

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

In the Matter of
AT&T Mobile Services, Inc.
Construction of Tower
Fort Ransom, North Dakota
Complaints of the Sheyenne River Valley National
Scenic Byway, Don Busta, Judith L. Morris, and
the North Country Trail Association

MEMORANDUM OPINION AND ORDER

Adopted: October, 15, 2015

Released: October 15, 2015

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

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I. INTRODUCTION

1. Several parties have filed complaints alleging that AT&T Mobility Services, Inc. (AT&T) failed to comply with the Commission’s environmental and historic preservation review requirements in connection with a tower constructed in late 2012 in Fort Ransom, North Dakota (Fort Ransom Tower). The Competition and Infrastructure Policy Division of the Wireless Telecommunications Bureau (Division)1 has reviewed the complaints and the responsive pleadings and, as explained below, finds that the Fort Ransom Tower was correctly determined under the Commission’s procedures to have no significant environmental impact and no adverse effects on historic properties. Therefore, the Division dismisses in part and denies in part the complaints. The Division notes, however, that AT&T failed to adhere fully to all procedural requirements in conducting its review. While these

1 On May 12, 2015, the former Spectrum and Competition Policy Division was renamed the Competition and Infrastructure Policy Division.

procedural defects are immaterial to the outcome under the facts of this case, the Division advises AT&T and all other applicants that they are responsible for ensuring full compliance with all of the Commission's environmental review requirements, including those both substantive and procedural, set forth in its rules.

## II. BACKGROUND

2. In early 2012, AT&T commenced the environmental review required by the Commission's rules<sup>2</sup> implementing the National Environmental Policy Act (NEPA)<sup>3</sup> and other federal environmental statutes, including historic preservation review under the National Historic Preservation Act (NHPA),<sup>4</sup> for the then-proposed Fort Ransom Tower. On March 6, 2012, AT&T contacted the Tribal Nations that had expressed an interest in the geographic area containing the proposed tower site through the Commission's Tower Construction Notification System (TCNS). None of these Tribal Nations identified an interest in any historic or cultural property that might be affected by the then-proposed tower. On April 22, 2012, AT&T submitted its FCC Form 620 (historic preservation review packet) to the State Historical Society of North Dakota (NDSHPO)<sup>5</sup> as part of the Section 106 NHPA review process required under the Nationwide Programmatic Agreement that governs Section 106 review under the Commission's rules.<sup>6</sup> On May 8, 2012, the NDSHPO concurred with AT&T's recommendation that the proposed Fort Ransom Tower would have no effect on historic properties within the tower's area of potential effects (APE).<sup>7</sup> AT&T published notice of its historic preservation review, which is required under the NPA,<sup>8</sup> in a local newspaper on April 30, May 7, and May 14, 2012.<sup>9</sup>

3. In April 2012, AT&T contacted the U.S. Fish and Wildlife Service North Dakota Field Office (USFWS) and the North Dakota Game and Fish Department by letter, asking each of them whether the proposed Fort Ransom Tower site is in or near a designated wilderness area, wildlife preserve, or critical habitat and whether the site sustains plant or animal species that have been designated or proposed as threatened or endangered.<sup>10</sup> In May 2012, the USFWS responded that the proposed tower site was not in or near a designated wilderness area, wildlife preserve, or critical habitat.<sup>11</sup> Also in May 2012, the North Dakota Game and Fish Department responded that the tower should not have significant environmental effects on wildlife or wildlife habitat.<sup>12</sup>

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<sup>2</sup> 47 C.F.R. Part 1, Subpart I.

<sup>3</sup> 42 U.S.C. §§ 4321-4370h.

<sup>4</sup> 54 U.S.C. § 300101 *et seq.*; see 47 C.F.R. § 1.1307(a)(4) and (5).

<sup>5</sup> The State Historical Society of North Dakota is the State Historic Preservation Officer (SHPO) for North Dakota under Section 101(b)(1)(A) of the NHPA, 54 U.S.C. § 302301(1).

<sup>6</sup> See 47 C.F.R. § 1.1307(a)(4) and 47 C.F.R. Pt. 1, App. C (Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission) (NPA). The NPA tailors and streamlines the Section 106 review process required by the NHPA and the Commission's rules at 47 C.F.R. § 1.1307(a)(4).

<sup>7</sup> See AT&T's Response to Complaints Alleging Noncompliance with Section 106 of the National Historic Preservation Act from Tower in Fort Ransom, SD [*sic*], February 13, 2014 (AT&T Response to NCTA, Sheyenne, and Don Busta), Ex. A, NEPA Report, at 233 (Applicant's Form 620 Submission). The APE is discussed in more detail at ¶¶ 18-22, *infra*.

<sup>8</sup> 47 C.F.R. Pt. 1, App. C, § V(B),(C).

<sup>9</sup> AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. B.

