

**FCC FACT SHEET**\*

**Replacement Utility Poles Report and Order**

WT Docket No. 17-79

**Background:** As part of the FCC’s efforts to streamline the build out of next-generation wireless facilities, the agency is examining instances where regulatory review imposes needless burdens and slows infrastructure deployment. One potential hurdle is individualized review of whether a project could affect historic properties under the National Historic Preservation Act.

This Order would determine that there is no potential effect on historic properties when utility poles are replaced with substantially identical poles that can be used to support antennas or other wireless communications equipment. Therefore, it would conclude that individualized historic preservation review is unnecessary in such circumstances. Excluding these types of pole replacements from individualized historic preservation review would advance the public interest by providing significant efficiencies in the deployment of replacement poles that increasingly will be needed to support small cell facilities and the rollout of next-generation services, with no adverse effect on historic properties.

**What the Order Would Do:**

- Eliminate the requirement for historic preservation review when utility poles are replaced with substantially identical poles that can support antennas or other wireless communications equipment.
- Replacement utility poles would be excluded from review where the following conditions are met:
  - The original pole is not itself a historic property;
  - The replacement pole will be placed in the same hole, will have an appearance consistent with the original, and will cause no new ground disturbance.
- The Order would also consolidate the Commission’s historic preservation review procedures, currently in a variety of locations, into a single rule, making it easier to find, understand, and comply with the rules.

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

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

REPORT AND ORDER\*

Adopted:

Released:

By the Commission:

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I. INTRODUCTION

1. Today, we take an important step in our efforts to streamline the process of deploying wireless broadband by eliminating the need for historic preservation review in instances where there is no potential effect on historic properties. Specifically, in this order, we eliminate the requirement for such review when utility poles are replaced with substantially identical poles that can support antennas or other wireless communications equipment. We find that construction of such replacement utility poles, subject to the conditions discussed below, has no potential to affect historic properties, and therefore, the review process is unnecessary in this context.

\* This document has been circulated for tentative consideration by the Commission at its November 16, 2017 open meeting. The issues referenced in this document and the Commission’s ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

2. Enhancing the nation's wireless infrastructure is essential to meeting the exploding demand for robust mobile services and delivering the next generation of applications using transformative new network technologies. Review of deployment proposals pursuant to the National Historic Preservation Act (NHPA)<sup>1</sup> generally serves the important public policy objective of preserving the nation's historic heritage. Not all infrastructure deployments, however, have the potential to affect historic properties. Where such potential effects do not exist, requiring an individual historic preservation review can impose needless burdens and slow infrastructure deployment.

3. This order also reorganizes the rules governing the Commission's historic preservation review procedures by bringing together provisions that previously were scattered across a variety of locations into a single new Rule 1.1320. This new rule clearly sets forth the existing requirements, but (with the exception of the new exclusion for replacement utility poles) does not modify them. This reorganization should make it easier for affected parties to understand and comply with these requirements, and it will lay the groundwork for additional measures to streamline the review process and remove other impediments to rapid deployment, as proposed in the *2017 Wireless Infrastructure NPRM*.<sup>2</sup>

## II. BACKGROUND

4. Section 106 of the NHPA requires federal agencies to take into account the effect (if any) of their proposed "undertakings" on historic properties before proceeding with such undertakings.<sup>3</sup> The regulations of the Advisory Council on Historic Preservation (ACHP) prescribe detailed procedures for review of proposed undertakings, including (*inter alia*) consulting with specified parties; collecting and analyzing information to identify historic properties that might be affected by such undertakings; assessing such effects with input from consulting parties and the ACHP; negotiating alternatives or modifications to avoid, minimize, or mitigate any adverse effects; and conducting one or more rounds of notice and public comment.<sup>4</sup> Where an agency and the ACHP agree that the potential effects of a

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<sup>1</sup> 54 U.S.C. § 306108.

<sup>2</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017) (*2017 Wireless Infrastructure NPRM*).

<sup>3</sup> 54 U.S.C. § 306108; 36 CFR Part 800. Agencies are responsible for deciding whether or not particular types of activities qualify as undertakings, under the definitions in the ACHP's regulations. *See* 36 CFR §§ 800.3(a), 800.16(y). The Commission has found that its undertakings include the construction and replacement of communications towers and the collocation (i.e., mounting and installation) of antennas and related equipment on towers or other structures. *See CTIA—The Wireless Ass'n v. FCC*, 466 F.3d 105, 112-15 (D.C. Cir. 2006) (*CTIA v. FCC*) (affirming determination that certain types of facility deployments constitute the Commission's undertakings).

<sup>4</sup> 36 CFR §§ 800.2–800.13. The ACHP has authorized the Commission to delegate to parties seeking to deploy such facilities certain responsibilities associated with initiating the historic preservation review process, *see* Memo from ACHP Executive Director to FCC, State Historic Preservation Officers, and Tribal Historic Preservation Officers, re Delegation of Authority for the Section 106 Review of Telecommunications Projects (Sept. 21, 2000) (available at <http://wireless.fcc.gov/section106/nepa106.pdf>). The Commission, in turn, has adopted specific requirements for applicants in connection with that process. *See generally* 47 CFR § 1.1307(a)(4)(i) (2016) (requiring applicants to follow procedures set forth in the ACHP's rules or the FCC's Nationwide Programmatic Agreements to ascertain whether proposed actions may affect historic properties). For example, the Commission has required applicants to initiate the review process by making initial contacts with SHPOs, Tribal Nations, local governments, and members of the public, and providing specified information regarding the parameters of their proposed undertakings. *See Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings*, 47 CFR Part 1, Appx. C, §§ IV, V, VII.A (2004 NPA); *see also Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1106-13, 1132-33, paras. 89-109, 162-64 (2004) (2004 NPA Order), *aff'd sub nom. CTIA v. FCC*. Applicants also must follow specified processes to confirm the areas of potential effects, identify historic properties within those areas, and assess the effects of their proposed undertakings on those properties. *See 2004 NPA*, 47 CFR Part 1, Appx. C, § VI; *NPA Order*, 20 FCC Rcd at 1113-30, paras. 110-157. And in the event adverse effects on historic properties

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category of undertakings are “foreseeable and likely to be minimal or not adverse,” the ACHP may issue or agree to one of several varieties of a “program alternative” – *i.e.*, a document specifying alternative procedures and criteria that may streamline or truncate the historic preservation review of undertakings in that category.<sup>5</sup> And where an agency determines that a type of activity has no potential to affect historic properties under any circumstances, the agency may unilaterally eliminate the review process for such undertakings.<sup>6</sup>

5. The Commission and the ACHP have established three major program alternatives that streamline review of categories of the Commission’s undertakings: two “nationwide programmatic agreements” agreed to by the Commission, the ACHP, and the National Conference of State Historic Preservation Officers; and one “program comment” issued by the ACHP. The two programmatic agreements are the *Collocation Agreement*, adopted in 2001 and amended in 2016, which excludes from review specified types of antenna collocations on existing structures,<sup>7</sup> and the broader *2004 NPA*, which excludes some categories of construction from review and specifies procedures for review of others.<sup>8</sup> The *Positive Train Control Program Comment*, issued by the ACHP in 2014, eliminates or streamlines review of wayside poles and collocations on or near railroad facilities that are used for positive train control.<sup>9</sup> Finally, the Commission adopted an order in 2014 that, among other things, eliminated review of two defined categories of collocation that it found have no potential to affect historic properties.<sup>10</sup>

6. Of particular relevance here, the *2004 NPA* excludes the construction of replacement structures from historic preservation review under defined conditions, but only if the structure being replaced meets the definition of a “tower,” meaning that it was constructed for the sole or primary purpose of supporting Commission-authorized antennas.<sup>11</sup> A structure that does not qualify as a tower, such as a pole that initially was erected to support electric utility lines, does not fall within the exclusion under the *2004 NPA* even if it is later used to support Commission-authorized antennas. Consequently, if such a pole must be replaced to support a communications antenna and no other exclusion applies, the pole replacement is subject to review.

