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

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| In the Matter of | ) |
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| Wireless Properties, LLC | ) |
| Application for Review | ) |
| | ) |
| Proposed Tower, Missionary Ridge | ) |
| Chattanooga, Tennessee | ) |
| | ) |
| | ) |

**ORDER**

**Adopted: July 16, 2015** **Released: July 21, 2015**

By the Commission: Commissioner Pai issuing separate statement.

**TABLE OF CONTENTS**



## I. INTRODUCTION

1. With this Order, we deny an Application for Review filed by Wireless Properties, LLC (Wireless Properties)[1] and affirm in all respects the underlying Order released by the Spectrum and Competition and Policy Division (Division) of the Wireless Telecommunications Bureau.[2] In the Order, the Division denied Wireless Properties' Petition for Expedited Declaratory Ruling (Petition), which sought a determination that the National Historic Preservation Act (NHPA) Section 106[3] review for a proposed communications tower had been completed. For the reasons the Division articulated in its Order and those set forth below, we hold that the Section 106 review is not complete because Wireless Properties failed to identify all of the listed or determined eligible historic properties within the proposed tower's Area of Potential Effects (APE). Although the Tennessee Historical Commission (Tennessee

[1] Wireless Properties, Application for Review, filed June 22, 2007 (Application for Review).

[2] Wireless Properties, LLC Petition for Declaratory Ruling, Proposed Tower, Missionary Ridge, Chattanooga, Tennessee, *Order*, 22 FCC Rcd 9299 (2007) (Order). On May 12, 2015, the Spectrum and Competition Policy Division was renamed the Competition and Infrastructure Policy Division.

[3] 54 U.S.C. § 306108 (formerly codified at16 U.S.C. § 470f).

SHPO), which is the State Historic Preservation Officer (SHPO) for Tennessee under the NHPA,[4] had concurred with the Applicant's determination that the proposed tower would have no adverse effect, that determination was based on Wireless Properties' materially incomplete submission. Like the Division, we find that the original Tennessee SHPO determination, based on erroneous information, does not complete the Section 106 process, and we therefore affirm the Order and deny the Application for Review.

## II. BACKGROUND

2. Although there are a number of contested issues in this proceeding, the facts necessary to our analysis and conclusion are undisputed. Wireless Properties proposes to construct a 150-foot monopole in Chattanooga, Tennessee. The tower would be located within 1,000 feet of the Bragg Reservation, a unit of the Chickamauga and Chattanooga National Military Park (National Park). The Bragg Reservation is therefore within the Area of Potential Effects (APE) of the proposed tower because, as detailed in the Nationwide Programmatic Agreement (NPA) that governs the Commission's reviews of wireless infrastructure under Section 106,[5] it is within a half mile of the proposed installation.[6] The National Park, of which the Bragg Reservation is a part, is listed on the National Register of Historic Places (National Register).[7] Under the Commission's rules and the NPA, except for excluded undertakings, the party responsible for Section 106 review must, prior to construction, affirmatively identify properties in the APE that are listed or eligible for listing in the National Register, and evaluate whether the proposed construction would affect or adversely affect any of those properties.[8] The NPA governs the process for making this determination, including specifying records that shall be used.[9]

3. In connection with the proposed tower, Wireless Properties filed an FCC Form 620 and an accompanying Submission Packet with the Tennessee SHPO, as the NPA process requires.[10] In those materials, Wireless Properties stated that a 180-foot monopole at the proposed location would have no

[4] *See* 54 U.S.C. § 302301(a) (formerly codified at 16 U.S.C. § 470a(b)(1)(A)) (providing for designation of State Historic Preservation Officers).

[5] Nationwide Programmatic Agreement for the Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA), 47 C.F.R. Part 1, App. C. *See* 47 C.F.R. § 1.1307(a)(4) (requiring that applicants shall use the NPA to ascertain whether proposed facilities may affect properties that are listed or eligible to be listed in the National Register ); Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, *Report and Order*, 20 FCC Rcd 1073 (2004) (*NPA Report and Order*), *aff'd sub nom CTIA-Wireless Ass'n v. F.C.C.,* 466 F.3d 105 (D.C.Cir. 2006).

[6] Under the NPA, the APE for visual effects for a tower 200 feet or less in overall height is presumed to be a circle with a half-mile radius unless otherwise established through consultation. NPA § VI.A.4.a.

[7] For the National Park's listing in the National Register, *see* http://pdfhost.focus.nps.gov/docs/nrhp/text/66000274.PDF.

[8] *See* NPA § VI.

[9] In particular, the NPA directs applicants to consult the National Register and certain records that are maintained by the SHPO or that can be found in publicly available sources identified by the SHPO to determine what properties to consider when evaluating the visual effects of proposed towers on historic properties, other than properties of traditional cultural and religious significance to Tribal Nations and Native Hawaiian Organizations. *See* NPA § VI.D.1.

[10] NPA §§ VII.A.1. (providing that the applicant shall prepare a Submission Packet for the SHPO and the consulting parties that (1) defines the APE; (2) identifies historic properties within the APE; (3) evaluates the historic significance of the identified properties; and (4) assesses the effects of the proposed undertaking); VII.B-D (requiring that the SHPO shall review the Submission Packet and the applicant's proposed determination in the first instance and specifying circumstances that do not require direct involvement by Commission staff in the Section 106 process).

adverse visual effects on historic properties in the APE.[11] In support of that proposed finding, Wireless Properties identified two National Register-listed properties, the Missionary Ridge Historic District and Founders Home at the McCallie School, located within one-half mile of the proposed tower site and thus within the APE for visual effects, but it did not disclose the location of the Bragg Reservation within the APE or consider any visual effects the tower would have on it. The Submission Packet also included a cultural resources assessment, prepared by a cultural resources specialist, which concluded that the proposed tower would have no adverse effect on historic properties but failed to list the Bragg Reservation among the historic properties in the APE.[12] An accompanying letter from Paul Archambault, a historic preservation planner representing the Chattanooga Area Regional Council of Governments, also concluded that the tower would not adversely affect historic properties but did not list the properties that he took into consideration.[13]

4. Based on its review of the FCC Form 620 and accompanying materials, the Tennessee SHPO informed Wireless Properties in March 2006 that it concurred with the applicant's finding of no adverse effect.[14] In December of that year, Mr. Archambault sent a letter to the Tennessee SHPO reversing his previous advice that the proposed tower would have no adverse effect on historic properties.[15] He explained that the proposed tower would adversely affect the Bragg Reservation and the Missionary Ridge Historic District and recommended that the applicant find an alternative site. He attributed his earlier conclusion of "no adverse effect" to his lack of familiarity with the area and inexperience in the job.[16] The Tennessee SHPO notified Wireless Properties three days later that it was reopening its review of the project, rescinding its earlier finding of no adverse effect, and concluding that the project would have an adverse effect on historic properties.[17]

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[11] *See* Wireless Properties FCC Form 620 (filed March 13, 2006) (Exhibit A to the Petition). While the Form 620 references a 180-foot monopole, Wireless Properties subsequently informed the Tennessee authorities that it intends to build only a 150-foot monopole. *See* Letter from Henry A. Fisher, Engineer, Environmental Engineers, Inc., to Paul Archambault, Historic Preservation Planner, Chattanooga Area Regional Council of Governments, Southeast Tennessee Development District (April 18, 2006); Letter from Henry A. Fisher, Engineer, Environmental Engineers, Inc., to Dr. Joseph Garrison, Tennessee Historical Commission (May 26, 2006).

[12] *See* A Phase I Cultural Resources Assessment of the Proposed I-24 Ridgecut Telecommunications Tower in Chattanooga, Hamilton County, Tennessee, FCC Form 620, March 13, 2006 (Exhibit A to the Petition).