<sup>10</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 15 (Letter from Impact 7G, Inc., environmental consultant for AT&T, to North Dakota Game and Fish Department, April 24, 2012) and at 17 (Letter from Impact 7G, Inc. to U.S. Fish and Wildlife Service, North Dakota Field Office, April 24, 2012).

<sup>11</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 18-19 (Letter from U.S. Fish and Wildlife Service to Impact 7G, Inc., May 23, 2012).

<sup>12</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 16 (Letter from North Dakota Game and Fish Department to Impact 7G, Inc., May 15, 2012).

4. Because AT&T was required to notify the Federal Aviation Administration of the tower's proposed construction,<sup>13</sup> the Commission's rules require the tower to be registered in the Commission's Antenna Structure Registration (ASR) system.<sup>14</sup> The registration process involves both a national public notice that the Commission publishes on its website and a local notice that the applicant is required to publish in a newspaper of general circulation or by other appropriate means.<sup>15</sup> AT&T's ASR application file confirms that national notice was published on July 17, 2012, and AT&T certified in its application that local environmental notice was also published on July 17, 2012.<sup>16</sup> However, a copy of this local notice included in AT&T's pleadings indicates that it was published on July 23, 2012.<sup>17</sup>

5. The ASR Application was granted on August 28, 2012.<sup>18</sup> Subsequently, AT&T transferred ownership of the tower to Skyway Towers, LLC (Skyway), and on October 2, 2012, Skyway filed a Notice of Construction in the ASR system.<sup>19</sup> As constructed, the Fort Ransom Tower is a latticework structure with lighting and an overall height above ground level (AGL) of 320 feet.

6. Four parties (the Complainants) filed complaints against the constructed Fort Ransom Tower between November 2012 and March 2013:<sup>20</sup> the Sheyenne River Valley National Scenic Byway (Sheyenne),<sup>21</sup> Don Busta,<sup>22</sup> Judith L. Morris,<sup>23</sup> and the North Country Trail Association (NCTA).<sup>24</sup> Altogether, the Complainants raise allegations in three general categories. First, all four argue that AT&T failed to provide adequate notice of the proposed Fort Ransom Tower to interested parties.<sup>25</sup> Second, all four Complainants assert that AT&T failed adequately to assess whether the proposed tower would have a significant environmental effect or impact on historic properties.<sup>26</sup> Third, Judith L. Morris asserts that AT&T violated city zoning laws and failed to obtain a local building permit before construction began.<sup>27</sup> AT&T and Skyway submitted multiple responses to the complaints, arguing that AT&T complied with

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<sup>13</sup> See 14 C.F.R. § 77.9.

<sup>14</sup> 47 C.F.R. § 17.4(a).

<sup>15</sup> See 47 C.F.R. § 17.4(c)(3),(4). This local notice requirement is separate from the historic preservation local notice required under the NPA, although both requirements can be met through a single notice if it satisfies the timing and content requirements of each. See *In the Matter of Effects of Communications Towers on Migratory Birds*, WT Dockets 06-81 and 03-187, *Order on Remand*, 26 FCC Rcd. 16700, 16716 ¶ 41 (2011) (*Migratory Birds Remand Order*).

<sup>16</sup> See Application for Antenna Structure Registration, AT&T Mobility Services LLC, File No. A0779997, available at: <http://wireless2.fcc.gov/UlsApp/AsrSearch/asrApplication.jsp?applKey=4130369> (last visited Oct. 14, 2015).

<sup>17</sup> AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. B, Local Public Notices, July Public Notice.

<sup>18</sup> See Antenna Structure Registration, AT&T Mobility Services LLC, Registration No. 1284938, available at: <http://wireless2.fcc.gov/UlsApp/AsrSearch/asrRegistration.jsp?regKey=2684366> (last visited Oct. 14, 2015).

<sup>19</sup> See Application for Antenna Structure Registration, AT&T Mobility Services LLC, File No. A0779997, available at: <http://wireless2.fcc.gov/UlsApp/AsrSearch/asrApplication.jsp?applKey=4130369> (last visited Oct. 14, 2015).

<sup>20</sup> All four complaints were filed initially with the FCC's Consumer and Governmental Affairs Bureau and then transferred to the Division.

<sup>21</sup> Sheyenne's complaint (Sheyenne Complaint) was submitted on November 27, 2012. Although the first paragraph of the complaint states in part that it was filed on behalf of both Sheyenne and the Sheyenne State Forest/Fort Ransom Segment of the North Country National Scenic Trail, it is signed only by Bobby Koeplin as the Chairperson of Sheyenne.

<sup>22</sup> Don Busta's complaint (Don Busta Complaint) was submitted on November 29, 2012.

<sup>23</sup> Judith L. Morris submitted her Letter re: Formal Complaint of Installation of AT&T Antenna Structure, Antenna Structure Registration No. 1287938 (Judith L. Morris Complaint) on December 22, 2012.

