impact on historic properties that are supported by meaningful

the adoption of the *Program Comment*. But it will be impossible to file a complaint unless the locations of the Twilight Towers are disclosed. And even if the locations are known, 90 days is not enough time to assess the possible adverse effects of so many towers and to prepare complaints with sufficient information to meet the showings required the FCC. Perhaps, most disturbingly, CCA proposes that any complaint not resolved within 120 days of the filing of the complaint would not bar collocation on that tower so long as it met the other terms of the *Program Comment*. Adoption of this proposal would have the irrational result of allowing collocation on towers even where a substantial showing of adverse impact has been made, simply because the FCC failed to act within a short period of time.

Conclusion

Until the locations of the twilight towers have been disclosed and the FCC has completed consultations with the Tribal Nations, this Commission should not send the *Draft Program Comment* to the Advisory Council on Historic Preservation for review.

Respectfully submitted,

/s/ James T. Graves

James T. Graves*

Angela Campbell

Institute for Public Representation

Georgetown University Law Center

600 New Jersey Avenue NW, Room 312

Washington, DC 20001

(202) 662-9545

documentary evidence, such as photographs and maps.” Comments of CCA at 3 and CCA Revisions to Draft Program Comment WT Docket No. 17-79 (filed Feb. 9, 2018).

* These comments were drafted primarily by Ariel Anderson, a law student in the Institute for Public Representation Communication & Technology Clinic under the supervision of attorneys that are members of the D.C. Bar.

*Counsel for National Association of Tribal
Historic Preservation Officers*

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