[13] *See* Letter from Paul Archambault, Historic Preservation Planner, Chattanooga Area Regional Council of Governments, Southeast Tennessee Development District, to Marla Spry, MRS Consultants, LLC (Feb. 16, 2006) (attached as Appendix C to the Petition); *see also* Letter from Paul Archambault, Historic Preservation Planner, Chattanooga Area Regional Council of Governments, to Henry Fisher, Environmental Engineers, Inc. (May 9, 2006) (reiterating his conclusion as applied to a 150-foot tower). As a matter of practice, the Tennessee SHPO considers the advice and local knowledge of the local historic preservation planner in performing Section 106 review. *See* http://www.tennesseepreservationtrust.org/resources/tennessee-development-districts.

[14] *See* Letter from Herbert L. Harper, Executive Director and Deputy State Historic Preservation Officer, Tennessee Historical Commission, to Henry Fisher, Environmental Engineers (March 29, 2006) (Exhibit G to the Petition); *see also* Letter from Herbert L. Harper, Executive Director and Deputy State Historic Preservation Officer, Tennessee Historical Commission, to Henry Fisher, Environmental Engineers, Inc. (June 12, 2006) (reiterating concurrence as applied to a 150-foot tower).

[15] Letter from Paul Archambault, Historic Preservation Planner, Chattanooga Area Regional Council of Governments, Southeast Tennessee Development District, to Joseph Y. Garrison, Review and Compliance Coordinator, Tennessee Historical Commission (Dec. 11, 2006) (Exhibit H to the Petition).

[16] *Id.*

[17] Letter from Richard G. Tune, Deputy SHPO, Tennessee Historical Commission, to James A. Duncan, Terracon (Dec 14, 2006). While not conceding that the Tennessee SHPO had the authority to reverse its decision, Wireless Properties subsequently conducted a "balloon test," in which observers assess visual effects based on a balloon floating at the height of the proposed tower. After observing the balloon test, several parties filed comments with the Tennessee SHPO opposing the tower. *See* Letter from Lora Peppers, Acting Superintendent, Chickamauga and

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5. After receiving the notice from the Tennessee SHPO, Wireless Properties contacted Division staff by telephone in early 2007, requesting that the Division inform the Tennessee SHPO that it had no authority to reopen its review of this matter. Division staff then spoke with representatives of the Tennessee SHPO and National Park Service (NPS) to gather additional background information, and on February 22, 2007, the Division sent Wireless Properties a letter requesting information regarding its compliance with NPA procedures for assessing visual effects.[18]

6. On April 24, 2007, the Advisory Council on Historic Preservation (Advisory Council), which bears responsibility for overseeing Federal agencies' administration of the NHPA, advised the Division in writing that it had learned of "unresolved procedural issues" regarding the Section 106 review of Wireless Properties' proposed tower.[19] The Advisory Council specifically referenced, among other things, concerns about the content of the FCC Form 620 that Wireless Properties had submitted to the Tennessee SHPO. The Advisory Council stated that the proposed tower would adversely affect the Bragg Reservation, and it reserved the right to formally participate in consultation regarding the tower pending further developments.[20]

7. *Petition for Expedited Declaratory Ruling*. On April 25, 2007, Wireless Properties filed the Petition, in which it sought a declaratory ruling that the Section 106 review was complete as a matter of law and could not be reopened. It contended that it had complied with all procedural requirements set forth in the NPA and that the Tennessee SHPO's finding of "no adverse effect" was therefore final and could not be reopened without violating due process. Wireless Properties also argued that, even if the review were reopened, the proposed tower would have no adverse effect because the area already contains several modern intrusions.[21]

8. On the same day that Wireless Properties filed the Petition, the Missionary Ridge Neighborhood Association (Neighborhood Association) and the Friends of Chickamauga & Chattanooga National Military Park (Friends of the National Park) filed a letter with the Commission asking it to overturn the Tennessee SHPO's original finding of no adverse effect because of a "significant procedural defect" in Wireless Properties' FCC Form 620. Specifically, they argued that the Section 106 review was

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Chattanooga National Military Park, to Dr. Joe Garrison, Review and Compliance Coordinator, Tennessee Historical Commission (Feb. 1, 2007); Letter from Dwayne Smith, Missionary Ridge Neighborhood Association, to Dr. Joe Garrison, Review and Compliance Coordinator, Tennessee Historical Commission (Jan. 30, 2006 [sic]); Letter from John Hillbrandt, President, and Kay Parish, Executive Director, Friends of Chickamauga and Chattanooga National Military Park, to Dr. Joe Garrison, Review and Compliance Coordinator, Tennessee Historical Commission (Jan. 25, 2007); Letter from Kay Parish, Executive Director, Friends of Chickamauga and Chattanooga National Military Park, to Dr. Joe Garrison, Review and Compliance Coordinator, Tennessee Historical Commission (Jan. 29, 2007); Letter from John B. Hildreth, Director, Southern Office, National Trust for Historic Preservation, to Dr. Joe Garrison, Review and Compliance Coordinator, Tennessee Historical Commission (Feb.6, 2007); Letter from Cornerstones, Inc. to Dr. Joe Garrison, Review and Compliance Coordinator, Tennessee Historical Commission (Jan. 30, 2007).

[18] *See* Letter from Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, to Fred R. Wagner, Beveridge & Diamond, P.C. (Feb. 22, 2007).

[19] Letter from Charlene Dwin Vaughn, Assistant Director, Federal Permitting, Licensing, and Assistance Section, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau (April 24, 2007) (Advisory Council April 24 Letter).

[20] *Id.*

[21] Wireless Properties, LLC's Petition for Expedited Declaratory Ruling (April 25, 2007) (Petition). On the same day, Wireless Properties also filed a response to the Advisory Council's April 24 Letter, arguing that its concerns were misguided and founded on misrepresentations by local opponents of the tower. Letter from Fred Wagner, Beveridge & Diamond, PC, to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau (April 25, 2007).

defective because Wireless Properties did not list the Bragg Reservation as a historic resource.[22] On May 15, 2007, the National Trust for Historic Preservation (National Trust) submitted a letter asking the Commission to reopen the Section 106 review due to the discovery of an unanticipated effect on a historic property, consistent with Section XI of the NPA[23] and Section 800.13(b) of the Advisory Council's rules.[24]

9. *The Division Order*. On May 24, 2007, the Division released its Order denying Wireless Properties' Petition. The Order held that the Section 106 review had not been completed in accordance with the requirements of the NPA and that the review process should therefore resume. The Division rejected the argument that a Section 106 process can never be reopened and held that finality is predicated upon the applicant's compliance with the foundational steps of the review process.[25] The Division explained that reopening the review was appropriate in this case because Wireless Properties had omitted material information from its FCC Form 620 by failing to identify the Bragg Reservation.[26] The Division noted that it was reasonable for the Tennessee SHPO to assume that the applicant had supplied a complete roster of properties as required.[27] The Division therefore found that the Section 106 process should be reopened, holding that the NPA affords the Commission discretion to take action where an applicant's submission fails to comply with applicable requirements "in a manner that preclude[s] the SHPO's effective review."[28]

10. The Order did not make a finding as to whether the proposed tower would have adverse effects on historic properties. Rather, the Order held that to complete the review, Wireless Properties should submit to the Tennessee SHPO a revised FCC Form 620 that described effects on the Bragg Reservation and other historic properties as required by the NPA.[29]

11. *Wireless Properties' Application for Review*. In its Application for Review, Wireless Properties largely reiterates the arguments it made in its Petition. Wireless Properties asks the Commission to reverse the Order and hold that the underlying Section 106 process was complete and final. Ten entities filed oppositions to the Application for Review,[30] and none filed in support. Wireless Properties filed a reply.[31]

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[22] Letter from Sam D. Elliott, Gearheiser, Peters, Lockaby, Cavett & Elliott, PLLC, to Kevin J. Martin, Chairman, Federal Communications Commission (April 25, 2007). The letter also argued that the review was defective because Wireless Properties did not provide adequate notice of the proposed tower to the Neighborhood Association. The Order did not address this argument, and we need not reach it here because we are reopening the review on other grounds and the Neighborhood Association now has notice of the review.