<sup>24</sup> NCTA's complaint (NCTA Complaint) was submitted on March 1, 2013.

<sup>25</sup> See Sheyenne Complaint, Attachment; Don Busta Complaint; Judith L. Morris Complaint at 1-3; and NCTA Response to Response of AT&T to complaint 13-C00476941-1 (NCTA Response to AT&T).

<sup>26</sup> See Sheyenne Complaint and Attachment; Don Busta Complaint; Judith L. Morris Complaint at 3-5; and NCTA Response to AT&T.

<sup>27</sup> Judith L. Morris Complaint at 3.

the Commission's rules when it completed its environmental and historic preservation review for the proposed Fort Ransom Tower.<sup>28</sup> AT&T also submitted as an exhibit the NEPA Report that it had prepared in connection with its environmental review.<sup>29</sup> NCTA and Sheyenne submitted replies.<sup>30</sup>

7. On November 13, 2014, the Division requested that AT&T file Declarations from its consultants clarifying the procedures they used to conduct the Section 106 review, and that it serve those Declarations on the Complainants.<sup>31</sup> AT&T filed the requested Declarations on November 20 and 28, 2014.<sup>32</sup> None of the Complainants filed a reply.

### III. DISCUSSION

8. The Division has reviewed each of the complaints and responsive pleadings. As explained in more detail below, we conclude that AT&T substantively completed the steps required by the Commission's rules governing historic preservation and environmental review, and that nothing in the record compels us to question AT&T's conclusion that the tower would not cause significant environmental impacts or affect historic properties. However, AT&T failed to comply fully with the Commission's procedural requirements governing its review. While those defects do not affect the outcome of the review under the facts of this case, AT&T and all applicants are cautioned to take care that they adhere to the required process in future reviews.

9. As an initial matter, both AT&T and Skyway argue that the complaints were filed months after completion of the public comment periods initiated by AT&T's notices, and therefore that they should be dismissed as untimely.<sup>33</sup> In general, we do not consider after the fact environmental and historic preservation claims that could have been raised in a timely manner. In appropriate circumstances, however, the Commission will reopen an environmental or historic preservation review where a material error or omission by the applicant previously precluded effective review.<sup>34</sup> The question before us, then,

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<sup>28</sup> AT&T Response to Notice of Informal Complaint re: Bobby Koepplin, January 16, 2013 (AT&T Response to Sheyenne); AT&T Response to Notice of Informal Complaint re: Don Busta, January 16, 2013 (AT&T Response to Don Busta); Response of Skyway Towers Development, LLC, to Informal Complaints 12-C00443444-1 and 12-C00444128-1, January 18, 2013 (Skyway Response to Sheyenne and Don Busta); AT&T Response to Notice of Informal Complaint re: Bruce Matthews, April 13, 2013 (AT&T Response to NCTA); AT&T Response to NCTA, Sheyenne, and Don Busta; Response of Skyway Towers, LLC, to Informal Complaints 12-C00443444-1, 12-C0044128-1, and 13-C00476941-1, February 13, 2014 (Skyway Response to Sheyenne, NCTA, and Don Busta); Response of Skyway Towers, LLC, to Informal Complaint of Judith L. Morris, 12-C00452973, March 6, 2014 (Skyway Response to Judith L. Morris); and AT&T's Response to Complaint of Judith Morris (No. 12-C00452973) Alleging Noncompliance with Section 106 of the National Historic Preservation Act from Tower in Fort Ransom, SD [*sic*], March 6, 2014 (AT&T Response to Judith L. Morris).

<sup>29</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report.

<sup>30</sup> NCTA Response to AT&T; Response to AT&T and Skyway Towers Development, LLC, filed by Sheyenne, February 19, 2014.

<sup>31</sup> Email from Donald Johnson, Attorney, Spectrum and Competition Policy Division, to Robert Vitanza, General Attorney, AT&T Services, Inc., November 13, 2014.

<sup>32</sup> Declaration of Lance Rom, Principal Investigator for Quality Cultural Resource Services, November 20, 2014 (Rom Declaration); Declaration of Jeromy Pribil, Project Manager for Impact 7G, Inc., November 28, 2014 (Pribil Declaration).

<sup>33</sup> See, e.g., AT&T Response to NCTA, Sheyenne, and Don Busta at 1; AT&T Response to Don Busta; AT&T Response to Sheyenne; Skyway Response to Judith L. Morris at 2; Skyway Response to Sheyenne and Don Busta at 1; Skyway Response to Sheyenne, NCTA, and Don Busta at 5.

<sup>34</sup> See *In the Matter of Wireless Properties, LLC, Order*, 2015 WL 4484432, ¶14 (July 21, 2015) (*Wireless Properties*); see also 47 C.F.R. Pt. 1, App. C, § XI ("Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement. ... The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or

is whether the Complainants have identified any defects in AT&T's compliance that meet that standard.