7. The ACHP recently considered historic preservation review requirements for the replacement of structures necessary to support communications lines and equipment in the context of communications deployments on Federal lands. In May 2017, it issued a Program Comment for Communications Projects

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are identified, applicants must submit plans to modify their projects so as to avoid, minimize, or mitigate any such effects. *2004 NPA*, 47 CFR Part 1, Appx. C, §§ VII.D, IX.B, X.D; *NPA Order*, 20 FCC Rcd at 1222, Appx. C, § D.

<sup>5</sup> 36 CFR § 800.14. The ACHP may also issue certain types of program alternatives on its own initiative. *Id.*

<sup>6</sup> 36 CFR § 800.3(a)(1).

<sup>7</sup> *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Collocation Agreement)*, 47 CFR Part 1, Appx. B; see *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 16 FCC Rcd 5574 (WTB 2001); *Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (2016).

<sup>8</sup> See *2004 NPA*, 47 CFR Part 1, Appx. C; *NPA Order*. See also *supra* note 4.

<sup>9</sup> Advisory Council on Historic Preservation, *Program Comment to Tailor the Federal Communications Commission’s Section 106 Review for Undertakings Involving the Construction of Wayside Poles and Infrastructure (“Positive Train Control Program Comment”)*, 79 Fed. Reg. 30861 (May 29, 2014); see Public Notice, 29 FCC Rcd 5340 (WTB 2014).

<sup>10</sup> *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12899-12913, paras. 70-105 (2014) (*2014 Wireless Infrastructure Order*) (eliminating review of small antennas and equipment mounted on utility poles and antennas that are not substantially visible from nearby streets and public spaces), *aff’d on other grounds, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015); see 47 CFR § 1.1307(a)(4)(ii)(A) and (B).

<sup>11</sup> *2004 NPA*, 47 CFR Part 1, Appx. C, § III.B.

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on Federal Lands and Property (*Federal Lands Program Comment*) that substantially streamlines historic preservation requirements when such deployments are subject to special use permits issued by Federal land management agencies.<sup>12</sup> Among other things, the *Federal Lands Program Comment* excludes from historic preservation review certain pole replacements regardless of whether the original structure being replaced was used to support communications antennas.<sup>13</sup>

8. In the *Wireless Infrastructure NPRM*, the Commission initiated a broad “examination of the regulatory impediments to wireless network infrastructure investment and deployment, and how we may remove or reduce such impediments, consistent with the law and the public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans.”<sup>14</sup> The Commission specifically sought comment on whether to expand the categories of undertakings that are excluded from historic preservation review to include pole replacements, and whether such a step would facilitate wireless facility siting while creating no or foreseeably minimal potential for adverse impacts to historic properties.<sup>15</sup> The Commission asked whether the construction of replacement poles should be excluded from Section 106 review, regardless of whether such poles are located in historic districts, provided that the replacement pole is not substantially larger than the pole it is replacing.<sup>16</sup> The Commission also solicited input on whether any additional conditions would be appropriate, such as limiting the exclusion to projects for which construction and excavation do not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction, or applying other criteria within utility rights-of-way.<sup>17</sup>

9. Hundreds of parties submitted comments on the *NPRM*,<sup>18</sup> but only a relative few of these comments specifically address the issue that is the focus of the present order. Parties representing carriers and tower developers that address this issue submit that pole replacements are often required to support small cell facilities and will increasingly be needed to support the rollout of 5G services.<sup>19</sup> They contend that there is no valid reason to continue distinguishing between poles and towers and that adopting an exclusion for replacement utility poles will provide for greater consistency by providing similar treatment for all replacement poles.<sup>20</sup> For example, CTIA argues that there is no reason to treat poles that already host wireless facilities differently from those that do not.<sup>21</sup> By contrast, some state historic preservation officers (SHPOs) and Tribal Nations oppose broadly excluding replacement poles or express concern about the proposal. Some assert that replacement poles may have potential effects on archeological

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<sup>12</sup> See Advisory Council on Historic Preservation, *Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property*, 82 Fed. Reg. 23818, 23822-29 (May 24, 2017) (final text of Program Comment for Communications Projects on Federal Lands and Property) (*Federal Lands Program Comment*).

<sup>13</sup> *Id.*, § VIII.B, 82 Fed. Reg. at 23827.

<sup>14</sup> *2017 Wireless Infrastructure NPRM*, 32 FCC Rcd at 3331, para. 2.

<sup>15</sup> *Id.* at 3353-54, paras. 66-68.

<sup>16</sup> *Id.* at 3353-54, para. 68.

<sup>17</sup> *Id.* at 3354, para. 68.

<sup>18</sup> Commenters and Reply Commenters, and the short forms by which they are cited herein, are listed in Appendix B. In addition, the Commission received and has considered numerous Brief Comments and Ex Parte Submissions.

<sup>19</sup> AT&T Comments at 31; WIA Comments at 66.

<sup>20</sup> See e.g., AT&T Comments at 29 (noting inconsistency introduced by previous streamlining efforts); CCA Reply Comments at 27 (“excising the old ‘tower’ requirement will clarify the process and ensure it is also up to date”); Verizon Comments at 54 (same); WIA Reply Comments at 34 (arguing for new exclusion to enable poles falling outside “tower” definition to be used for wireless infrastructure without unnecessary review).

<sup>21</sup> See CTIA Comments at 38.

resources, particularly from exclusions that are not appropriately cabined.<sup>22</sup> Others express concern that factors such as the materials, color, or size of replacement poles may compromise the integrity of historic districts.<sup>23</sup> The Texas SHPO, for example, argues that light and utility poles may sometimes exhibit character-defining features, and their replacement without Section 106 consultation could result in adverse effects to historic properties.<sup>24</sup> We address these comments in the discussion below.

### III. DISCUSSION

#### A. Exclusion for Pole Replacements that Have No Potential to Affect Historic Properties

10. Pursuant to Section 800.3(a)(1) of the ACHP's rules, we conclude that in the circumstances specified below, replacement of a pole that was constructed with a sole or primary purpose other than supporting communications antennas with a pole that will support such antennas would have no potential to affect historic properties. We therefore revise our rules to provide that the construction of such replacement poles will be excluded from Section 106 review when all the following conditions are met:

- (i) The original structure—
  - (A) Is a pole that can hold utility, communications, or related transmission lines;
  - (B) Was not originally erected for the sole or primary purpose of supporting antennas that operate pursuant to a spectrum license or authorization issued by the Commission; and
  - (C) Is not itself a historic property.
- (ii) The replacement pole—
  - (A) Is located within the same hole as the original pole;
  - (B) Has a height that does not exceed the height of the original pole by more than 10 percent of the height of the original pole; and
  - (C) Has an appearance consistent with the quality and appearance of the original pole.<sup>25</sup>
- (iii) Construction of the replacement pole in place of the original pole entails no new ground disturbance (either laterally or in depth) outside previously disturbed areas, including disturbance associated with temporary support of utility, communications, or related transmission lines. For purposes of this paragraph, "ground disturbance" means any activity

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<sup>22</sup> New Mexico SHPO Comments at 2; Chickasaw Nation Comments at 6.

