

# Gov't Must Resolve Uncertainty Over 'Twilight' Cell Towers

By **Bozana Lundberg, Barry Friedman and Heather Richardson** (May 28, 2021)

If you worked from home during the pandemic and relied on your wireless service to remain in contact with colleagues and clients, you knew the importance of receiving high-quality wireless services where latency, jitter or dropped calls are minimal.

Telecommunications or cell towers, where calls are transmitted or received on the initial or final legs of the communication process, are an integral element of the wireless service.

It is common to see cell towers on the roofs of buildings or along highways, in cities, suburbs and on large structures in the vicinity of the interstate highway system. These sites often contain multiple antennas, reflecting the three major and multiple minor wireless service operators, that process signals received from cellphones, wireless networks, etc.

Although towers are constructed and operated by private parties, the ability to construct these towers and use of them by wireless operators and others (broadcasters, microwave services, etc.) are regulated by the Federal Communications Commission and, to a lesser degree, local governments.

Further, because the FCC's role over tower construction makes their approval a federal action, parties proposing to construct towers must first evaluate their projects for compliance with the environmental and cultural/historical protection requirements of the National Environmental Policy Act[1] and the National Historic Preservation Act.[2]

In turn, the Advisory Council on Historic Preservation publishes federal government regulations[3] to ensure compliance with the NHPA, and the FCC has its own rules to effectuate NEPA and the NHPA.[4]

Even after a tower is constructed, adding antennas to a tower, called collocation, or modifying the height or location of constructed towers, remains regulated by the FCC and its application of the environmental and historical/cultural preservation rules.

If towers have minimal or no impact on the environment, usually owing to their being small-sized towers, they may be categorically excluded from further NEPA review. However, reaching such conclusions requires a project proponent to consider several factors delineated by the FCC (the so-called FCC checklist items) before a tower is constructed with or, where an exclusion exists, without FCC prior approval.

Today, there is a standard review process that developers of new tower projects customarily undertake before a tower project is presented to the FCC for authority to construct.

One aspect involves consultation with state historic preservation officers and tribal historic preservation officers through the FCC's online tower construction notification system, applying Section 106 of the NHPA.



Bozana Lundberg



Barry Friedman



Heather Richardson

However, this process has only been in place for a little over 15 years, while there are many towers that predate the adoption of this formal process. Consequently, there is a gap in regulation that has led to certain towers that predate the rules, known as twilight towers, having uncertain regulatory status and a cloud over such towers' usage, for current and prospective tower owners.

These twilight towers are towers whose construction commenced between March 16, 2001, when Section 106 became applicable to towers, and March 7, 2005, when Section 106 compliance procedures became effective, and where the owner either did not complete Section 106 review or the owner cannot document that such review occurred.[5]

It is estimated that there are about 5,000 such towers nationwide. During the twilight time period, FCC rules did not specify any Section 106 requirements, so companies followed a variety of procedures which were often less rigorous in their examination of environmental and historical preservation issues than what is applicable today.

Even where such reviews were undertaken, many current owners of twilight towers cannot document compliance with Section 106 review because, as indicated, either they or their predecessors undertook no such review and/or the currently available paperwork is insufficient, incomplete or lost.

Since March 7, 2005, the nationwide programmatic agreement regarding the Section 106 National Historic Preservation Act review process[6] has imposed requirements that are still in place today and regularly followed by most tower owners that allow for full use of post-2005 towers. As a result, owners of these towers are not constrained in their ability to operate or modify their wireless towers.

What this means in practice, for twilight tower owners, is that their wireless operator tenants are generally reluctant to collocate on towers if the owner of a twilight tower cannot demonstrate Section 106 compliance, and this directly impacts the owners' leasing and tower sales efforts.

In effect, the twilight tower may be in violation of law or the tower owner may simply be unwilling or unable to undertake a Section 106 review. Yet the tower is constructed and can often provide space to collocate new antennas today where there exists a great need for wireless infrastructure.

While the FCC's position in the past administration was that collocation should be permitted without further Section 106 review, Native American tribes and the Advisory Council on Historic Preservation disagreed.[7]

Their position has been that twilight towers which may not be compliant with historical, NEPA or archeological requirements present impacts that may have adverse effects on the environment and should not be permitted to sidestep the Section 106 review.[8]

President Joe Biden has appointed Jessica Rosenworcel as the FCC's acting chairwoman but her solution, or that of a new permanent chair, in resolving the twilight towers problem, is yet to be articulated.

The prior chairman, Ajit Pai, who served until January 2021, put forth a proposal that collocation on twilight towers be permitted without full Section 106 compliance, though with some conditions.[9]

This proposal, as previously noted, was opposed by ACHP and the Native American tribes, most recently in the fall of 2020.