**A. Notice of the Proposed Tower**

10. Sheyenne, Judith L. Morris, and NCTA all complain that Sheyenne and NCTA should have been individually notified of the tower as proposed, prior to construction, because the Fort Ransom Tower is less than one mile from both the Sheyenne River Valley National Scenic Byway and the North Country Trail.<sup>35</sup> Judith L. Morris further alleges that “neither the City nor the surrounding community received proper notification”<sup>36</sup> of the then-proposed tower.<sup>37</sup> Don Busta claims he was never notified about the then-proposed Fort Ransom Tower, which is located “directly across the valley from”<sup>38</sup> his property and which he can see from “top to bottom.”<sup>39</sup> AT&T and Skyway respond that AT&T provided adequate notice under the Commission's rules and received no complaints until months after construction was completed.<sup>40</sup> In particular, AT&T claims it satisfied the Commission's notice rules when it provided local and national public notice.<sup>41</sup>

11. We reject the Complainants' assertions that AT&T was required to provide any notice to the local public or to specific individuals or organizations beyond publication in the newspaper. Both the NPA and Section 17.4(c) require publication of historic preservation and environmental notice, respectively, in a newspaper of general circulation or by other appropriate means. The record shows that AT&T satisfied these requirements through publication in the local newspaper.<sup>42</sup> Neither the NPA nor Section 17.4(c) requires any additional notice to individuals in the community or to local organizations.<sup>43</sup> While Judith L. Morris and NCTA make reference to *The Siting of Wireless Telecommunications Facilities near National Scenic Trails* (Scenic Trails Resolution),<sup>44</sup> an October 1999 agreement between two industry trade associations and several organizations devoted to trail preservation, the Scenic Trails Resolution imposes no legal obligation on AT&T. The Scenic Trails Resolution contains an early notification provision pursuant to which “wireless telecommunications carriers and site management companies... are strongly encouraged to contact the appropriate Managing and Supporting Trail Organization... as early as possible in the siting process,”<sup>45</sup> but this guideline is expressly voluntary.<sup>46</sup> Additionally, the Scenic Trails Resolution is not incorporated in the Commission's rules, and AT&T is not a signatory to the Scenic Trails Resolution.<sup>47</sup>

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Council, where appropriate, take appropriate actions. The Commission shall notify the objector of the outcome of its actions.”)

<sup>35</sup> Sheyenne Complaint; Judith L. Morris Complaint at 5; NCTA Response to AT&T.

<sup>36</sup> Judith L. Morris Complaint at 2.

<sup>37</sup> *Id.* at 1.

<sup>38</sup> Don Busta Complaint.

<sup>39</sup> *Id.*

<sup>40</sup> *See, e.g.*, Skyway Response to Sheyenne and Don Busta at 3; AT&T Response to NCTA, Sheyenne, and Don Busta; *see* 47 C.F.R. § 17.4(c) and 47 C.F.R. Pt. 1, App. C, § V(B).

<sup>41</sup> *See, e.g.*, AT&T Response to Don Busta.

<sup>42</sup> *See* AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 181 and Ex. B, Local Public Notice and July Public Notice.

<sup>43</sup> Under the NPA, the SHPO may require notice to local organizations, but there is no evidence that the NDSHPO did so here. *See* 47 C.F.R. Pt. 1, App. C, § V.D.

<sup>44</sup> *See* Scenic Trails Resolution, as published on the Appalachian Trail Conservatory website, available at: <https://www.atcvip.org/docs/default-source/default-document-library/wireless-industry-agreement.pdf?sfvrsn=0> (last visited Oct. 14, 2015).

<sup>45</sup> *See id.*, § IIA, at 4.

<sup>46</sup> *Id.*

<sup>47</sup> Signatories to the Scenic Trails Resolution are: CTIA – The Wireless Association, PCIA – The Wireless Infrastructure Association, the Appalachian Trail Conference, the American Hiking Society, the Potomac Heritage

12. Sheyenne and Judith L. Morris also question whether AT&T complied with the Commission's requirement to contact the local government as part of the Section 106 process.<sup>48</sup> The NPA requires applicants to provide written notice to "the local government that has primary land use jurisdiction over the site,"<sup>49</sup> which in this case is the City of Fort Ransom (City). AT&T's NEPA Report documents that its consultant wrote to the City using an email address that Sheyenne believes may be a "tourism hotline email [address]."<sup>50</sup> The record does not establish, however, that the email address AT&T used was, in fact, incorrect or that AT&T should have used a different email or other address to contact the City. Further, the City has not complained about lack of written notice under the NPA.