[23] *See* NPA§ XI (providing that the public may notify the Commission of concerns regarding application of the NPA with respect to review of individual undertakings and the Commission will consider these comments and "where appropriate, take appropriate actions").

[24] Letter from Elizabeth Merritt, Deputy General Counsel, National Trust, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau (May 15, 2007). *See* 36 C.F.R. § 800.13(b)(1) (providing that, if unanticipated effects on historic properties are found after the Section 106 process is completed and before construction has commenced, the agency shall consult to resolve any adverse effects).

[25] Order, 22 FCC Rcd at 9304 paras. 13-14. The Division stated that "[t]he NPA affords finality only for those who have complied with its prerequisites." *Id.* at 9305 para. 15.

[26] *Id.*

[27] *Id.*

[28] *Id*.

[29] Order, 22 FCC Rcd at 9306 para. 19.

[30] *See* Letter from John M. Fowler, Executive Director, Advisory Council on Historic Preservation to Kevin J. Martin, Chairman, Federal Communications Commission (July 18, 2007) (Advisory Council July 18 Letter); Letter of Opposition to Wireless Properties, LLC's Application for Review filed by Missionary Ridge Neighborhood

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## III. DISCUSSION

12. In reviewing Applications for Review of Bureau decisions, the Commission assesses whether (1) the action conflicts with statute, regulation, case precedent, or established policy; (2) the action involves a previously unresolved question of law or policy; (3) the application of existing precedent should be overturned; (4) an erroneous finding as to an important or material question of fact has occurred; or (5) there has been prejudicial procedural error.[32]

13. The issues germane to our review in this particular case are straightforward. First, we assess whether the Order held correctly that the Section 106 review process may be reopened by the Commission upon discovery of a material error or omission in the applicant's submission, even after the SHPO has reached a determination. Second, if that holding is correct, we assess whether the Order found correctly that Wireless Properties' failure to identify the Bragg Reservation constituted a material error or omission warranting reopening of the Section 106 process.

14. After a careful review of the record, we affirm the Order in all respects. We hold that Section XI of the NPA permits the Commission to reopen the Section 106 process when the applicant submits materials that are inconsistent with the NPA and thereby precludes the SHPO's effective review. The Commission, however, will only reopen a final SHPO approval if there is a material error or omission by the applicant. We also find that Wireless Properties' failure to identify the Bragg Reservation was a material error or omission that undermined the ability of the Tennessee SHPO, the NPS, and the public to understand and evaluate the potential effects of the proposed tower on historic properties and rendered the Section 106 review process incomplete, and that the Section 106 review may be reopened to correct the effects of such error or omission in the event that the Commission finds a material error or omission in the applicant's submission to the SHPO.

### A. The Commission's Authority to Reopen the Section 106 Process

15. *Pleadings*. In its Application for Review and Reply, Wireless Properties asks the Commission to reverse the Order because the Tennessee SHPO's original determination was final and nothing in the NPA or the NHPA authorizes the Commission to reopen the Section 106 process. Wireless Properties bases its contention on Section VII of the NPA, which identifies processes and timelines that, Wireless Properties contends, reflect an intention to provide certainty and finality within identified and specific timeframes.[33] According to Wireless Properties, neither Section XI of the NPA,[34] on which the

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Association (July 2, 2007) (Neighborhood Association Letter); Letter from Sam D. Elliott, Gearheiser, Peters, Lockaby, Cavett & Elliott, on behalf of Friends of the Chickamauga and Chattanooga National Military Park to Federal Communications Commission (July 2, 2007) (Friends of the National Park Letter); Letter from Mary Ann Peckham, Executive Director, Tennessee Civil War Preservation Association to Federal Communications Commission ((July 15, 2007) (TCWPA Letter); The National Trust for Historic Preservation, Opposition to Application for Review (July 20, 2007) (National Trust Opposition); Letter from O. James Lighthizer, President, Civil War Preservation Trust, to Federal Communications Commission (July 19, 2007) (CWPT Letter); The NPS, Opposition to Application for Review (July 20, 2007) (NPS Opposition); Letter from Daryl Black, Ph.D., Curator, Chattanooga Regional History Museum to Federal Communications Commission (July 20, 2007) (CRHM Letter); The National Parks Conservation Association, Opposition to Application for Review (July 20, 2007) (NPCA Opposition); Letter from Ann Myers Gray, Executive Director, Cornerstones, Inc. to Kevin J. Martin, Chairman, Federal Communications Commission *et al.* (July 3, 2007) (Cornerstones Letter).

[31] Wireless Properties, LLC's Reply in Support of its Application for Review (Aug. 2, 2007) (Reply).

[32] 47 C.F.R. § 1.115(b).

[33] In particular, Wireless Properties relies on Section VII.C.1 of the NPA, which provides that once the SHPO makes a written finding of no adverse effect on historic properties, the Section 106 process is complete and the applicant can proceed with construction. *See* Application for Review at 8; Reply at 11-12 (arguing that when the SHPO concurs with the applicant's finding of no adverse effect, no further Commission proceedings are necessary).

[34] NPA § XI.

Order relies, nor Section 800.13(b) of the Advisory Council's rules,[35] which the Order also cites, provides authority to reopen the Section 106 process.[36] In addition, Wireless Properties argues, the Order violated its due process rights by effectively authorizing the Tennessee SHPO to abrogate its license without affording it an opportunity to be heard.[37]

16. Parties opposing the Application for Review assert that Section XI of the NPA permits the Commission to reopen a Section 106 proceeding after a SHPO has concurred with an applicant's finding of no adverse effect on historic properties where the Submission Packet provided to the SHPO contained a material error or omission.[38] The National Trust further contends that the Commission may rely on Section 800.13(b) of the rules of the Advisory Council.[39]

17. *Decision*. Section XI of the NPA provides in relevant part: "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 Council, where appropriate, take appropriate actions." The Division's Order reopening the Section 106 process, in response to a request that specifically invoked Section XI as well as community groups' expressed concerns regarding defects in the earlier review,[40] was an appropriate action in this case under Section XI. We reject Wireless Properties' argument that the Order impermissibly undermined the finality and certainty accorded under the NPA by invoking Section XI to invalidate a SHPO determination that was based on material misinformation submitted by the applicant. To the contrary, and consistent with the Division, we hold that Section XI of the NPA allows the Commission to reopen the Section 106 process where there has been a material error or omission in the information submitted by the applicant—even if the error or omission comes to light after the SHPO has concurred with an applicant's finding of no adverse effect.[41]

18. Applicants, Not SHPOs, Bear the Burden of Ensuring that Submissions are Complete. Wireless Properties contends that under the NPA, any alleged deficiencies in a submission may be

[35] 36 C.F.R. § 800.13(b).

[36] Application for Review at 20; Reply at 13-14.

[37] Application for Review at 11-15; Reply at 13. Wireless Properties also contends that the full Commission should have acted on the Petition because it presented a novel question of law and policy outside the Division's delegated authority. Application for Review at 20-21. This argument is moot as these issues are now before the Commission for review.