<sup>23</sup> See Oregon SHPO Comments at 4 ("it is not only the size of a pole that can affect the character of the build environment around it – the materials, color, shape, and other characteristics can all have such an effect."); NCSHPO Comments at 5 (stating that "replacements of different size, material, or design pose a challenge."); Pechanga Comments at 7-8 (even projects without ground disturbance may affect historic properties, depending on their height); *but see* National Trust for Historic Preservation Comments at 3 (supporting exclusion for pole replacements that are smaller in height and diameter than existing pole); Delaware SHPO Comments at 4 (suggesting support for an exclusion for replacement poles if the definition of "substantially larger" were negotiated and agreed upon).

<sup>24</sup> Texas Historic Commission Comments at 4. See also California SHPO Comments at 2 (arguing that existing size limitations may not consider the width of antenna increases); Missouri SHPO Comments at 4; Delaware SHPO Comments at 4.

<sup>25</sup> We note that antennas separately deployed on a replacement pole that is exempted under the rule adopted here remain subject to existing historic preservation rules about antenna deployments, including the exemptions in the *Collocation Agreement* for equipment that is limited in size.

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that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils.

11. We conclude that, where these conditions are met, the construction of a replacement for a preexisting utility pole will have no potential to affect historic properties (even assuming such properties are present), regardless of whether the pole was originally built for the purpose of supporting communications equipment. We further conclude that excluding such replacements from historic preservation review advances the public interest.<sup>26</sup> We have authority to take this step pursuant to Section 800.3(a)(1) of the ACHP's regulations, which authorizes agencies to exclude undertakings that have no potential to affect historic properties from historic preservation review.<sup>27</sup>

12. We anticipate that adoption of this exclusion will provide significant efficiencies in the deployment of replacement facilities. The record indicates that pole replacements are often required to support small cell facilities, which increasingly will be needed to support the rollout of next-generation services.<sup>28</sup> Small cell antennas are much smaller and less obtrusive than traditional antennas mounted on macro cell towers, but a far larger number of them will be needed to accomplish the network densification that providers need, both in order to satisfy the exploding consumer demand for wireless data for existing services and in order to implement advanced technologies such as 5G. We find that excluding the pole replacements at issue here from review under Section 106 will allow providers to complete these deployments more efficiently. In addition, creating an exclusion for replacement of utility poles will promote consistency between the process that carriers and pole constructors must follow to comply with our historic preservation review requirements and those they must follow when building replacement poles that are subject to the requirements of other agencies applying the ACHP's *Federal Lands Program Comment*.<sup>29</sup>

13. In implementing large-scale network densification projects that require deployment of large numbers of facilities within a relatively brief period of time, use of existing structures, where feasible, can both promote efficiency and avoid adverse impacts on the human environment. Utility poles may be an appealing option for such deployments, since they often are the appropriate height for small cell antennas and are ubiquitous in many metropolitan areas. When existing utility poles cannot support additional equipment, however, pole replacement is required. Wooden utility poles, in particular, frequently need to be replaced because of their age and condition. For example, over time, wooden poles typically begin to rot from the top, where additional antennas associated with small cell facilities are usually attached, and frequently need to be replaced to have sufficient strength to support additional attachments. A pole also may need to be replaced if it is not sturdy enough or if it lacks sufficient space to mount new small cell antennas above utility infrastructure already installed on the pole, such as electric cables, telephone lines, cable television wires, or other equipment.<sup>30</sup>

14. Replacement poles placed in the same locations as the original structures will be sturdier than the preexisting poles, but will not necessarily be substantially taller or occupy appreciably more space on or in the ground than the original poles. In those circumstances, there is no likelihood that such pole replacements could affect historic properties. Nonetheless, under current rules, only replacements for

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<sup>26</sup> See, e.g., Sprint Comments at 33; Crown Castle Comments at 40.

<sup>27</sup> 36 CFR § 800.3(a)(1). For present purposes, we do not revisit our treatment of the construction of wireless communications structures, including replacement structures, as Commission undertakings. Cf. *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12904-05, para. 84; *2004 NPA Order*, 20 FCC Rcd at 1082-83, paras. 24-25.

<sup>28</sup> AT&T Comments at 31; WIA Comments at 66.

<sup>29</sup> See *Federal Lands Program Comment*, § VIII.B, 82 Fed. Reg. at 23827.

<sup>30</sup> See generally Wireless Infrastructure Association, "Small Cells on Pole Facilities: A Primer on How Utility Poles, Street Lights, and Traffic Signals will Help Drive Next Generation Mobile Broadband Networks," at 8 (2016) (available at <https://wia.org/wp-content/uploads/Small-Cells-on-Pole-Facilities.jpg>).

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poles meeting the definition of a “tower” are excluded from Section 106 review while other types of pole replacements continue to require review.<sup>31</sup> We agree with commenters that there is no valid reason to continue distinguishing between poles based on the purpose for which they were originally constructed, and that adopting an exclusion for replacement utility poles will promote greater consistency by providing similar treatment for similar replacement structures.<sup>32</sup> We also expect that creating an additional exclusion for pole replacements will encourage providers to replace existing poles in previously disturbed areas rather than undertaking new construction activity that potentially could affect historic properties.<sup>33</sup>

15. We limit the replacement pole exclusion, as discussed below, to ensure that such pole replacements have no potential to affect historic properties. These limitations address the concerns raised by some parties about the potential effect of a broad, unlimited exclusion for replacement poles and ensure that the exclusion we adopt today satisfies the strict standard in the ACHP’s rules. In adopting these conditions, we rely on, and incorporate, the Commission’s and the ACHP’s analyses in support of recent similar exclusions, including the new exclusions for collocations on a wide variety of structures (including utility poles) in the 2016 amendments to the *Collocation Agreement* as well as the exclusion of utility pole replacements in the ACHP’s 2017 *Federal Lands Program Comment*.<sup>34</sup>

16. This Order is an initial step in our broader effort to streamline historic preservation review requirements in this proceeding. The new exclusion we adopt today focuses only on utility pole replacements; our rule thus describes the new exclusion using terminology consistent with that in the *Federal Lands Program Comment* by referring to poles that “can hold utility, communications, or related transmission lines.”<sup>35</sup> We do not exclude replacements for structures that the *2004 NPA* defines as “towers,” since that program alternative already sets forth the conditions under which replacement of towers will be excluded from review.<sup>36</sup> And the rule makes clear our intent not to exclude from review the construction of new poles to replace existing poles that themselves qualify as historic structures.

