

NCSHPO

National Conference of State Historic Preservation Officers

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14 June, 2017

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

RE: Wireless Infrastructure Notice of Proposed Rulemaking (NOPRM) and Notice of Inquiry (NOI), WT Docket Nos. 17-79 and 15-180

Dear Ms. Dortch:

State Historic Preservation Officers (SHPOs) take very seriously their statutory role in consulting with federal agencies in carrying out their responsibilities under Section 106 of the National Historic Preservation Act (NHPA). Similarly, the National Conference of State Historic Preservation Officers (NCSHPO) is committed to its role consulting with Agencies on the development of alternate approaches to meeting their obligations under Section 106, such as the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas currently in place with your agency.

NCSHPO will continue to work with the FCC and the Advisory Council on Historic Preservation (ACHP) to determine common-sense improvements and approaches to achieving the stated goal of accelerating broadband deployment. But we believe the best approach must be a thoughtful and deliberative one to assure both the deployment of a technology that we all benefit from as well as the protection of our historic places. We do not think that the appropriate solution is through rulemaking, and are disappointed that the FCC has seemingly drafted the NPRM informed solely by industry. When approaching rulemaking, we believe a Federal Agency should consult with the affected parties prior to the issuance of such a notice. Clearly your agency had extensive conversations with industry prior to the pursuit and release of this NOPRM. Why was the same courtesy not extended to the other entities impacted by this action? As our experience with your agency at crafting solutions should demonstrate, we can achieve a great deal through meaningful consultation.

GENERAL COMMENTS AND SUGGESTIONS

Over the past few years, including at our 2015 Annual Review with your agency of the Nationwide Programmatic Agreement mentioned above, we have made suggestions and provided comments that we think could aid in more efficient review. Before we comment on several of the many questions raised in your NOPRM/NOI, we would like to offer the following:

Clear Communication and Full Disclosure: In the many years that NCSHPO has been working with the FCC, the ACHP and industry on finding ways to achieve efficient project review, we frequently experience a lack of clarity about the nature of undertakings, the types of equipment being deployed, the infrastructure necessary, the quantity of deployments, the appearance of equipment, the size of equipment, the location of equipment and even the definitions used to describe it. Frequently, months are spent considering the impact of what appears to be a fairly discreet “box” that indeed may have little effect, only to find that there is a failure to disclose that accompanying those boxes are a series of additional switches, antenna, structures or other infrastructure – or that there will be additional variations in size, shape, color and material depending upon the carrier and location. In short, it becomes difficult to define exactly what is being reviewed – making it hard to establish a uniform process if the installation itself is not uniform and the impacts not disclosed. In our opinion, consistent and clear disclosure and description of the elements proposed for installation and perhaps an illustrated guide (with dimensions) of terms and equipment might enable a more productive conversation. Such a guide would need to be regularly updated to reflect frequent changes in technology and make it easier to see if existing programmatic approaches can be employed to handle review – or whether new ones should be sought.

Adequate Information – The best decisions and the most efficient processes rely upon adequate information. First, it must be understood that to make a determination on the impact of an undertaking on historic resources one has to first know what historic resources are present, and then know the scope and details of the project. Although this sounds simple, in practice, it is not always so.

State and tribal inventories and survey information are in many cases incomplete. In order to compensate for their federal responsibilities, states and tribes rely upon funding from the Historic Preservation Fund (HPF) – a funding stream established in 1976 based on a very small percentage of lease revenues generated from the Outer Continental Shelf. Although authorized at \$150 million per year, the funds are subject to congressional appropriation. As such, funding has never reached this level – usually hovering around 30% to 50% of the authorized amount. And it has never been adjusted for inflation. While tremendous progress has been made using state or other sources of support, not every SHPO has the most current or electronically available survey data. Recognizing this, submission for projects not already covered by the exclusions in the NPA or Collocation NPA may require additional information in order to make a determination. Unfortunately, at times, this information gap is exacerbated by applicants (or their contractors) providing documentation that doesn’t even meet minimum requirements, such as the inclusion of an adequate map.