[38] *See, e.g.,* Advisory Council July 18 Letter at 2 (arguing that Section XI of the NPA affords the FCC the ability to correct errors such as an applicant's failure to identify a historic property listed on the National Register within the APE); National Trust Opposition at 2, 4-5 (contending that the relief granted in the Order is "precisely the kind of 'appropriate action' authorized by Stipulation XI" of the NPA); NPS Opposition at 7 (arguing that the Order's reliance on Section XI of the NPA is supported by the record and consistent with the goals of the NPA).

[39] National Trust Opposition at 4-5 (arguing that the Order properly relied on Section 800.13(b)).

[40] Letter from Elizabeth S. Merritt, Deputy General Counsel, National Trust, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Communications Bureau (May 15, 2007) (sharing the concerns expressed by the Advisory Council, the NPS, the Tennessee SHPO, and a number of local groups regarding the proposed tower's adverse effects on historic properties and the defects in the earlier review, and requesting that the FCC reopen Section 106 consultation pursuant to Section XI of the NPA); Letter from Sam D. Elliot, Gearheiser, Peters, Lockaby, Cavett & Elliott, PLLC, to Kevin J. Martin, Chairman, Federal Communications Commission (Apr. 25, 2007) (asking the Commission on behalf of the Neighborhood Association and the Friends of the National Park to overturn the Tennessee SHPO's no adverse effect finding due to a significant procedural defect in the review).

[41] We clarify that Section XI of the NPA provides this authority to the Commission, not to the SHPO, which may not on its own authority reopen a completed Section 106 review

addressed and corrected only before the process is complete, and that this is the "only regulatory framework in which to detect or challenge deficiencies."[42] In particular, it argues, Sections VI.D.1.c.i and VII.A.4 give the SHPO 30 days to review the Form 620 in order to, among other things, identify additional historic properties within the APE.[43] In this case, Wireless Properties argues, not only did the Tennessee SHPO fail to note the omission of the Bragg Reservation within the 30-day period, but it affirmatively concurred with Wireless Properties' finding of no adverse effect, thereby concluding the review under Section VII.C.1.[44] Accordingly, Wireless Properties contends, by the terms of the NPA the Tennessee SHPO cannot now raise the failure to include this historic property on the Form 620, and the Order's holding that the incomplete submission rendered the Tennessee SHPO's review invalid is incorrect as a matter of law.[45]

19. Wireless Properties' argument misunderstands the roles of the applicant and the SHPO under the NPA. Read as a whole, the NPA, and particularly Sections VI.A and VI.D.1, places the burden solely on the applicant to supply the information necessary for the Section 106 review.[46] We agree with commenters opposing the Application for Review[47] that Wireless Properties' reading would impermissibly shift this burden to the SHPO, contrary to the NPA and the statute.[48] While Section VI.D.1.c.i. of the NPA states that the SHPO "may" identify additional properties within the APE during the review period, and Section VII.A.4 provides that the SHPO "will immediately notify" the applicant if

[42] Application for Review at 9.

[43] *Id.* at 18-19. *See* NPA §§ VI.D.1.c.i (providing that, during the 30-day review period, the SHPO may identify additional properties included in the inventory and located within the APE that the SHPO considers eligible for National Register listing and shall notify the Applicant pursuant to Section VII.A.4), VII.A.4 (providing that, if the SHPO determines that the Submission Packet is inadequate or it identifies additional historic properties within the APE, it will immediately notify applicant and describe any deficiencies).

[44] *See* NPA § VII.C.1 (providing that, if the SHPO concurs in writing with the applicant's determination of no adverse effect, the facility is deemed to have no adverse effect on historic properties and the Section 106 process is complete).

[45] Application for Review at 18-19.

[46] *See* NPA §§ VI.A ("In preparing the Submission Packet for the SHPO/THPO, . . the Applicant shall . . . identify Historic Properties within the APE."), VI.D.1 (specifying sources that the applicant must review when identifying historic properties); *see also NPA Report and Order*, 20 FCC Rcd at 1117 para. 121 (referring to "applicants' obligations with respect to the identification and evaluation of historic properties within the APE for visual effects").

[47] *See* NPS Opposition at 6-7; Neighborhood Association Letter at 5 (arguing that, under Section VI of the NPA, it is the applicant's burden to make a complete submission, and the SHPO is not responsible for completing the submission or verifying its content or completeness); NPCA Opposition at 4 (contending that Wireless Properties' argument is flawed as it implies that the SHPO alone bears the burden of identifying errors).

[48] While Wireless Properties notes that the NHPA allocates to the SHPO certain responsibilities to administer a federally approved historic preservation program, Reply at 12, citing 54 U.S.C. §§ 302303(b)(1),(2),(5),(9) (formerly codified at 16 U.S.C. §§ 470a(b)(3)(A),(B),(E),(I)), most of these responsibilities do not bear upon Section 106 review. *See, e.g.,* 54 U.S.C. § 302303(b)(1) (formerly codified at 16 U.S.C. § 470a(b)(3)(A)) (directing SHPO, in consultation with Federal agencies and other parties, to direct and conduct a statewide survey of historic properties and maintain inventories of such properties). With respect to Section 106 review, the SHPO's responsibility is expressly of a consultative nature. *See* 54 U.S.C. § 302303(b)(5) (formerly codified at 16 U.S.C. §§ 470a(b)(3)(E)) (providing that the SHPO is to "advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities"), 302303(b)(9)(A) (formerly codified at 16 U.S.C. § 470a(b)(3)(I)(i)) (providing that the SHPO shall *consult* with Federal agencies on Federal undertakings that may affect historic properties). Nothing in the NPA expands, nor could permissibly expand, the SHPO's legal responsibilities beyond what is specified in the statute. Nor would the Advisory Council's statutory authority to implement Section 106, 54 U.S.C. § 304108 (formerly codified at 16 U.S.C. § 470s), permit the approval of alternate Section 106 procedures developed pursuant to Section 800.14 of the Advisory Council's regulations, 36 C.F.R. § 800.14, that are inconsistent with the text of the statute.

it identifies additional historic properties within the APE or if it determines that the applicant's submission is inadequate, the purpose of these provisions is to afford the SHPO an opportunity to identify additional historic properties already within its inventory that it considers eligible but that were not available to the applicant within the publicly available records that it was required to review.[49] And, as the Order found, there was nothing on the face of Wireless Properties' submission that would have alerted the SHPO to the existence of the undisclosed property.[50] Nothing in the NPA, including the provisions discussed above, requires the SHPO to identify and correct any omissions or otherwise assume the applicant's burden to ensure the filing is complete and accurate. Otherwise, applicants could simply rely on the SHPO to identify any potentially affected properties. This would eviscerate the applicant's obligation and incentive to prepare a meaningful submission and would undermine the purpose of assigning that obligation to the applicant. Shifting that burden to the SHPO would likely delay, rather than expedite, reviews under Section 106 —an approach that is completely at odds with the NPA.

20. The NPA Affords the Commission Discretion to Reopen the Process in the Event of Material Errors or Omissions. Having found that the NPA places the burden on the applicant to identify all properties within the APE for visual effects that are listed in the National Register or identified as eligible for listing within the specified sources, it follows that a review based upon a materially incomplete submission is invalid. The purpose of the Submission Packet provided to the SHPO and the consulting parties is to "facilitate review of the applicant's findings and any determinations with regard to the potential impact of the proposed undertaking on historic properties."[51] Its preparation requires that the applicant define the APE, identify historic properties within the APE, evaluate the historical significance of the identified properties, and assess the effects of the undertaking on those historic properties.[52] Without the requisite information, the SHPO cannot make a reasoned analysis of the applicant's proposed effect finding, and its decision, which would ordinarily complete the Section 106 process under the terms of the NPA,[53] cannot constitute the meaningful review contemplated by Section 106. We are guided by the statute in concluding that, under the NPA, the validity and finality of the SHPO's decision is necessarily predicated on applicant's submission, prepared as specified in the NPA, [54] being sufficiently complete and accurate to facilitate a reasoned determination as to the effects of the proposed undertaking on historic properties.