13. We do observe, however, that AT&T fell short of the notice requirements in Section 17.4(c) and the NPA in several respects. First, the NPA notices did not include a street address, as required by the NPA.<sup>51</sup> Instead, AT&T described the location of the then-proposed tower as "near the intersection of Sorby Hill Rd and Valley Rd, Fort Ransom, ND 58033."<sup>52</sup> We note that a street address was, in fact, available, as it was included in AT&T's July 23, 2012 local public notice pursuant to the Commission's ASR rules.

14. In addition, both notices were untimely. First, the NPA requires applicants to provide local public notice of their proposed towers on or before the date on which the applicant submits its FCC Form 620 to, in this case, the SHPO, thereby giving the SHPO the opportunity to consider any public comments generated by the local public notice during the SHPO's own period of review.<sup>53</sup> AT&T published local public notice describing the proposed tower and inviting public comments with respect to its potential effects on historic properties in *The Ransom County Gazette* on April 30, May 7, and May 14, 2012.<sup>54</sup> However, it failed to publish this notice on or before the date on which it submitted its FCC Form 620 to the NDSHPO, April 22, 2012.

15. Second, the Commission's rules require a prospective ASR applicant to provide local public notice containing specific details about the proposed tower and instructions for filing requests for further environmental review "through publication in a newspaper of general circulation or other appropriate means."<sup>55</sup> On or after the date on which local notice is published, the Commission posts notification of the proposed construction on its website.<sup>56</sup> This national environmental notice remains on the Commission's website for 30 days, after which interested members of the public may no longer submit requests for further environmental review.<sup>57</sup> Thus, in order to ensure compliance with these timing provisions, the applicant must publish local notice on or before the date on which it requests that the Commission publish national notice, and the applicant is required to inform the FCC that it supplied

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Partnership, the Continental Divide Trail Alliance, the Florida Trail Association, the Ice Age Park and Trail Association, the Pacific Crest Trail Association, and NCTA.

<sup>48</sup> Sheyenne Complaint at 5; Judith L. Morris Complaint at 2.

<sup>49</sup> 47 C.F.R. Pt. 1, App. C, § V(C).

<sup>50</sup> Sheyenne Complaint at 1. See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 230 (Letter from Impact 7G to City of Fort Ransom at [info@fortransomnd.com](mailto:info@fortransomnd.com), April 17, 2012).

<sup>51</sup> 47 C.F.R., Pt. 1, App. C, § V(C)(1).

<sup>52</sup> AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. B, Local Public Notices.

<sup>53</sup> See 47 C.F.R. Pt. 1, App. C, § V(B); see also *id.* at §§ V(E) (directing applicant to forward public comments to the SHPO) and VII(A)(3) (providing additional time for SHPO to review comments received during last five days of review period).

<sup>54</sup> AT&T Response to NCTA, Sheyenne, and Don Busta at 6.

<sup>55</sup> 47 C.F.R. § 17.4(c)(3).

<sup>56</sup> See 47 C.F.R. § 17.4(c)(4).

<sup>57</sup> See 47 C.F.R. § 17.4(c)(4),(5). Applications currently on environmental notice can be found on the Federal Communications Commission website at: <https://wireless2.fcc.gov/ASRManager/service/nationalNoticeReport.faces> (last visited Oct. 14, 2015).

the required local notice when it completes its application.<sup>58</sup> Although AT&T's application included this information, as well as a general certification that all information in the application is "true, complete, correct, and made in good faith," it in fact published local public notice pursuant to the Commission's ASR rules on July 23, 2012.<sup>59</sup> Because the national public notice was published at AT&T's request on July 17, 2012, six days prior to the publication of local public notice, the public comment period remained open for only 24 days following local notice – not 30 or more days, as would be the case in a fully compliant scenario.

16. Under the circumstances of this case, we find that these procedural defects, while significant, do not invalidate AT&T's review. While the Section 106 notice did not contain a street address, it accurately described the tower's location, and there is no evidence that the lack of a street address misled any potential commenter. Furthermore, there is no evidence that any party attempted to file a comment or request for review within 30 days of either notice but was prevented from doing so. While not an excuse, we note that the applicable environmental notification rules had been in place for less than a month at the time AT&T began the ASR application process for the Fort Ransom Tower, and we have no reason to believe that AT&T or any other party is systematically providing untimely notices. All the same, we caution AT&T and other applicants that full compliance with the content and timing provisions of these notice procedures is required under the Commission's rules. Under appropriate circumstances, failure to comply may lead to invalidation of the review and/or enforcement action.

17. Therefore, the Division denies the Complainants' complaints to the extent they allege that public notice of the Fort Ransom Tower was insufficient under the Commission's rules or that individual notice should have been provided to specific entities. However, the Division emphasizes the importance of full compliance and expects AT&T and all other applicants to adhere to the Commission's public notice rules in both substance and procedure in the future.