As a practical matter, we have recommended that the FCC revisit their Form 620 and 621 Submission package. These forms were created more than 10 years ago and in some cases require the submission of unnecessary information (wasting time and paper), and in others lack field inputs that would make identification and review efforts more efficient. Although the FCC expressed an interest in undergoing a review of these forms, that effort has not advanced. SHPOs remain ready and willing to assist in revising the submission package forms to seek efficiencies.

Improve E-106 System – The states that are able to participate in the electronic review system (E-106) designed by the FCC (states that must rely on paper-based systems are unable to participate in E-106), have provided feedback that the system could use some improvements to prevent confusion and delay. For example, currently, you can only select “concur,” “concur with conditions,” or “not concur.” If you

“concur with conditions,” the system will flag the review as unresolved and in need of a Memorandum of Agreement (MOA) – which isn’t always necessary. Frequently the non-concurrence is going from a “no effect” determination to a “no adverse effect” determination – rendering an MOA unnecessary. Again, as with the Forms 620 and 621, some common-sense attention to existing systems can help to improve the process and avoid delays. We remain committed to helping with this in any way we can.

State or Regional Agreements - In a country as geographically diverse as the United States, it is hard to develop a review process that can address and accommodate every type of variation. For this reason, other federal agencies have employed State or Regional NPAs or even Nationwide Prototype Agreements that permit for the development of state protocols. This approach takes into account the survey data available in a given area, the types of resources that might be affected, and the types of installations (undertakings) relevant to the project at hand. Certainly if such a prototype system can be successfully employed by the Federal Emergency Management Agency (FEMA) to comply with Section 106 in response to complex disaster events, such an approach could be employed to tailor efficient project review for the wireless industry. If a state has a robust survey system and is comfortable accepting electronic submissions of information and can review a project quickly, we recommend tailoring the review in that state to achieve that efficiency, enabling the FCC and industry to focus efforts on states that may have fewer resources at their disposal.

COMMENTS ON PROPOSALS IN THE NPRM/NOI

The NCSHPO offers comments on specific questions posed in the NPRM/NOI below by paragraph number:

#19 – Costs and Changes to Construction – SHPOs, as a condition for receiving their HPF Funds, do not charge fees for Section 106 reviews. While the NPRM raises concerns about the timing of local and state reviews, the vast majority of construction projects proceed through SHPO review with a finding of “no adverse effect,” and without substantial changes. On a rare occasion, a tower on or near a historic property might need to be reduced or a specific installation technique might need to be employed in order to avoid damage. It should be pointed out, however, that the very existence of the review process leads, when possible, to the avoidance of historic resources. So one cannot rely solely on statistical analyses of adverse effects to determine the utility of the review process.

Also in this section the question was raised whether state and local historic preservation reviews are “duplicative.” We will address this later in the document in response to paragraph 54 of the NOPRM.

#39 – Lack of Response and Time Limits – NCSHPO is unaware of any widespread instances of SHPOs not responding to review requests in a timely manner. The ACHP’s regulations put a 30-day deadline on SHPO review from the time adequate information is submitted. A current survey of our membership demonstrates that FCC review times average 20 days or less with many reporting capabilities for 24-hour turnaround. The most common cause of any failure to maintain the 30-day deadline is failure on the part of the applicant to provide adequate information to support their application, as previously noted. In such instances, additional information must be sought in order to make a determination – which indeed can extend a review period.

The NPRM further questions whether different time limits should apply to different categories of construction. From the SHPO perspective, this is not necessary as the data does not support a problem

with review times. Beyond this, different review times would lead to operational inconsistencies that would not only be extremely difficult to manage, but would likely increase confusion and lead to delays.

#41 – Batched Submission Process – While batching has been employed with some success with Positive Train Control (another FCC Section 106 process), enabling the review of multiple installations at once, there are some underlying characteristics that make such an approach possible. Batching can work when you have the exact same product being installed in a consistent manner in a homogenous geographic area with a repetitive impact on a historic resource. Batched submitting for reviews of several identical PTC towers along a linear stretch of railroad right-of-way may indeed, at times, make sense. While this would seem helpful to industry, it must be noted that with this approach, individual review by the SHPO still takes place. Therefore, the only efficiency achieved on the SHPO review side is in some instances the ability to consolidate filing and processing documents. Considering there is such a lack of consistency with definition, equipment characteristics, and installation methods, (again, addressed earlier in this document) surrounding other types of wireless equipment, such an efficiency for Broadband may be difficult to achieve, but NCSHPO remains open to discussion.