21. Section XI of the NPA provides the vehicle for the Commission, consistent with its responsibility under Section 106 to consider the effects of its undertakings on historic properties,[55] to invalidate a review that it finds to have contained a material error or omission. Section XI authorizes the staff to take actions, where appropriate, in response to public comments and objections regarding the

[49] *See NPA Report and Order,* 20 FCC Rcd at 1119 para. 126 (stating that the SHPO review "provides a safeguard for the [SHPO] to identify specific historic properties that may be affected in rare instances where the process provided in the Nationwide Agreement might otherwise cause significantly affected properties to be overlooked").

[50] Order, 22 FCC Rcd at 9305 para. 15.

[51] NPA §§ II.13 (defining Submission Packet), VII.A.1 (Submission Packet shall be submitted to the SHPO and all consulting parties).

[52] NPA § VI.1.

[53] NPA § VII.B-C.

[54] NPA §§ VI.A (specifying the contents of the Submission Packet that the applicant prepares for the SHPO and the consulting parties), VI.D.1.a (specifying the resources and records the applicant must consult and review in identifying and evaluating National Register-listed or -eligible historic properties within the APE for visual effects); VI.D.1.c (Submission Packet shall include a list of properties identified by the applicant based on the sources listed in Section VI.D.1.a, information gathered from Tribal Nations and Native Hawaiian Organizations pursuant to Section VI.D.1.b, and public comment received pursuant to Section V).

[55] *See NPA Report and Order*, 20 FCC Rcd at 1077.

application of the NPA or the review of individual undertakings covered by the NPA.[56] As the Advisory Council observes, ultimate legal responsibility for FCC-related undertakings lies with the FCC, not the SHPO.[57] Therefore, the Advisory Council supports the Order's analysis of the NPA and concurs that the Commission may reopen the process under Section XI.[58] The National Trust supports the Advisory Council's interpretation. According to the National Trust—which notes that it was a "direct and active participant in the development" of the NPA and that it provides its viewpoint based on "years of consultation that led to the language of the [NPA]"—Section XI was designed to afford the FCC broad and flexible discretion to address a wide variety of procedural issues and other concerns that might undermine the assessment of effects on historic properties.[59]

22. Wireless Properties argues that the Division's Order improperly infers an open-ended authority, unstated in the NPA or the statute, under which Section 106 approval could be revoked without notice, without an identifiable process, and in perpetuity.[60] In adopting the NPA, however, the Commission specifically rejected as infeasible and potentially arbitrary a proposal to include a strict time limit for public comments and objections.[61] Thus, the broad language of Section XI recognizes the Commission's need for flexibility to ensure that it complies with its statutory obligations under Section 106.[62] Furthermore, our interpretation does not create an open-ended, standardless opportunity to reopen

[56] *See* para. 17, *supra.*

[57] Advisory Council Letter at 1-2 (explaining that the SHPO does not assume the Federal agency's responsibility, but instead participates in a consultative role to assist the agency in the Section 106 review process); *see also* note 48, *supra*.

[58] *See* Advisory Council Letter at 2 ("[A]s the party in legal jeopardy for noncompliance with Section 106, the FCC needs to retain the ability to correct such errors—an ability clearly afforded by Stipulation XI of the NPA."). The views of the Advisory Council are particularly significant because Congress has entrusted the Advisory Council with administering Section 106 and, accordingly, the Advisory Council's interpretation of the NHPA and its own rules merits substantial deference. *CTIA v. FCC*, 466 F.3d 105, 115-17 (D. C. Cir. 2006), *citing* 16 U.S.C. § 470s (recodified at 54 U.S.C. § 304108). *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.* 467 U.S. 837 (1984). Section 202(b) of the NHPA requires the Advisory Council to "review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under this Act." 54 U.S.C. § 304102(a)(6) (formerly codified at 16 U.S.C. § 470j(a)(6)). Further, Section 800.9(a) of the Advisory Council's rules authorizes it to "provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part." 36 C.F.R. § 800.9(a) (also providing that "[t]he Council may provide such advice at any time at the request of the individual, agency or organization or on its own initiative," and that "[t]he agency official shall consider the views of the Council in reaching a decision on the matter in question").

[59] National Trust Opposition at 2. *See also* NPS Opposition at 7 (arguing that the Order's interpretations of Section XI of the NPA are "supported by the record in this proceeding and are consistent with the requirements of the NPA").

[60] Application for Review at 8-9.

[61] *NPA Report and Order,* 20 FCC Rcd at 1129-30 para. 156.

[62] The NPA provides for a Commission decision in a number of circumstances where there is disagreement as to the effects of a proposed tower without specifically delineating criteria the FCC should use. *See, e.g*., NPA §§ VI.B.4 (providing that the applicant may submit a disagreement with the SHPO as to effects on an historic property to the Commission), VI.C.2 (providing that, if the SHPO does not notify the applicant of its decision within thirty days, concurrence is presumed and the Section 106 process is complete unless the Commission notifies the applicant otherwise), VI.C.4 (providing that, if the SHPO disagrees with an applicant's finding of no adverse effect and the parties cannot resolve their dispute, the applicant may at any time choose to submit the matter to the Commission). Furthermore, the Commission has exercised its discretion in interpreting the NPA in other cases. *See*, *e.g., United States Cellular Corp. Constructed Tower Near Fries, Virginia*, 24 FCC Rcd. 8729, 8735 para. 17 (2009) (noting that Section X.C of the NPA instructs the Commission to take "appropriate action" upon receiving a complaint, thus affording it broad discretion to determine what action is appropriate based on the facts of each case); *White Park*

(continued....)

a complete review. Rather, we balance the need for flexibility to achieve the purposes of the NHPA with the interest in finality and certainty by asserting authority to reopen an apparently final Section 106 review only in circumstances where the review was tainted by the applicant's material error or omission.

23. Moreover, our exercise of this authority is consistent with Section 106 of the NHPA, its legislative history, and the Advisory Council's implementing regulations that govern historic preservation reviews of federal undertakings. Section 800.13(b) of the Advisory Council's rules supports the proposition that a federal agency has the obligation to consider unanticipated effects on historic properties that are discovered after completion of review.[63] As noted above, the Advisory Council, which Congress has directed to oversee agency implementation of the NHPA, supports our interpretation of Section XI as consistent with the statute. Therefore, we conclude that under Section XI, the Commission has the authority, in its discretion, to take remedial action where there is a material error or omission in the applicant's submission that is identified after the SHPO review.[64]

24. Our conclusion that reopening an apparently final SHPO determination -- only where there is a material error or omission by the applicant -- is an appropriate action authorized in Section XI advances certainty and finality as embodied in the NPA's procedures and timelines.[65] For the reasons explained above, the finality of the SHPO's determination, and hence the certainty that its finding completes the Section 106 process, is predicated on the applicant having submitted a substantially complete and materially correct Submission Packet that informs and facilitates SHPO review. A failure to comply with the foundational Submission Packet preparation requirements specified in the NPA,[66] to the extent that it precludes meaningful Section 106 review, vitiates the SHPO's determination and warrants reopening that determination. Wireless Properties' reading of the NPA, under which the SHPO's decision is final and the Section 106 process is complete in all circumstances, would undermine the integrity of the review process established by the NPA. Applicants would have little incentive diligently to prepare accurate and materially complete submissions that facilitate expeditious, legally sufficient SHPO review. Instead, they would be rewarded for making inaccurate and incomplete submissions, thereby undermining fulfillment of the Commission's statutory obligation to safeguard historical and cultural values through the NPA's streamlined process.[67] As the National Trust notes,

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*Broadcasting*, 24 FCC Rcd 3549, 3567 para. 27 (2009) (finding that, where an applicant did not furnish accurate and complete information in its Form 620, "[t]he choice of remedies and sanctions is an area in which we have broad discretion").