17. We adopt limitations regarding location, size, quality, and appearance of replacement poles to address the concerns raised by some Tribal Nations, State Historic Preservation Officers, and preservation advocates. Consistent with commenters’ concerns, we find that excluding replacement poles that are substantially larger or that differ in other material ways from the poles being replaced might compromise the integrity of historic properties and districts.<sup>37</sup> Similar to the provisions contained in the ACHP’s *Federal Lands Program Comment*, we therefore exclude from historic preservation review only those

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<sup>31</sup> See *2004 NPA*, 47 CFR Part 1, Appx. C, § III.B.

<sup>32</sup> See, e.g., AT&T Comments at 29; CCA Reply Comments at 27; CTIA Comments at 38; Verizon Comments at 54; WIA Reply Comments at 34.

<sup>33</sup> See AT&T Comments at 31 (arguing that excluding replacement poles from Section 106 review will encourage carriers to site facilities on existing poles rather than undertake new construction).

<sup>34</sup> *Collocation Agreement*, 47 CFR Part 1, Appx. B, §§ VI.A (exclusion for collocations of small wireless antennas outside of historic districts), VII.B (exclusion for collocation of specified categories of antennas and equipment on utility poles); *Federal Lands Program Comment*, 82 Fed. Reg. at 23827, § VIII.B.

<sup>35</sup> See *infra*, Appx. A, new rule § 1.1320(b)(3)(i)(A); *accord*, *Federal Lands Program Comment*, 82 Fed. Reg. at 23825, § III.O (defining “pole” as “a non-tower structure that can hold utility, communications, and related transmission lines”). Our new rule uses the word “or” instead of the word “and” in the corresponding definition in the *Federal Lands Program Comment* to clarify that the exclusion extends to replacements where the original poles are capable of supporting any of the listed types of facilities, not necessarily all of them.

<sup>36</sup> See *infra*, Appx. A, new rule § 1.1320(b)(3)(i)(B) (applying exclusion only to poles “not originally erected for the sole or primary purpose of supporting antennas that operate pursuant to the Commission’s spectrum license or authorization”); see also 47 CFR Part 1, Appx. C, § III.B (exclusion for construction of replacement “towers”); *id.*, § II.A.14 (defining “tower” as “[a]ny structure built for the sole or primary purpose of supporting Commission-licensed antennas . . .”); *Federal Lands Program Comment*, 82 Fed. Reg. at 23825, § III.W (same).

<sup>37</sup> See NCSHPO Comments at 5; Pechanga Comments at 7-8.

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replacement poles that are situated in the same hole as the original pole, are no more than 10 percent taller than the original pole, and are consistent with the quality and appearance of the original pole.<sup>38</sup> The provision limiting the exclusion to a new pole located in the same hole as the original structure ensures that the new pole is truly a “replacement” and that the replacement will not cause changes to the setting of any historic properties that may be nearby.<sup>39</sup>

18. For purposes of this new exclusion, we use a size definition that differs from the *Collocation Agreement*'s definition of “substantial increase in the size of the tower” because that definition allows for increasing the height by either 10 percent or 20 feet plus the height of an antenna array, whichever is greater.<sup>40</sup> Utility poles are typically 25 to 40 feet tall, and we find that a 10 percent increase in the height of such a pole (*i.e.*, an increase of 2.5 to 4 feet) would be *de minimis* and thus would have no potential to affect historic properties.<sup>41</sup> We cannot reach the same conclusion as to a height increase of 20 feet or more, however. Such an increase may not be likely to have significant adverse effects, particularly in the case of a traditional macro cell tower.<sup>42</sup> But we cannot conclude that a replacement pole that is so much taller than the preexisting structure would have no potential for effects on any historic properties that may be nearby, as is required under the ACHP's rules for exclusions adopted by an agency official.<sup>43</sup>

19. We adopt an additional limitation to ensure that construction of the replacement pole will entail no new ground disturbance.<sup>44</sup> This limitation recognizes that construction-related ground disturbance or excavation may affect properties that are historic due to the presence of archeological resources, including those of cultural or religious significance to a Tribal Nation or Native Hawaiian organization.<sup>45</sup> The limitation on new ground disturbance outside previously disturbed areas, including disturbance associated with temporary support of lines, as well as the definition of “ground disturbance” as “any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously

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<sup>38</sup> See *infra*, Appx. A, new rule § 1.1320(b)(3)(ii)(A), (B), (C); *cf. Federal Lands Program Comment*, 82 Fed. Reg. at 23827, §§ VIII.B.1, VIII.B.3, VIII.B.4. While we note concerns that allowing small increases in height could, through multiple replacements over time, eventually result in significantly larger poles, see Missouri SHPO Comments at 3-4, we are aware of no evidence that this has occurred under existing program alternatives and therefore do not find this speculative concern persuasive.

<sup>39</sup> See 36 CFR § 800.5(a)(1) (“An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”); *id.* § 800.5(b)(iv) (an example of such adverse effect is a “[c]hange of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance”).

<sup>40</sup> See *Collocation Agreement*, 47 CFR Part 1, Appx. B, § I.E.1; 2004 NPA, 47 CFR Part 1, Appx. C, §§ III.A & III.B. The *Federal Lands Program Comment* applies this “substantial increase in height” definition, but only in the context of undertakings identical to those for which the 2004 NPA uses that definition. 82 Fed. Reg. at 23825, 23826, §§ III.S, VI.B.1 & n.2.

<sup>41</sup> *Cf. Federal Lands Program Comment*, 82 Fed. Reg. at 23827, § VIII.B.4 (exclusion for replacement poles applies where the “height increase of the replacement structures or poles is no more than 10 percent of the height of the originals”).

<sup>42</sup> See 36 CFR § 800.14(c)(ii) (program alternatives may exclude categories of undertakings if their “potential effects . . . upon historic properties are foreseeable and likely to be minimal or not adverse.”).

<sup>43</sup> 36 CFR § 800.3(a)(1).

<sup>44</sup> See *infra* Appx. A, new rule § 1.1320(b)(3)(iii); *cf. Chickasaw Nation Comments* at 6 (expressing concern that replacement poles might disturb archeological resources); *New Mexico SHPO Comments* at 2 (same).

<sup>45</sup> See 36 CFR § 800.16(l)(1) (including within the definition of historic property “artifacts, records, and remains that are related to and located within such properties”).

(continued....)

undisturbed soils,” are taken directly from the *Federal Lands Program Comment*.<sup>46</sup> We further specify that the limitation on ground disturbance in previously undisturbed areas applies to increases in both depth and lateral disturbance.<sup>47</sup>

20. All the conditions described above must be satisfied in order for a replacement pole to be excluded from historic preservation review. We conclude that, taken together, these provisions will ensure protection for historic properties and guard against replacements that would be out of scale with preexisting utility poles in a particular area. By adopting this new exclusion subject to these limitations, we continue to fulfill our statutory responsibilities regarding historic preservation, while removing an unnecessary impediment to the rapid deployment of sorely needed small cell facilities and other wireless infrastructure across the country.