#46 - Pole Replacement – As noted in the NPRM, several exclusions for pole replacements already exist in the current NPA – provided the pole meets the definition of “tower.” The NPRM questions whether this should be broadened to allow the exclusion to apply to all poles – regardless of whether they meet the definition. This goes back to our original point about descriptions, definitions and specifications. We would need more information about what is meant by “poles” that do not meet this definition before we could determine whether such an approach makes sense. Similarly, applying this approach for poles in “rights of way” outside of historic districts would also need further explanation – namely in what meets the definition of “rights of way.” Additional efficiencies might indeed be able to be crafted under certain circumstances. Traditionally replacements “in-kind” are permitted in historic districts of various elements – but replacements of different size, material, or design pose a challenge. In these instances, a programmatic approach to replacements makes more sense – potentially allowing for wide scale replacements provided that there is a very specific agreement on the pole and method of installation.

#48/49 – Transportation Rights of Way – We have to concur with the Commission’s previous determination that the concentration of historic properties near highways and railroads makes a blanket exclusion for transportation corridors not feasible. That said, this does not mean certain circumstances could not be identified for discreet exclusions to apply. Material, height, method of installation, location, proximity to known historic properties, and cumulative impacts of adding to any existing infrastructure would all come into play. We suspect the most appropriate approach would be through the creation of a new Nationwide Programmatic Agreement given the great number of variables, but look forward to consultation with the FCC and the ACHP on this topic.

#50 – Utility or Communications Right of Way Located on a Historic Property – While we recognize that in some instances the installation of additional equipment in an existing utility or communications right-of-way may appear to have little impact on a historic property, we are uncomfortable with the idea of an outright exclusion from review. We believe that Installations on historic properties deserve some level of review. In some instances there may be no issue. But in others, such as when you have a carefully installed set of existing light poles conforming to agreed-upon design criteria, equally spaced to be compatible with a historic property, random installations of additional elements would be

substantially disruptive. For this reason, we recommend that review continue for installations of additional equipment on utility or communications rights-of-way on historic properties.

#52 – Collocation – As stated in the NPRM, the FCC has “...long excluded most collocations of antennas from Section 106 review,” and recently this was expanded to include “smaller infrastructure associated with new technologies.” Collocations in historic districts and within 250 feet of the boundary of a historic district, however, must be reviewed. After not even being in place long enough to analyze the impact of the amendment (less than a year, the NPRM poses the question whether this 250 foot buffer should be reduced to 50 feet – in other words, changed from an amount less than a City block to the width of about two row houses. It is unclear to us how much of an added efficiency this reduction would achieve relative to the potential effects on a historic district and, frankly, there has not yet been enough experience with this issue to even answer the question. In our opinion, 250 feet permits a more reasonable buffer from visual effects to a historic district and therefore should not be altered.

#54 – CLG Review in Lieu of SHPO Review – We are sensitive to the fact that industry has expressed frustration at seemingly duplicative state and local review. Unfortunately, the types of review handled by the SHPO and any that may be conducted by a Certified Local Government (CLG) are quite different. SHPOs are the federally required participants in the Section 106 process and are charged with taking a broad view of the impact of federal undertakings on historic resources. CLG’s, however, are almost entirely focused upon the built environment and only have jurisdiction on locally-designated historic districts. Very few are in a position to comment on archaeological impacts and, in fact, may not even have the records or information necessary to do so. Beyond this, very few CLGs have been or are even qualified to be delegated federal project review functions. Therefore, we find it hard to envision a scenario where CLG review in lieu of SHPO review would even work. Very few, if any, CLGs would have the capability of fulfilling the type of consultation and review conducted by the SHPO as required under the NHPA and ACHP regulations.