[63] *See* 36 C.F.R. § 800.13(b) (providing that, if historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the Section 106 process, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties). Wireless Properties argues that we cannot rely on Section 800.13(b) because it has been superseded by Section IX of the NPA, which sets forth specific procedures to follow in the event of inadvertent or post-review discoveries. Application for Review at 20. We clarify that we are not relying on Section 800.13(b) as legal authority, but citing it as evidence that the policies the Advisory Council has followed in implementing the NHPA are consistent with our interpretation of Section XI.

[64] As noted above, the authority afforded the Commission under Section XI of the NPA to reopen a Section 106 proceeding in these limited circumstances extends only to the Commission. We reiterate that the SHPO does not have such authority under the NPA. *See* note 41 *supra.*

[65] *See, e.g.,* NPA §§ VII.C.1 ("If the SHPO/THPO concurs in writing with the Applicant's determination of no adverse effect, the Facility is deemed to have no adverse effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required."), VII.A (limiting the SHPO to a 30-day review period, subject to an extension of up to 5 days).

[66] *See generally NPA* § VI (describing standards and procedures applicant shall apply in preparing the Submission Packet).

[67] *See* 54 U.S.C. § 300101 (formerly codified at 16 U.S.C. § 470-1) (stating that it is the policy of the Federal Government to "provide leadership in the preservation of the prehistoric and historic resources of the United States
(continued....)

under Wireless Properties' interpretation, "no determination regarding adverse effects could be revisited once the 30-day review period has expired, regardless of how egregious or intentional the applicant's failure to disclose information."[68] We emphasize, however, that only a material error or omission that precludes effective review of the potential effects of the proposed tower on historic properties will invalidate the SHPO's determination and justify reopening the Section 106 process by the Commission. Absent such an error, the SHPO's approval is final and not reviewable by the Commission. An insignificant or ministerial error or omission, discovered after the fact, which does not undermine the validity of the earlier review, will not ordinarily warrant reopening the Section 106 proceeding.[69] We explain below that the failure to disclose the Bragg Reservation in Wireless Properties' Submission Packet was a material error or omission.[70]

25. Reopening the Section 106 Process Does Not Rescind a Previously Granted License. We reject Wireless Properties' assertion that the Order unlawfully authorized the Tennessee SHPO to abrogate what amounted to a construction license on which Wireless Properties had relied to its financial detriment.[71] This argument improperly assumes that the SHPO's original determination of no adverse effect is final in all circumstances. As explained above, the NPA affords the Commission discretion to reopen an apparently complete review process to ensure that it complies with its statutory obligations under Section 106. More importantly, the Tennessee SHPO's initial finding did not authorize construction or constitute a license within the meaning of the Administrative Procedure Act,[72] and its withdrawal, based on material errors or omissions in the Submission Packet, did not foreclose construction of a compliant tower upon successful completion of the reopened Section 106 process. The FCC implements its responsibilities under Section 106 by requiring that applicants complete all environmental processing prior to the initiation of construction.[73] Even in those instances in which completion of the Section 106 process does not require a Commission decision,[74] the agency's environmental procedures, rather than any SHPO action, determine when construction may begin under the NPA. The Tennessee SHPO's December 2006 withdrawal of its original finding of no adverse effect, based upon the subsequent discovery of a significant undisclosed historic property within the APE, did not terminate any opportunity under the Commission's procedures for the applicant to construct, or otherwise revoke what amounts to a construction license. It afforded Wireless Properties the opportunity

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and of the international community of nations and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments" and to "contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means").

[68] National Trust Opposition at 3.

[69] *See* Joseph Kroboth, III, 28 FCC Rcd 1142 (WTB SCPD 2013) (declining to reopen the Section 106 process because there was not a material omission or other failure to complete the foundational steps of the process sufficient to overcome the earlier determination's finality).

[70] *See* Section III.B, *infra*.

[71] Application for Review at 11-15; Reply at 13.

[72] 5 U.S.C.§§ 551(8) (defining "license" to include the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission); 551(9) defining "licensing" to include "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of a license").

[73] 47 C.F.R. § 1.1312; NPA § I.E.

[74] NPA §§ VII.B.1 (The SHPO concurs in writing with the Applicant's determination of no historic properties affected), VII.B.2 (The SHPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no historic properties affected within 30 days following receipt of a complete Submission Packet), VII.C.1 (The SHPO concurs in writing with the Applicant's determination of no adverse effect).

to submit additional information to demonstrate that, as it had claimed originally, the proposed tower would have no adverse effects on historic properties. Reinstatement of the no adverse effect finding, based on review of a revised, materially complete Submission Packet, would satisfy the review requirements set forth in the Commission's rules with respect to effects on historic properties.[75] The Division's Order reopening the Section 106 process merely suspended the opportunity to construct consistent with these procedures pending completion of the Section 106 process.

26. Wireless Properties relies on *Blackwell College of Business v. Attorney General of the United States*,[76] in which the court reversed a decision by the Immigration and Naturalization Service (INS) withdrawing a college's status as an approved school for nonimmigrant alien students. The court reasoned that the college's approved status was a valuable asset in the nature of a license, entitling the school to due process protections under the APA.[77] Wireless Properties claims that the Tennessee SHPO's reversal of its March 2006 no adverse effect finding deprived it of due process insofar as the Tennessee SHPO did not indicate whether it had investigated the merits underlying the reversal or assessed whether the NPA's procedures permit such reversal.[78] The actions of the INS and the Tennessee SHPO are not analogous, however. The INS initiated an enforcement proceeding to terminate the college's right to admit nonimmigrant alien students without affording the school the requisite APA due process in that proceeding.[79] By contrast, the Tennessee SHPO's rescission of its original no adverse effect finding did not deprive Wireless Properties of construction authority or any other valuable asset in the nature of the license so as to implicate due process concerns. Moreover, the Division's Order directing Wireless Properties to resubmit to the Tennessee SHPO its Section 106 submission with the properly identified and evaluated Bragg Reservation affords Wireless Properties the due process required under the APA and *Blackwell* as it can fully participate in the ongoing proceeding and demonstrate that the original no adverse effect finding was warranted.

### B. Wireless Properties' Failure to Identify the Bragg Reservation in its Submission Packet

27. Having found that we have authority under the NPA to reopen a Section 106 proceeding due to a material error or omission in the application, we now turn to whether Wireless Properties' failure to identify the Bragg Reservation was a material error or omission. We affirm the Order's finding that it was.

28. *Pleadings*. According to Wireless Properties, even assuming that the Commission can lawfully reopen the Section 106 process, the Order erred in finding that Wireless Properties' submission was incomplete due to its admitted failure to identify the Bragg Reservation.[80] Wireless Properties contends that it was not required to identify the Bragg Reservation because it is not listed on the National Register, noting that the Order refers to National Register listings that include the National Park but do not separately identify the Bragg Reservation itself. Wireless Properties argues that it failed to identify the Bragg Reservation as a historic property based on the National Park listing because "the main part of

[75] NPA § I.E.

[76] 454 F.2d 928 (D.C. Cir. 1971) (*Blackwell*).

[77] *Blackwell*, 454 F.2d at 933, quoting 5 U.S.C. 558(c) ("Except in cases of willfulness or those in which public health, interest, or safety require otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -- (1) notice by the agency in writing of the facts or conduct which may warrant the action, and (2) opportunity to demonstrate or achieve compliance with all lawful requirements").