Aimee Jorjani, chairman of the ACHP, who still leads that agency, spoke out in opposition to the FCC's proposed solution. On Oct. 7, 2020, she stated, among other things, that the FCC's proposal was deficient due to "lack of sufficient measures to consider past and ongoing effects to historic properties that may have occurred as a result of the original construction of these towers, and the lack of clear measures to resolve such effects when or if they are identified." [10]

Jorjani added that a streamlined process was needed for reviewing the twilight towers when they are proposed for collocation, including consultations that included state historic preservation officers, tribal historic preservation officers and the general public.

State historic preservation officers and tribal historic preservation officers want a clear complaint process for raising concerns dealing with twilight towers and argue that just because no complaints have been made to-date, it does not mean that problems do not exist. They suggest that parties may not have known where to raise concerns or where the twilight towers are located.

The FCC, in its proposal, disagrees, arguing that these towers have been in place for 15-19 years without concerns being raised. State historic preservation officers and tribal historic preservation officers also want some type of review of twilight towers before collocations are permitted.

Among the suggestions raised have been to review the entire inventory of twilight towers or permit state historic preservation officers and tribal historic preservation officers to review a tower before collocation is permitted.

In contrast, the FCC contends, in supporting collocation on twilight towers, that new towers, impacting on the environment, would not need to be built if twilight towers could be more fully utilized. The FCC is also concerned that it would be too burdensome on the commission to require review of each twilight tower when the chance that there would be an adverse impact is, in its opinion, limited.

The tribal historic preservation officers have joined in opposing the FCC's proposed rule changes for twilight towers by contending that the FCC has not met its obligations for government-to-government consultation. [11]

The new administration may be receptive to these concerns. Among Biden's goals is more involvement of tribal nations in federal government actions affecting tribal nations.

On Jan. 26, 2021, the administration issued a memorandum on tribal consultation and strengthening nation-to-nation relationships. [12] Biden described that among his priorities is respect for tribal sovereignty including regular, meaningful and robust consultation with tribal nations.

It is too soon to tell, but Biden's goal of strengthening nation-to-nation relationships may play a role in Section 106 tribal consultations, including for twilight towers.

While a blanket exclusion from Section 106 would make collocation on twilight towers more efficient, by allowing for greater tower use through the removal of uncertainty, it would do so by bypassing historical preservation reviews and state historic preservation officer and

tribal historic preservation officer consultation that those entities and the new administration support.

What is clear is that finality is needed for a problem that has remained unanswered for far too long. A final action will provide, one way or the other, for the rules of the road for use of critical infrastructure during a period of high demand for wireless internet across the country.

The new administration should turn its attention to this matter and find a solution to this long-standing problem at the earliest possible time.

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*Bozana Lundberg is a managing associate, and Barry Friedman and Heather Richardson are senior counsel, at Thompson Hine LLP.*

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[1] See 42 U.S.C. § 4321, et seq.

[2] See 54 U.S.C. § 306108.

[3] See 36 C.F.R. part 800.

[4] See 47 C.F.R. §§ 1.1301-1.1320.

[5] See Comment Sought on Draft Program Comment for the FCC's Review of Collocations on Certain Towers Constructed Without Documentation of Section 106 Review, FCC, 83 F.R. 1215 (Jan. 10, 2018).

[6] See Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Reviewed by the Federal Communications Commission. See 47 C.F.R. part 1, app. C. Prior to this, the FCC had entered into the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas. See 47 C.F.R. part 1, app. B.

[7] See FCC Proposes Excluding Twilight Towers from Historic Preservation Review, Sarah K. Leggin, Lexology (January 16, 2018), available at <https://www.lexology.com/library/detail.aspx?g=74bdeca5-aa8b-4d39-9534-25b14d1bec2c>. See also 'Twilight towers' issue pits wireless industry against Native American, historical preservation groups, Mark Dano, Fierce Wireless (Feb. 14, 2018), available at <https://www.fiercewireless.com/wireless/twilight-towers-pits-wireless-industry-against-some-native-americans-historical>.

[8] See Industry, Tribes Disagree on Twilight Towers Program Comment, Paul Kirby, Wolters Kluwer (Sept. 28, 2020), available at <https://lrus.wolterskluwer.com/news/tr-daily/industry-tribes-disagree-on-twilight-towers-program-comment/122102/>.

[9] FCC Draft Program Comment for Twilight Towers, Summary of Public Outreach, Tribal Consultation, and Comments (Aug. 24, 2020).

[10] Letter from Aimee K. Jorjani, Chairman of ACHP, to Brendan Carr, Commissioner, FCC, Ref: Request for a Program Comment to Address Collocations on Twilight Towers (Oct. 7, 2020).

[11] See Letter from Omaha Tribe of Nebraska to Ajit Pai, Chairman, FCC (Jan. 26, 2018), available at <https://ecfsapi.fcc.gov/file/10126136520913/FCC%20Twilight%20Years%20Comments.PDF>.

[12] See Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.