#55 – Scope of Responsibility – The NPRM poses several questions essentially exploring whether the installation of wireless equipment should even undergo review under the NHPA at all. While it is always healthy to take a step back to determine whether something long in practice continues to make sense, we feel there is insufficient information available to even entertain this notion. The “corresponding changes in the nature and extent of wireless infrastructure deployment,” used as a reason for this approach is revealing. From our perspective, given these “corresponding changes,” there is very little understanding of what equipment is necessary, what it looks like, how big it is, where it needs to be installed, and what means of installation will be undertaken. Without a common recognition of this, it is impossible to determine the impact of the equipment on our historic resources – so categorically excluding it from the application of the NHPA doesn’t make sense.

As for the interpretation of what constitutes the federal nexus triggering Section 106 in the first place, or the FCC’s interpretation of their jurisdiction, we can only rely upon the existing case law which appears to have already addressed this question. We would rather work with the ACHP, the FCC and Industry to help identify efficient ways forward than entertain ways in which industry can seemingly attempt to bypass the NHPA.

#58 - Twilight Towers (Non-Compliant Towers) – We have been engaged with the FCC and the ACHP on finding a solution to the unique issues posed by so-called Non-Compliant or “Twilight Towers” built between the adoption of the Collocation NPA and the effective date of the NPA. We understand the

reason for the urgency behind finding a solution to “Twilight Towers,” as they are considered ripe for collocation of additional equipment. This collocation, of course, can’t happen without review if the existing tower never went through the Section 106 process.

Our members have expressed willingness to find a programmatic solution as they frequently receive requests for reviews of such towers. Below are some principles we have put forth in those discussions:

Identification – there needs to be a good faith effort by industry to identify the number of “non-compliant” towers in each state. This identification should be accompanied by adequate information to perform a review.

Submission Limits – Once a number is known, a reasonable limit should be established on the number of such towers that can be submitted at one time and over a period of time. Both states and tribes have indicated that they have inadequate information as to how many towers fall into this category. Therefore, it is hard to commit to a process for their review.

Programmatic Approach – Once it is known how many towers fall into this category, a programmatic approach can be developed to help streamline the review procedure.

Mitigation – An appropriate type of programmatic mitigation to resolve adverse effects should be established. A programmatic approach can offer a more efficient way of dealing with adverse effects and perhaps can be used to help support ongoing survey efforts – further aiding in future Section 106 reviews.

Removal/Relocation in Extreme Cases – Review and consultation only means something if there is a willingness to resolve serious issues. If any egregious tower installations are discovered that have resulted in major effects on historic resources, there should be a willingness to remove and/or move the tower. Given the number of years that have transpired, this is a somewhat unlikely scenario, but particularly for tribes this may be important in certain extreme circumstances.

The NPRM questions on the one hand whether collocations should simply be allowed without Section 106, and on the other hand acknowledges that states and tribes have expressed concern on the cumulative impacts to towers that may already have adverse effects. This concern, to be sure, stands. We see no reason to make a potentially bad decision even worse by making yet another potentially uninformed decision. The extent of the impact is, moreover, impossible to assess – since the impact of the existing tower has not been evaluated, and the type of additional equipment is not known. We appreciate the comment in the report that “the vast majority of towers that have been reviewed under the NPA have had no adverse effects on historic properties” and contend that this positive result is due primarily to the existence of the review process itself. It does not signal that review isn’t necessary or is a “waste of time.” Rather this reveals that the process is working – leading to better decision-making and avoidance of impacts to historic resources from the get-go.

CONCLUSION

The NCSHPO and SHPOs have, for years, worked with the FCC to try to achieve efficiencies in the Section 106 review process. We understand that over time, technologies change. Fortunately, it appears that smaller equipment seems to be the trend – which overall could reduce some impacts. But much more

effort needs to be put into identifying and defining the equipment and revealing installation methods before additional programmatic efficiencies or exclusions can be comfortably defined or identified.

We continue to look forward to working with the FCC and with industry to find solutions that both safeguard our historic resources and enable our access to the wireless technologies that we all benefit from.

Thank you for the opportunity to provide comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Erik M. Hein", with a stylized flourish at the end.

Erik M. Hein
Executive Director