[78] Application for Review at 11.

[79] The court found that the enforcement proceeding in which the school lost its approved status was marked by several violations of procedural due process, including *ex parte* testimony that the school was not allowed to rebut.

[80] Application for Review at 15-16; Reply at 1-5.

the Park lies well outside the APE and [Wireless Properties'] consultants, based on maps provided by the SHPO's office, … were unaware at the time of the relationship between Bragg Reservation" and the National Park.[81] Further, Wireless Properties asserts that its failure to identify and analyze the Bragg Reservation did not render its submission incomplete because the Tennessee SHPO had "actual knowledge" of the existence and proximity of this property.[82] In particular, Wireless Properties notes that it sent notice of its proposal to the National Park and included a copy of that notice in its submission,[83] and it contends that the Tennessee SHPO acknowledged that it was aware of the Bragg Reservation and its proximity to the proposed tower site at the time of its initial review.[84]

29. The commenters opposing Wireless Properties' Application for Review emphasize the historic importance of the Bragg Reservation in particular and the National Park as a whole, and they support reopening the Section 106 process given Wireless Properties' failure to identify either of them.[85] The NPS explains that the Bragg Reservation was the site of a major Civil War battle and that the National Park, a unit composed of several non-contiguous land parcels located in what is now an urban setting, is the oldest and largest military park administered by the NPS.[86] Thus, the NPS states, Wireless Properties' consultants should have looked at the National Register and determined that the National Park included the Bragg Reservation.[87] The Advisory Council and other commenters also dispute Wireless Properties' claims that it was not required to identify the Bragg Reservation because it was not individually listed on the National Register or because the Tennessee SHPO allegedly knew of its existence.[88] NPCA agrees that omitting the Bragg Reservation was a "substantive defect" in Wireless Properties' submission that undermined the ability of the NPS and the public to understand the proposal's

[81] Application for Review at 16; Reply at 3-5. Wireless Properties argues that the NPA imposes no obligation on applicants to "ferret out" units or segments of listed properties, but instead requires applicants to consult five specific sources to the extent they are "available at the offices of the SHPO/THPO or can be found in publicly available sources identified by the SHPO/THPO." Reply at 3-4 (quoting NPA § VI.D.1.a).

[82] Application for Review at 17-18.

[83] Application for Review at 16. *See* Letter from Henry A. Fisher, Engineer, Environmental Engineers, Inc., to Chickamauga and Chattanooga National Military Park (March 21, 2006) (Exhibit F to the Petition). The National Park did not respond to this letter.

[84] Wireless Properties bases this contention on the declaration of G. Larry Wells, President of Wireless Properties, attesting to the contents of an after-the-fact telephone conference call on March 5, 2007, with unnamed members of FCC staff, Wireless Properties' legal counsel, representatives of the NPS, and Dr. Joseph Y. Garrison, a representative of the Tennessee SHPO. According to Wireless Properties, during that conversation, Dr. Garrison stated that the Tennessee SHPO "knew in general terms where the Bragg Reserve was." Application for Review at 17 & Ex. 4. *See also* Reply at 1-2.

[85] *See*, *e.g.*, CRHM Letter at 1; CWPT Letter; Friends of the National Park Letter; Neighborhood Association Letter at 1-2; National Trust Opposition at 1; TCWPA Letter at 1; Cornerstones Letter.

[86] NPS Opposition at 2. *See* Neighborhood Association Opposition at 2 (noting that the Bragg Reservation is part of a discontinuous historic district associated with the National Park). The NPS states that it is fighting a constant battle at the National Park against incremental erosion of the values of the battlefield sites, and that Wireless Properties seeks to construct a phone tower directly in the viewshed of the Bragg Reservation. NPS Opposition at 2-3.

[87] NPS Opposition at 6 n.5 ("This was a mistake of Wireless Properties and cannot be passed off on the SHPO.").

[88] Advisory Council Letter at 1-2 (arguing that Wireless Properties improperly failed to identify the Bragg Reservation as a historic property within the APE, and it is of no consequence that the Bragg Reservation is part of the National Park, not a separate historic property, or that the bulk of the National Park is located outside the APE); Neighborhood Association Letter at 8-9 (arguing that Wireless Properties was required to list the Bragg Reservation because it is part of the National Park, which is listed in the National Register).

impact on the historic property.[89] Similarly, Friends of the National Park contends that whether the Tennessee SHPO was aware of the Bragg Reservation is irrelevant because the NPA required Wireless Properties to accurately and completely identify all historic properties, not just those that were unknown to the SHPO.[90]

30. *Discussion*. We agree with the Order and the commenters in opposition that Wireless Properties' failure to identify the Bragg Reservation was a material omission.[91] While the Bragg Reservation is not individually listed on the National Register despite its historic significance as the location of an important Civil War battle, there is no dispute that it is a component of the Chickamauga and Chattanooga National Military Park, which is listed on the National Register.[92] Therefore, as the NPS and other commenters argue, Wireless Properties' consultants should have looked at the National Register to determine that the Park includes the Bragg Reservation and the Bragg Reservation is a listed property within the APE.[93] In reaching this conclusion, we give particular weight to the views of the NPS as the federal agency charged with administering the National Register as well as the longtime steward of the National Park.[94] Furthermore, because the National Register is one of the sources that the NPA requires applicants to review in identifying and evaluating historic properties within the APE for visual effects,[95] and all of the information necessary to identify the Bragg Reservation as a listed property within the APE was readily discernible from the National Register, its identification as a listed property to be disclosed in the Submission Packet did not require that Wireless Properties look beyond the National Register and review other specified sources available in the SHPO's office or in publicly available sources identified by the SHPO.[96] For this reason, Wireless Properties cannot rely on the failure of a map provided by the Tennessee SHPO to identify the Bragg Reservation, or to clarify its relationship to the National Park, to excuse its omission. Making sure Wireless Properties knew the location of the Bragg Reservation (within the APE) and its relationship with the National Park (partially within the APE) was not the Tennessee SHPO's responsibility under the NPA. Failing to identify the Bragg Reservation was a material error in Wireless Properties' submission that undermined the ability of the Tennessee SHPO, the NPS, and the

[89] NPCA Opposition at 2. NPCA rejects Wireless Properties' suggestion that an agency reviewing an application should be aware of a tower's proximity to historic properties simply by observing the proposed location on a map. *Id*.

[90] Friends of the National Park Letter at 2.

[91] As Wireless Properties and the NPS agree, it is premature for us to assess whether the proposed tower would have adverse effects and, if so, whether they can be mitigated. Reply at ii; NPS Opposition at 5. These questions will be considered in the first instance by the Tennessee SHPO in the reopened Section 106 review.

[92] For the National Register listing of the National Park, *see* http://pdfhost.focus.nps.gov/docs/nrhp/text/66000274.PDF. The Park includes the Bragg Reservation. *See* http://npplan.com/parks-by-state/georgia/at-a-glance-chickamauga-and-chattanooga-national-military-park/. *See also* NPS Opposition at 5, n. 4 ("Although the property at issue is not listed in the National Register as 'Bragg Reservation' it is included in the listing for the Park and as part of the 'discontinuous historic district' associated with the Park.").

[93] NPS Opposition at 6, n.5 ("[T]he consultants should have looked at the Register of Historic Places and determined that the Park included the Bragg Reservation."); *see also* Advisory Council Letter at 2; National Trust Opposition at 1; NPS Opposition at 4; Friends of the National Park Letter at 1-2; Neighborhood Association Letter at 2.

[94] *See* 36 C.F.R. § 60.3 (Department of Interior regulation delegating to the NPS authority and responsibility for administering the National Register program).