### **B. Conforming Amendments and Reorganization of Historic Preservation Rules**

21. In this order, we eliminate requirements relating to historic preservation review that formerly applied to parties seeking to deploy certain replacement facilities, as discussed above. We also take this opportunity to reorganize existing historic preservation regulations into a single rule section that will be clearer, more accessible, and easier to understand. The NPRM stated that this proceeding would take a “comprehensive fresh look at our rules and procedures implementing . . . the National Historic Preservation Act (NHPA)” and would ensure that “the Commission’s rules and policies . . . are clear on licensees’ and applicants’ obligations.”<sup>48</sup> Our rules previously commingled detailed provisions implementing the historic preservation review process under Section 106 with the provisions implementing the National Environmental Policy Act.<sup>49</sup> To provide more clarity, we are moving the historic preservation review provisions into a new rule, Section 1.1320, that more clearly sets forth the existing requirements governing that review process; and within that rule, we adopt a paragraph (b)(3) establishing the exclusion described above.<sup>50</sup>

22. Moreover, we find that notice and comment are unnecessary and that we have good cause to make these clarifying revisions without expressly seeking comment on them.<sup>51</sup> Except for paragraph (b)(3)’s addition of a pole replacement exclusion, new Section 1.1320 makes no substantive changes to our existing requirements implementing the historic preservation review process under Section 106, but merely simplifies the way our regulations describe them by collecting existing requirements in one place and organizing them in a more straightforward fashion.<sup>52</sup> As explained in detail below, each provision in the new Section 1.1320 is taken directly from existing requirements and adds no new obligations. Thus,

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<sup>46</sup> See *infra*, Appx. A, new rule § 1.1320(b)(3)(iii); cf. *Federal Lands Program Comment*, 82 Fed. Reg. at 23824, § III.I (defining ground disturbance); *id.* at 23827, § VIII.B.1 (exclusion for replacement poles conditioned on no new ground disturbance).

<sup>47</sup> Cf. *Collocation Agreement*, 47 CFR Part 1, Appx. B, § VI.A.6 (collocation exclusion applies unless “[t]he depth and width of any proposed ground disturbance associated with the collocation exceeds the depth and width of any previous ground disturbance . . .”).

<sup>48</sup> See *2017 Wireless Infrastructure NPRM*, 32 FCC Rcd at 3339, 3344, paras. 23, 37.

<sup>49</sup> See 47 CFR § 1.1307(a)(4)(i) & (ii) (2016); *infra*, Appx. A (revised text of § 1.1307(a)(4)). The other provisions of Section 1.1307 – including the paragraphs immediately preceding and following § 1.1307(a)(4) – have nothing to do with historic preservation.

<sup>50</sup> See *infra* Appx. A, new rule § 1.1320(b)(3); see generally *infra*, Appx. A, new rule § 1.1320.

<sup>51</sup> See 5 U.S.C. § 553(b)(B) (notice not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

<sup>52</sup> Cf. *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (“agency actions that do not themselves alter the rights or interests of parties” are “exempt from the general notice and comment requirements” of the Administrative Procedure Act).

public comment is unnecessary because no substantive changes are being made. Moreover, the delay engendered by a round of comment would be contrary to the public interest. The simpler presentation of our requirements in the new rule should make it easier for licensees and applicants to understand and comply with our historic preservation review requirements, and thus may expedite the completion of such review, thus facilitating more expeditious deployment of wireless infrastructure.

23. Paragraph (a) of the new rule incorporates into the Commission's rules the existing provisions in the ACHP's regulations establishing that all federal agencies' undertakings with the potential to cause effects on historic properties are subject to review under Section 106 of the NHPA.<sup>53</sup> There was no corresponding provision in the Commission's preexisting rules.<sup>54</sup> Paragraphs (a)(1) and (a)(2) clarify the procedures that apply to historic preservation review of categories of undertakings. Paragraph (a)(1) cross-references the ACHP's regulations establishing the default procedures that generally apply to Commission undertakings,<sup>55</sup> unless the undertakings are subject to one of the Commission's program alternatives, such as those cross-referenced in paragraph (a)(2) (*i.e.*, the *Collocation Agreement*, the *2004 NPA*, and the ACHP's 2014 Program Comment concerning deployment of infrastructure for positive train control), in which case they are reviewed using the procedures described in the applicable program alternative.<sup>56</sup>

24. Paragraph (b) of the new rule lists Commission undertakings that are not subject to any FCC historic preservation review process. Paragraph (b)(1) refers to undertakings for which an agency other than the Commission is the "lead Federal agency" that is primarily responsible for historic preservation review.<sup>57</sup> Paragraph (b)(2) recognizes that the Commission's program alternatives not only establish streamlined procedures but also exempt some categories of undertakings from review.<sup>58</sup> Paragraph (b)(3) of the new rule sets forth the new utility pole replacement exclusion adopted in this order, and paragraph (b)(4) of the new rule is identical to paragraph (a)(4)(ii) of § 1.1307 of the preexisting rules, which

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<sup>53</sup> See *infra* Appx. A, new rule § 1.1320(a); *cf.* 36 CFR § 800.1(a) (basic requirement and purpose of historic preservation review under the NHPA), § 800.2(a) (agency's obligation); § 800.16(b), (y) (defining "agency" and "undertaking," respectively). An illustrative list of Commission activities and regulated facilities treated as undertakings for purposes of Section 106 of the NHPA is set forth in Attachment 2 to the *2004 NPA Order*, 20 FCC Rcd at 1176-78. See also *id.* at 1082-84, paras. 24-28 (reaffirming conclusion that tower deployments are undertakings); *CTIA v. FCC*, 466 F.3d at 112-15 (specifically affirming this conclusion).

<sup>54</sup> Preexisting rule § 1.1307(a)(4)(i) required applicants to "ascertain whether a proposed action may affect [historic] properties" by following the procedures set forth in the ACHP's rules, "as modified and supplemented by" the *Collocation Agreement* and the *2004 NPA*. While this paragraph set forth sources of information for applicants to use for purposes of environmental review, it did not specifically describe the historic preservation review process or establish requirements or procedures governing it. Moreover, the paragraph imprecisely referred to the ACHP's rules, "as modified and supplemented by" the Commission's program agreements; but the *Collocation Agreement* and the *2004 NPA* actually *supplant* portions of the ACHP's regulations but do not *modify* them. The present order strikes out this language and amends the paragraph (redesignated as § 1.1307(a)(4)) to cross-reference section 1.1320, as well as Section 106 of the NHPA, to identify the historic preservation factors relevant to whether applicants must prepare environmental assessments of proposed actions. See *infra* Appx. A, amended rule § 1.1307(a)(4).

<sup>55</sup> See *infra* Appx. A, new rule § 1.1320(a)(1) (cross-referencing 36 CFR §§ 800.3–800.13).

<sup>56</sup> See *infra* Appx. A, new rule § 1.1320(a)(2) (cross-referencing the *Collocation Agreement*, the *2004 NPA*, and the *Program Comment to Tailor the Federal Communications Commission's Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure*, 79 Fed. Reg. 30861 (May 29, 2014)). Note that the new rule refers to program alternatives "including but not limited to" the three that are specifically identified. Undertakings subject to any other Commission program alternative also would be reviewed pursuant to the applicable procedures in such program alternative, even if it is not explicitly listed in this rule.

<sup>57</sup> See *infra* Appx. A, new rule § 1.1320(b)(1) (cross-referencing 36 CFR § 800.2(a)(2)).

<sup>58</sup> See *infra* Appx. A, new rule § 1.1320(b)(2); *cf.* *Collocation Agreement*, §§ III-VIII; *2004 NPA*, § III.