#### **B. Section 106 Review**

18. Sheyenne, Judith L. Morris, and NCTA complain that AT&T failed properly to review the tower's visual effects on historic properties, including the T.J. Walker Historic District, King/Pyramid Hill, the Sheyenne River Valley National Scenic Byway, and the North Country Scenic Trail.<sup>60</sup> Judith L. Morris states that the T.J. Walker Historic District is within the tower's APE, and she disputes the assertions in AT&T's NEPA Report that the tower would not be "generally visible" from within the historic district or "visible" from structures within the district.<sup>61</sup> Sheyenne questions AT&T's use of a radius of three quarters of a mile from the tower site to search for visual effects.<sup>62</sup> AT&T responds that the complaints are untimely and argues that it met the Commission's requirements for historic preservation review when it submitted its Section 106 Submission Packet to the NDSHPO.<sup>63</sup>

19. Section 1.1307(a)(4) of the Commission's rules implements the NHPA by requiring applicants to consider the effects of proposed Federal undertakings on historic and cultural properties that are listed or eligible for listing in the National Register of Historic Places.<sup>64</sup> The Commission has deemed

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<sup>58</sup> See FCC Form 854, Items 47 and 49-51 and Certification Statements, available at: <https://transition.fcc.gov/Forms/Form854/854.pdf> (last visited Oct. 14, 2015).

<sup>59</sup> AT&T Response to NCTA, Sheyenne, and Don Busta at 7.

<sup>60</sup> Sheyenne Complaint and Attachment at 1-2; Judith L. Morris Complaint at 2-5; NCTA Response to AT&T.

<sup>61</sup> Judith L. Miller Complaint at 4. See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 210.

<sup>62</sup> Sheyenne Complaint at 1.

<sup>63</sup> See, e.g., AT&T Response to NCTA, Sheyenne, and Don Busta at 2-4.

<sup>64</sup> See 47 C.F.R. § 1.1307(a)(4).

the grant of an ASR application to be a Federal undertaking.<sup>65</sup> In order to complete Section 106 review under the NHPA, the applicant is required to follow the procedures set forth in the NPA, which is incorporated into the Commission's rules.<sup>66</sup> The NPA streamlines and tailors the Section 106 review process specifically for proposed new towers.

20. The NPA requires applicants proposing to construct new towers to define separate APEs for direct and visual effects and to identify potentially impacted historic or cultural properties within both APEs in a Section 106 Submission Packet provided to the relevant SHPO or Tribal Historic Preservation Officer (THPO), as appropriate.<sup>67</sup> The APE for direct effects is limited to the area of potential ground disturbance and any property that might be physically altered or destroyed.<sup>68</sup> The APE for visual effects is "the geographic area in which" the proposed tower "has the potential to introduce visual elements that diminish or alter the setting, including the landscape, where the setting is a character-defining feature of a Historic Property that makes it eligible for listing on the National Register."<sup>69</sup> For a 320-foot tall tower like the Fort Ransom Tower, the APE for visual effects is presumed to be three quarters of a mile from the tower site unless otherwise established through consultation with the SHPO or THPO.<sup>70</sup> No other APE for visual effects for the then-proposed Fort Ransom Tower was established in this case.

21. In its Section 106 Submission Packet, AT&T found no direct effect on historic properties in either the APE for direct effects or the APE for visual effects.<sup>71</sup> AT&T identified the T.J. Walker Historic District as a historic property in the APE for visual effects, but found that the tower would have no visual effect on it because trees and terrain were expected to obstruct the view of the tower.<sup>72</sup> AT&T further searched both the National Register and the NDSHPO's records, as required under the NPA,<sup>73</sup> and did not identify King/Pyramid Hill as a property that was listed or had been determined eligible for listing.<sup>74</sup> Letters from Tribal Nations contacted through TCNS state that the then-proposed tower would have no impact on historic properties of cultural or religious significance to them in the area where AT&T proposed to build the tower.<sup>75</sup> Additionally, there is no evidence in the record establishing that either the Sheyenne River Valley National Scenic Byway or the North Country Scenic Trail is listed or has been determined eligible for listing on the National Register of Historic Places. Therefore, AT&T was not required under the NPA to determine whether either was within the APE for visual effects and, if so, whether the proposed Fort Ransom Tower would have a visual effect on either property. No timely public comment questioning or challenging these determinations was received, either during the SHPO's review or within 30 days after AT&T provided public notice. Based on AT&T's Submission Packet and the lack of public comment, the NDSHPO concurred with AT&T's "No Historic Properties Affected" determination,<sup>76</sup> and this concurrence concluded the review process under the NPA.<sup>77</sup> In sum, the record

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<sup>65</sup> Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1083 ¶ 25 (2004), *aff'd. sub nom. CTIA – The Wireless Ass'n. v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

<sup>66</sup> See 47 C.F.R. § 1.1307(a)(4); 47 C.F.R. Pt. 1, App. C.

<sup>67</sup> See 47 C.F.R. Pt. 1, App. C, §§ II.A.3, VI.A, and VI.C.