[95] NPA § VI.D.1.a.i ("Applicants shall identify Historic Properties within the APE for visual effects by reviewing . . . [p]roperties listed in the National Register").

[96] NPA § VI.D.1 (listing the sources (including the National Register) that applicants are required to review when identifying and evaluating historic properties within the APE for visual effects, and providing that applicants are required to review these records "only to the extent that they are available at the offices of the SHPO/THPO or can be found in publicly available sources identified by the SHPO/THPO.")

public to understand and evaluate the effects of the proposed tower on a historically significant Civil War site visited by thousands each year. Wireless Properties' failure to identify the Bragg Reservation, by not carefully following the NPA's procedures in preparing Submission Packet, was a material error or omission that precluded the effective consultation and meaningful historic preservation review required by Section 106.[97]

31. We also agree with the Division in rejecting Wireless Properties' claim that any error or omission on its part was immaterial because the Tennessee SHPO was aware or should have been aware of the Bragg Reservation's location within the APE when it conducted its initial review. Wireless Properties offers scant evidence of the Tennessee SHPO's actual knowledge of the Bragg Reservation, asserting no support other than its own Declaration that a representative of the Tennessee SHPO's office stated that the Tennessee SHPO "knew in general terms where the Bragg Reserve was."[98] Moreover, Wireless Properties, as the applicant, had sole responsibility under the NPA to identify historic properties in the APE,[99] and it cannot shift legal responsibility for its material error or omission to the SHPO. Wireless Properties claims that other documents in its submission, including its unanswered letter to the National Park, should have alerted the Tennessee SHPO that the Bragg Reservation is within the APE despite its omission from the list of historic properties in the Submission Packet. Nothing in Section 106 or in the NPA, however, permits Wireless Properties to shift to the Tennessee SHPO the burden of sifting through other documents included in the submission to identify historic properties that it was required to, but did not, list. Consistent with the SHPO's statutory role as a consulting party without ultimate responsibility for Section 106 reviews,[100] the NPA does not impose an affirmative duty on the SHPO to independently identify significant historic properties within the APE that are not properly disclosed in the Submission Packet.[101] As the party obligated under the NPA to file a Submission Packet that accurately identified all historic properties within the APE, Wireless Properties bears full responsibility for the fact that its listing of historic properties did not include the Bragg Reservation.[102] Nothing in Section 106 or the NPA supports Wireless Properties' effort to convert this process into a factual inquiry into what the Tennessee SHPO should or could have identified on its own.

## IV. CONCLUSION

32. Based on the foregoing, we deny Wireless Properties' Application for Review, affirm the Order, and hold that Wireless Properties' failure to identify a significant historic property within the APE constituted a material error or omission that precluded the Tennessee SHPO from performing an effective

[97] *See* note 54, *supra*.

[98] *See* Declaration of G. Larry Wells, Application for Review at Ex. 4.

[99] *See* para. 19, *supra*.

[100] 54 U.S.C. §§ 302303(b)(5) (formerly codified at 16 U.S.C. § 470a(b)(3)(E)) (SHPO's responsibility is to "advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities"), 302303(b)(9)(A) (formerly codified at 16 U.S.C. § 470a(b)(3)(I)(i)) (SHPO shall consult with federal agencies on federal undertakings that may affect historic properties).

[101] In certain circumstances, the NPA does authorize the SHPO to identify additional properties within the APE, including properties already within its inventory that the SHPO considers eligible but that are not disclosed in publicly available records that the applicant was required to review. NPA §§ VI.D.1.c.1, VII.A.4.

[102] In proceedings before the Division, Wireless Properties contended that it did identify the Bragg Reservation by submitting a U.S. Geological Survey topographic map that shows a "monument" at the Bragg Reservation's location. The Order rejected this argument, noting that the graphics that Wireless Properties added to the map to indicate the locations of the tower site and several historic properties did not highlight the Bragg Reservation. The Order thus concluded that the map did not meaningfully indicate that the Bragg Reservation is located within the APE, much less that it might be impacted by the tower. Order, 22 FCC Rcd at 9306. We agree with this analysis.

review. We further affirm the direction in the Order to reopen the review.[103] On reopened review, Wireless Properties must ensure that its entire Submission Packet, including materials already submitted to the Tennessee SHPO, is complete and reflects the Bragg Reservation and all other historic properties that must be identified under the NPA.[104] The Tennessee SHPO shall confine its reopened review to effects on the Bragg Reservation and any other properties that were not previously identified, and shall not reconsider effects on properties that were fully disclosed and properly presented to it in the original Submission Packet. We also affirm the Division's determination that the Tennessee SHPO should address Wireless Properties' arguments that its proposed tower would not have an adverse effect on the Bragg Reservation because the area already contains many intrusions, and that many objections to the tower are based on aesthetic concerns that are not properly part of the historic preservation review process.[105]

## V. ORDERING CLAUSES

33. IT IS THEREFORE ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108, and Sections 1.2, 1.1307(a)(4), and 1.115(g) of the Commission's rules, 47 C.F.R. §§ 1.2, 1.1307(a) (4), 1.115(g), that the Application for Review filed by Wireless Properties, LLC, is DENIED.

34. IT IS FURTHER ORDERED that the Section 106 review shall proceed as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[103] In its Reply, Wireless Properties asserted that it was in the process of resubmitting its Form 620 Submission Packet to the Tennessee SHPO and would include a full evaluation of potential effects. Reply at ii, n.3. The Commission has received no indication that Wireless Properties' Submission Packet has been resubmitted.

[104] Wireless Properties need not resubmit to the Tennessee SHPO information that it has already submitted, but may supplement its earlier submission to include the Bragg Reservation and any other omitted historic properties..

[105] Order, 22 FCC Rcd at 9306. *See also* Reply at ii (acknowledging that it is premature for the Commission to assess adverse effects).

## STATEMENT OF COMMISSIONER AJIT PAI

Re: *Wireless Properties, LLC Application for Review*.

Deploying the towers, antennas, and other infrastructure necessary to meet consumers' growing demand for mobile broadband is no easy task. And it's often made more difficult by federal, state, and local regulations that unnecessarily slow the process down.[1] So when a state determines that a proposed tower will not adversely affect any historic property identified by the applicant, the law treats that as the state's final answer.

Accordingly, today's *Order* correctly finds that Tennessee lacked authority under the Nationwide Programmatic Agreement (NPA), which governs the review process, to reopen a proceeding after concluding that a proposed tower would have no adverse impact. This is the right answer under the law and one that will help promote certainty and transparency while speeding the deployment of wireless infrastructure.

At the same time, the NPA does provide the Federal Communications Commission with limited authority to reopen a proceeding. And I believe the FCC lawfully exercises that authority in this case because the applicant omitted material information from its application. In particular, it did not identify a National Park that fell within the proposed tower's Area of Potential Affect. So I agree that the FCC should exercise its own authority under the NPA and reopen the proceeding for the limited purpose of allowing the state to examine the proposed tower's potential impact on that property.

I would like to thank my colleagues for accommodating my suggestions on this item, and the hard-working staff of the Wireless Telecommunications Bureau, including Mania Baghdadi, Stephen Delsordo, Erica Rosenberg, Jeff Steinberg, and Johanna Thomas for their efforts.

[1] *See, e.g.*, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, 29 FCC Rcd 12865, 13016-17 (2014) (Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/3GynH; *see also* Remarks of Commissioner Ajit Pai at PCIA's 2014 Wireless Infrastructure Show (2014), *available at* http://go.usa.gov/3GynV; Remarks of Commissioner Ajit Pai at CTIA's MobileCon (2012), *available at* http://go.usa.gov/wMG9.