(continued....)

codified the exclusion adopted in the *2014 Wireless Infrastructure Order* for the collocation of antennas and related equipment on buildings other than towers or utility poles.<sup>59</sup> Paragraph (a)(4)(i) of § 1.1307 of the preexisting rules, originally adopted in 2014, has been omitted from the amended version of § 1.1307 and has not been included in the new § 1.1320 because that paragraph's exclusion for a narrow set of collocations on utility poles has been entirely subsumed within the broader exclusions established in the 2016 amendments to the Collocation Agreement.<sup>60</sup> Finally, paragraph (c) of the new rule sets forth the responsibilities of Commission applicants and licensees relating to the historic preservation review process.<sup>61</sup>

#### IV. PROCEDURAL MATTERS

##### A. Final Regulatory Flexibility Analysis

25. With respect to this Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Report and Order. The Commission will send a copy of the Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

##### B. Paperwork Reduction Act

26. This Report and Order does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

##### C. Congressional Review Act

27. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), *see* 5 U.S.C. § 801(a)(1)(A).

#### V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 4(i), 7, 201, 301, 303, and 332 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 301, 303, and 332, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108, that this Report and Order IS hereby ADOPTED.

29. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

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<sup>59</sup> See *infra* Appx. A, new rule § 1.1320(b)(3) & (4); *cf.* 47 CFR § 1.1307(a)(4)(ii) (2016); *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12910-12, paras. 96-103.

<sup>60</sup> See 47 CFR § 1.1307(a)(4)(i) (2016); *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12906-09, paras. 90-95; *Collocation Agreement*, 47 CFR Part 1, Appx. B, §§ V, VI, & VII.

<sup>61</sup> See *infra* Appx. A, new rule § 1.1320(c). Paragraph (c) of the new rule provides a reference to the *2004 NPA*, which sets forth these responsibilities in detail. 47 CFR Part 1, Appx. C, §§ III-X. Paragraph (d) makes clear that the most significant, potentially ambiguous terms in the rule – “antenna,” “applicant,” “collocation,” “tower,” and “undertaking” – should be construed in the same manner as defined in the *2004 NPA* or the *Collocation Agreement*. We have used the definition of “antenna” from the *2004 NPA*, rather than the narrower definition from the *Collocation Agreement*, in order to include antennas that are not mounted on a structure or building. With respect to “collocation,” however, we have incorporated the more recent and clearer definition from the 2016 amendments to the *Collocation Agreement*.

30. IT IS FURTHER ORDERED that Part 1 of the Commission's Rules IS AMENDED as set forth in Appendix A, and that these changes SHALL BE EFFECTIVE 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**  
**Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 C.F.R. Part 1 as follows:

**PART I – PRACTICE AND PROCEDURE**

1. *The authority citation for Part 1 continues to read as follows:*

Authority: 47 U.S.C. 151, 154(i), 155, 157, 225, 303(r), 309, 1403, 1404, 1451, and 1452.

2. *Section 1.1307 is amended by striking subparagraph (a)(4)(ii); redesignating subparagraph (a)(4)(i) as paragraph (a)(4); and revising paragraph (a)(4) to read as follows:*

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places (see 54 U.S.C. 300308; 36 CFR parts 60 and 800), and that are subject to review pursuant to section 1.1320 of this subpart and have been determined through that review process to have adverse effects on identified historic properties.

3. *The following new section 1.1320 is added:*

**1.1320 Review of Commission undertakings that may affect historic properties.**

(a) *Review of Commission undertakings.* Any Commission undertaking that has the potential to cause effects on historic properties, unless excluded from review pursuant to paragraph (b) of this section, shall be subject to review under section 106 of the National Historic Preservation Act, as amended, 54 U.S.C. 306108, by applying—

(1) The procedures set forth in regulations of the Advisory Council on Historic Preservation, 36 CFR 800.3–800.13, or

(2) If applicable, a program alternative established pursuant to 36 CFR 800.14, including but not limited to the following:

(i) The Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, as amended, Appendix B to Part 1 of this chapter.

(ii) The Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings, Appendix C to Part 1 of this chapter.

(iii) The Program Comment to Tailor the Federal Communications Commission’s Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure, 79 FR 30861, May 29, 2014.

(b) *Exclusions.* The following categories of undertakings are excluded from review under this section:

(1) *Projects reviewed by other agencies.* Undertakings for which an agency other than the Commission is the lead Federal agency pursuant to 36 CFR 800.2(a)(2).

(2) *Projects subject to program alternatives.* Undertakings excluded from review under a program alternative established pursuant to 36 CFR 800.14, including those listed in paragraph (a)(2) of this section.

(3) *Replacement utility poles.* Construction of a replacement for an existing structure where all the following criteria are satisfied:

(i) The original structure—

- (A) Is a pole that can hold utility, communications, or related transmission lines;
  - (B) Was not originally erected for the sole or primary purpose of supporting antennas that operate pursuant to the Commission's spectrum license or authorization; and
  - (C) Is not itself a historic property.
- (ii) The replacement pole—
- (A) Is located within the same hole as the original pole;
  - (B) Does not exceed the height of the original pole by more than 10 percent of the height of the original pole; and
  - (C) Has an appearance that is consistent with the quality and appearance of the original pole.
- (iii) Construction of the replacement pole in place of the original pole entails no new ground disturbance (either laterally or in depth) outside previously disturbed areas, including disturbance associated with temporary support of utility, communications, or related transmission lines. For purposes of this paragraph, "ground disturbance" means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils.
- (4) *Collocations on buildings and other non-tower structures.* The mounting of antennas (including associated equipment such as wiring, cabling, cabinets, or backup power) on buildings or other non-tower structures where the deployment meets the following conditions:
- (i) There is an existing antenna on the building or structure;
  - (ii) One of the following criteria is met:
    - (A) *Non-Visible Antennas.* The new antenna is not visible from any adjacent streets or surrounding public spaces and is added in the same vicinity as a pre-existing antenna;
    - (B) *Visible Replacement Antennas.* The new antenna is visible from adjacent streets or surrounding public spaces, provided that
      - (1) It is a replacement for a pre-existing antenna,
      - (2) The new antenna will be located in the same vicinity as the pre-existing antenna,
      - (3) The new antenna will be visible only from adjacent streets and surrounding public spaces that also afford views of the pre-existing antenna,
      - (4) The new antenna is not more than 3 feet larger in height or width (including all protuberances) than the pre-existing antenna, and
      - (5) No new equipment cabinets are visible from the adjacent streets or surrounding public spaces; or
    - (C) *Other Visible Antennas.* The new antenna is visible from adjacent streets or surrounding public spaces, provided that
      - (1) It is located in the same vicinity as a pre-existing antenna,
      - (2) The new antenna will be visible only from adjacent streets and surrounding public spaces that also afford views of the pre-existing antenna,
      - (3) The pre-existing antenna was not deployed pursuant to the exclusion in this subsection (§ 1.1320(b)(4)),

- (4) The new antenna is not more than three feet larger in height or width (including all protuberances) than the pre-existing antenna, and
- (5) No new equipment cabinets are visible from the adjacent streets or surrounding public spaces;
- (iii) The new antenna complies with all zoning conditions and historic preservation conditions applicable to existing antennas in the same vicinity that directly mitigate or prevent effects, such as camouflage or concealment requirements;
- (iv) The deployment of the new antenna involves no new ground disturbance; and
- (v) The deployment would otherwise require the preparation of an Environmental Assessment under section 1.1304(a)(4) of this Part solely because of the age of the structure.