<sup>68</sup> See *id.*, § VI.C.2.

<sup>69</sup> See *id.*, § VI.C.3.

<sup>70</sup> See *id.*, §§ VI.C.3 and VI.C.4.b.

<sup>71</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 200.

<sup>72</sup> See *id.* at 206-215.

<sup>73</sup> 47 C.F.R. Pt. 1, App. C, § VI.D.1.a.

<sup>74</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, at 183 (Letter from Impact 7G, Inc. to Ms. Susan Quinnell, Review and Compliance Coordinator, State Historical Society for North Dakota, April 22, 2012); Rom Declaration; Pribil Declaration.

<sup>75</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report, at 38, 41, and 44.

<sup>76</sup> See *id.* at 233.

<sup>77</sup> 47 C.F.R. Pt. 1, App. C, § VII.B.1.

does not support a finding that the applicant committed any material error or omission in completing the Section 106 process prescribed under the NPA that precluded the NDSHPO's effective review.<sup>78</sup> We therefore do not reopen the NDSHPO's contemporaneous final determination that no historic properties were affected.

22. Accordingly, the Division denies the complaints to the extent they allege that AT&T failed adequately to assess the Fort Ransom Tower's effects on historic and cultural properties within the appropriate APE.

### C. Environmental Review

23. In addition to effects on historic properties, Complainants also raise environmental concerns about the tower's visual effects. Judith L. Morris argues that AT&T should have been required to prepare an EA pursuant to Section 1.1308(a) of the Commission's rules because, she believes, the tower may have a significant effect upon the local environment due its "location at the edge of a pristine, untouched, and historic valley."<sup>79</sup> Don Busta contends that the tower takes away from the scenic view of the valley.<sup>80</sup> NCTA claims the tower dominates the "viewscape" from the North Country Scenic Trail.<sup>81</sup> Sheyenne says the tower is a detriment to the "scenic intrinsic quality" of the Sheyenne River Valley National Scenic Byway, and that, due to its construction, tourists will now have photographs of the tower as mementos.<sup>82</sup>

24. NEPA requires all federal agencies to identify and consider environmental effects when authorizing or undertaking a major federal action. Under Council on Environmental Quality (CEQ) rules, an agency shall prepare an Environmental Impact Statement (EIS) for any proposed action that the agency has determined will have a significant effect on the environment. If a proposed action falls within a class that the agency has determined may significantly affect the environment, but will not necessarily have a significant environmental impact, the agency shall prepare, or delegate preparation of, an EA in order to determine whether an EIS is required. Categories of actions that the agency has identified as individually and cumulatively unlikely to have a significant effect on the human environment are categorically excluded from review.<sup>83</sup>

25. Sections 1.1307(a) and (b) of the Commission's rules identify specific circumstances under which communications facilities may significantly affect the environment, and which, if present, require the applicant to prepare an EA for the Commission to evaluate as part of its decision-making process.<sup>84</sup> None of these circumstances, other than potentially significant effects on historic properties,<sup>85</sup> are alleged to be present here.

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<sup>78</sup> See *Wireless Properties* at ¶ 14. By contrast, in *Wireless Properties*, the applicant failed to identify to the SHPO a historic property within the APE that was listed in the National Register, which it was required to do under the NPA. See *id.* at ¶ 3.

<sup>79</sup> Judith L. Morris Complaint at 2-3. See 47 C.F.R. § 1.1308(a) (applicants shall prepare EAs for actions that may have a significant environmental impact).

<sup>80</sup> Don Busta Complaint.

<sup>81</sup> NCTA Response to AT&T.

<sup>82</sup> Sheyenne Complaint at 2.

<sup>83</sup> See 40 C.F.R. §§ 1501.4(a)-(b) (a federal agency shall determine whether a proposal is of a type that normally requires an environmental impact statement (EIS) or normally is categorically excluded and, if neither is applicable, the agency shall prepare an EA) and 1507.3(b)(2) (agency shall specify criteria for identifying typical classes of action that normally require an EIS, normally do not require either an EIS or an EA, and normally require an EA but not necessarily an EIS).

<sup>84</sup> 47 C.F.R. §§ 1.1307(a),(b); see also 47 C.F.R. § 1.1307(d) Note (interim criteria for preparing an EA to address potential significant effects to migratory birds, pending final rules). The Commission has not identified any category of actions that routinely requires an EIS. 47 C.F.R. § 1.1305.

<sup>85</sup> 47 C.F.R. § 1.1307(a)(4): see discussion in Section III.B, *supra*.