NOTE TO PARAGRAPH (b)(4): A non-visible new antenna is in the “same vicinity” as a pre-existing antenna if it will be collocated on the same rooftop, façade or other surface. A visible new antenna is in the “same vicinity” as a pre-existing antenna if it is on the same rooftop, façade, or other surface and the centerpoint of the new antenna is within ten feet of the centerpoint of the pre-existing antenna. A deployment causes no new ground disturbance when the depth and width of previous disturbance exceeds the proposed construction depth and width by at least two feet.

- (c) *Responsibilities of applicants.* Applicants seeking Commission authorization for construction or modification of towers, collocation of antennas, or other undertakings shall take the steps mandated by, and comply with the requirements set forth in, Sections III-X of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings, Appendix C to Part 1 of this chapter, or any other applicable program alternative.
- (d) *Definitions.* For purposes of this section, the term “collocation” has the meaning defined in Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, as amended, Appendix B to Part 1 of this chapter; and the terms “antenna,” “applicant,” “tower,” and “undertaking” have the meanings defined in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings, Appendix C to Part 1 of this chapter.



**APPENDIX B****Comments and Reply Comments****Comments**

5G Americas  
ACT | The App Association  
African American Mayors Association  
Alaska Department of Transportation & Public Facilities  
Alaska Native Health Board  
Alexandra Ansell  
American Association of State Highway and Transportation Officials  
American Bird Conservancy  
American Cable Association  
American Petroleum Institute  
American Public Power Association  
Arctic Slope Regional Corporation  
Arizona State Historic Preservation Office  
Association of American Railroads  
AT&T  
Bad River Band of the Lake Superior Tribe of Chippewa  
BioInitiative Working Group  
CAGW  
Cahuilla Band of Indians  
California Public Utilities Commission  
California State Historic Preservation Officer  
Cape Cod Bird Club, Inc.  
Catawba Indian Nation Tribal Historic Preservation Office  
Charter Communications, Inc.  
Chickasaw Nation  
Chippewa Cree THPO  
Choctaw Nation of Oklahoma  
Chuck Matzker  
Cindy Russell  
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee  
Citizen Potawatomi Nation  
City and County of San Francisco  
City of Alexandria, Virginia; Arlington County, Virginia; and Henrico County, Virginia  
City of Alexandria, Virginia; Arlington County, Virginia; and Henrico County, Virginia  
City of Arlington, Texas  
City of Austin, Texas  
City of Bellevue, City of Bothell, City of Burien, City of Ellensburg, City of Gig Harbor, City of Kirkland, City of Mountlake Terrace, City of Mukilteo, City of Normandy Park, City of Puyallup, City of Redmond, City of Walla Walla (Washington Munis)  
City of Chicago  
City of Claremont  
City of Eden Prairie, MN  
City of Irvine, California  
City of Lansing, Michigan  
City of New Orleans, Louisiana

City of New York  
City of Philadelphia  
City of Springfield, Oregon  
Cityscape Consultants, Inc.  
Coalition for American Heritage  
Colorado Communications and Utility Alliance, Rainier Communications Commission, City of  
Seattle, WA; City of Tacoma, WA; King County, WA; Jersey Access Group; and Colorado  
Municipal League (CO/NJ/WA Munis)  
Colorado River Indian Tribes  
Comcast Corporation  
Community Associations Institute  
Competitive Carriers Association (CCA)  
Computing Technology Industry Association (CompTIA)  
Computer & Communications Industry Association (CCIA)  
Consumer Technology Association  
Conterra Broadband Services, Southern Light, LLC, Uniti Group, Inc.  
Critical Infrastructure Coalition  
Crown Castle International Corp.  
CTIA  
CTIA and Wireless Infrastructure Association (CTIA/WIA)  
Delaware State Historic Preservation Office (Delaware SHPO)  
Diana Welling  
Dianne Desrosiers  
DuPage Mayors and Managers Conference  
East Bay Municipal Utility District  
Eastern Shawnee Tribe  
Edward Czelada  
Elijah Mondy  
Elizabeth Doonan  
EMF Safety Network and Ecological Options Network  
Environmental Health Trust  
ExteNet Systems, Inc.  
Fairfax County, Virginia  
FibAire Communications, LLC d/b/a AireBeam  
Fond du Lac Band of Lake Superior Chippewa  
Free State Foundation  
General Communication, Inc.  
Georgia Department of Transportation  
Georgia Historic Preservation Division  
Georgia Municipal Association, Inc.  
Gila River Indian Community  
Hongwei Dong  
Hualapai Tribal Historic Preservation Officer  
Illinois Department of Transportation  
Illinois Municipal League  
Information Technology and Innovation Foundation  
International EMF Scientist Appeal  
Jonathan Mirin  
Joyce Barrett  
Kate Kheel  
Kevin Mottus  
League of Arizona Cities and Towns; League of California Cities; and League of Oregon Cities

(AZ/CA/OR Cities)  
League of Minnesota Cities  
Leo Cashman  
Lighttower Fiber Networks  
Lisbeth Britt  
Lower Brule Sioux Tribe  
Maine Department of Transportation  
Mark N. Salvo  
Marty Feffer  
Mayor Pat Furey  
McLean Citizens Association  
Miami Tribe of Oklahoma  
Missouri State Historic Preservation Office (Missouri SHPO)  
Mobile Future  
Mobilitie, LLC  
Mohegan Tribe of Indians of Connecticut  
Montana SHPO  
Muscogee (Creek) Nation  
National Association of Telecommunications Officers and Advisors (NATOA)  
National Association of Tribal Historic Preservation Officers  
National Black Caucus of State Legislators  
National Conference of State Historic Preservation Officers (NCSHPO)  
National Congress of American Indians (NCAI)  
National League of Cities (NLC)  
National Tribal Telecommunications Association  
National Trust for Historic Preservation  
Navajo Nation President Russell Begaye and the Navajo Nation Telecommunications Regulatory  
Commission (NNTRC)  
NCTA – The Internet & Television Association  
NEPSA Solutions LLC  
New Mexico SHPO  
Nina Beety  
Nokia  
North Carolina State Historic Preservation Office (North Carolina SHPO)  
Northern Cheyenne Tribal Historic Preservation  
NTCA – The Rural Broadband Association  
Oakland County Board of County Road Commissioners  
Olemara Peters  
ONE Media, LLC  
Oregon SHPO  
Osage Nation  
Pechanga Band of Luiseno Mission Indians (Pechanga)  
Pennsylvania State Historic Preservation Office  
PTA-FLA, Inc .  
Puerto Rico State Historic Preservation Office  
Quad Cities Cable Communications Commission  
Quapaw Tribe of Oklahoma  
R Street Institute  
Rebecca Carol Smith  
Ronald M. Powell, Ph.D.  
Russell L. Martin  
S. Quick

Sacred Wind Communications, Inc.  
Samsung Electronics America, Inc.  
Santa Clara Pueblo  
Sault Ste. Marie Tribe of Chippewa Indians  
SCAN NATOA, Inc.  
Seminole Nation of Oklahoma  
Seminole Tribe of Florida  
Sisseton Wahpeton Oyate  
Smart Communities and Special Districts Coalition  
Soula Culver  
Sprint  
Standing Rock Sioux Tribe  
Starry, Inc.  
Swinomish Indian Tribal Community  
Telecommunications Industry Association  
Texas Department of Transportation  
Texas Historical Commission  
T-Mobile USA, Inc. (T-Mobile)  
Tonkawa Tribe of Oklahoma  
Triangle Communication System, Inc.  
Twenty-Nine Palms Band of Mission Indians  
Utah Department of Transportation  
Utilities Technology Council  
Verizon  
WEC Energy Group, Inc.  
Wei Shen  
Wireless Infrastructure Association (WIA)  
Wireless Internet Service Providers Association  
Xcel Energy Services Inc.