26. Except as provided in Sections 1.1307(c) and (d), actions not within the categories for which EAs are required under Sections 1.1307(a) and (b) of the Commission's rules "are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing."<sup>86</sup> Under Sections 1.1307(c) and (d), the agency shall require an EA if it determines, on its own motion or in response to an allegation by an interested person, that an otherwise categorically excluded action may have a significant environmental impact.<sup>87</sup> The Commission's environmental notification process for ASR applications provides an opportunity for interested persons to allege that an EA is required under Section 1.1307(c) for otherwise categorically excluded actions.<sup>88</sup>

27. Because no timely public comments or objections were received – indeed, public notice was provided in July 2012, and the first of the subject complaints was not submitted until the end of November 2012 - we dismiss each complaint as untimely filed with respect to claims of potentially significant environmental impacts that allegedly require an EA. As documented in AT&T's NEPA Report, AT&T performed sufficient research and inquiry to support its conclusion that the then-proposed Fort Ransom Tower would have no significant environmental effects under the criteria listed in Section 1.1307(a) and (b) of the Commission's rules.<sup>89</sup> The rules do not require an applicant to consider potential significant environmental impacts that are not listed in Section 1.1307(a) or (b).

28. We note that while the Commission does not automatically require submission of an EA in cases that may raise aesthetic concerns, such concerns may be raised as extraordinary circumstances pursuant to Sections 1.1307(c) and (d), and we decide on a case-by-case basis whether the action may have a significant environmental impact so as to require environmental processing.<sup>90</sup> In addressing such cases, we give considerable weight to any site approval obtained from a local, state, or regional land use authority or federal land management agency, if that approval has taken into account the environmental impact of the proposal.<sup>91</sup> Site-specific factors such as the presence of a designated scenic highway or trail would be considered. Given that NEPA requires environmental review of proposed (not completed) Federal actions, however, extraordinary circumstances that require environmental processing should be raised by interested parties, or identified by the staff on its own motion, during pre-construction review. Here Complainants raised concerns as to visual impacts only after the public notice period was complete and after the tower was constructed. In these circumstances, we dismiss the complaints as untimely. In doing so, we do not decide whether an EA would have been required if the allegations as to visual effects had been timely.

#### **D. Local Building Permit Process**

29. Judith L. Morris asserts that AT&T did not obtain a local building permit before construction began.<sup>92</sup> Without addressing the merits of this allegation, the Division notes that ensuring compliance with local building permit requirements falls outside of the Commission's purview.<sup>93</sup>

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<sup>86</sup> 47 C.F.R. § 1.1306(a).

<sup>87</sup> See 47 C.F.R. §§ 1.1307(c),(d); Public Employees for Environmental Responsibility, *Order*, 16 FCC Rcd 21439, 21441 ¶ 3 (2001). These provisions satisfy Section 1508.4 of the Council on Environmental Quality's rules, 40 C.F.R. § 1508.4, requiring that "[a]ny [categorical exclusion] procedures shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."

<sup>88</sup> *Migratory Birds Remand Order*, 26 FCC Rcd. at 16719 ¶ 50.

<sup>89</sup> See AT&T Response to NCTA, Sheyenne, and Don Busta, Ex. A, NEPA Report.

<sup>90</sup> See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, GEN Docket No. 79-163, 60 Rad.Reg.2d (P&F) 13 ¶ 11 (1986).

<sup>91</sup> *Id.* at ¶ 12.

<sup>92</sup> Judith L. Morris Complaint at 3.

<sup>93</sup> Cf. 47 U.S.C. § 332(c)(7)(A) ("Except as provided in this paragraph, nothing in [the Communications] Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the

Therefore, Judith L. Morris's complaint that AT&T failed to obtain a local building permit prior to construction is dismissed.

#### IV. CONCLUSION

30. Based on the record, the Division finds that AT&T complied generally and substantively with the Commission's process for assessing impacts pursuant to its rules implementing NEPA and the NHPA. Therefore, the complaints are dismissed in part and denied in part. The Division is concerned, however, by AT&T's deviations from the Commission's procedural requirements, although in this case they did not alter the ultimate conclusion and we find nothing to indicate that AT&T has routinely failed to adhere to these rules. The Division expects AT&T and all other applicants to ensure that they adhere to all substantive and procedural requirements when completing the environmental and historic preservation review process.

#### V. ORDERING CLAUSES

31. Accordingly, pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, Section 102(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(C), and Sections 1.1307(a) and (c) and 17.4(c) of the Commission's rules, 47 C.F.R. §§ 1.1307(a),(c), 17.4(c), the complaints filed by the Sheyenne River Valley National Scenic Byway, Don Busta, Judith L. Morris, and the North Country Trail Association are DISMISSED in part and otherwise DENIED.

32. This action is taken pursuant to delegated authority, pursuant to Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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placement, construction, and modification of personal wireless service facilities.”). In cases involving towers to be constructed in floodplains, the staff typically looks to the building permit as evidence that the facility will be elevated above the floodplain and therefore will not cause a significant environmental impact. *See* 47 C.F.R. § 1.1307(a)(6). The Fort Ransom Tower, however, is not located in a floodplain.