### **Reply Comments**

Aaron Rosenzweig  
Advisory Council on Historic Preservation  
American Cable Association  
American Public Power Association  
Association of American Railroads  
AT&T  
California Public Utilities Commission  
Catherine Kleiber  
Chippewa Cree Tribe  
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee (San Antonio et al.)  
City and County of San Francisco (San Francisco)  
City of Baltimore, Maryland  
City of Mukilteo  
City of New York  
City of Philadelphia  
Colorado Communications and Utility Alliance, Rainier Communications Commission, City of Seattle, WA, City of Tacoma, WA, King County, WA, Jersey Access Group, Colorado Municipal League (CO/NJ/WA Munis)  
Comcast Corporation  
Communications Workers of America

Competitive Carriers Association (CCA)  
Confederated Tribes of Grand Ronde Historic Preservation Office  
Consumer Technology Association  
Conterra Broadband Services, Southern Light, LLC, Uniti Group Inc.  
Critical Infrastructure Coalition  
Crown Castle International Corp. (Crown Castle)  
CTIA  
CTIA and Wireless Infrastructure Association (CTIA-WIA)  
Dan Kleiber  
District of Columbia  
Enterprise Wireless Alliance  
Environmental Health Trust  
ExteNet Systems, Inc.  
Fairfax County, Virginia  
Florida Coalition of Local Governments  
Gary Resnick  
Georgia Municipal Association, Inc.  
Greenlining Institute  
Greywale Advisors  
INCOMPAS  
Irregulars  
Judith E. Bittner  
Karen Spencer  
Kaw Nation  
League of Arizona Cities and Towns, League of California Cities, League of Oregon Cities (AZ/CA/OR  
Cities)  
National Association of Regulatory Utility Commissioners (NARUC)  
National Association of Telecommunications Officers and Advisors, National League of Cities, National  
Association of Towns and Townships, National Association of Regional Councils, United States  
Conference of Mayors, Government Finance Officers Association (NATOA et al.)  
National Association of Tribal Historic Preservation Officers  
National Congress of American Indians, United South and Eastern Tribes- Sovereignty Protection Fund,  
National Association of Tribal Historic Preservation Officers  
National Organization of Black Elected Legislative (NOBEL) Women  
National Rural Electric Cooperative Association (NRECA)  
Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission  
NCTA – The Internet & Television Association  
Pala Band of Mission Indians  
Pueblo of Acoma  
Puerto Rico Telephone Company, Inc. d/b/a CLARO  
Quintillion Networks, LLC and Quintillion Subsea Operations, LLC  
Rebecca Carol Smith  
SDN Communications  
Skyway Towers, LLC  
SmallCellSite.Com  
Smart Communities and Special Districts Coalition  
Soula Culver  
Sue Present  
Telecommunications Industry Association  
Texas Municipal League  
T-Mobile USA, Inc. (T-Mobile)  
Triangle Communication System, Inc.

United States Conference of Mayors  
Wireless Infrastructure Association (WIA)  
Wireless Internet Service Providers Association (WISPA)  
Xcel Energy Services Inc.

## APPENDIX C

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>62</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (NPRM)*.<sup>63</sup> The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>64</sup>

**A. Need for and Objectives of the Rules**

2. In the Order, we adopt rules that streamline the process of deploying next-generation wireless broadband infrastructure by eliminating the need for historic preservation review pursuant to the National Historic Preservation Act (NHPA)<sup>65</sup> in certain instances where there is no potential effect on historic properties. Specifically, we find that the construction of poles that can support antennas or other wireless communications equipment to replace pre-existing utility poles that are substantially identical, under specified conditions, has no potential to affect historic properties, and therefore, the historical preservation review process is unnecessary in this context. This order also reorganizes the rules governing the Commission's historic preservation review procedures by bringing together provisions that previously were scattered across a variety of locations into a single new Rule 1.1320, which clearly sets forth the existing requirements but, with the exception of the new exclusion for replacement utility poles, does not modify them.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

3. No parties filed comments that specifically addressed the rules and policies proposed in the IRFA. One party – the Smart Cities and Special Districts Coalition – filed comments arguing that some small local governments, special districts, property owners, or small developers might be harmed if the Commission were to adopt certain policy changes discussed in the *NPRM* relating to (i) batches of zoning applications filed with state or local governments, (ii) the maximum reasonable time for state or local governments to process zoning applications (“shot clock” rules and “deemed granted” remedies), or (iii) limitations on proprietary properties or regulation of their use.<sup>66</sup> The present order does not deal with any of the issues in the *NPRM* that the Smart Cities and Special Districts Coalition addressed in the cited portions of its comments. We will address these comments when we act on the relevant issues in a future order.

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

4. Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those

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<sup>62</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>63</sup> See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017) (*NPRM* or *2017 Wireless Infrastructure NPRM*).

<sup>64</sup> See 5 U.S.C. § 604.

<sup>65</sup> 54 U.S.C. § 306108.

<sup>66</sup> Smart Communities and Special Districts Coalition Comments at 41, 55, 81.

comments.<sup>67</sup> The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

**D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein<sup>68</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>69</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>70</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>71</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.<sup>72</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>73</sup> These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.<sup>74</sup> Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>75</sup> Nationwide, as of 2007, there were approximately 1,621,215 small organizations.<sup>76</sup> Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>77</sup> U.S. Census Bureau data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United

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<sup>67</sup> 5 U.S.C. § 604(a)(3).

<sup>68</sup> See 5 U.S.C. § 604(a)(3).

<sup>69</sup> 5 U.S.C. § 601(6).

<sup>70</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>71</sup> 15 U.S.C. § 632.

<sup>72</sup> See 5 U.S.C. § 601(3)-(6).

<sup>73</sup> See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1 – What is a small business?” [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016).

<sup>74</sup> See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small business are there in the U.S.?” [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016).

<sup>75</sup> 5 U.S.C. § 601(4).

<sup>76</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2010).

<sup>77</sup> 5 U.S.C. § 601(5).

(continued....)



States.<sup>78</sup> We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”<sup>79</sup> Thus, we estimate that most governmental jurisdictions are small.

7. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>80</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>81</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>82</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>83</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

8. The Commission’s own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today.<sup>84</sup> The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>85</sup> Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>86</sup> Thus, using available data, we estimate that the majority of wireless firms can be considered small.

9. *Personal Radio Services*. Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our rules.<sup>87</sup> These services include Citizen Band Radio Service, General Mobile Radio Service, Radio

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<sup>78</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2012* at 267, Table 429 (2011), <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf> (citing data from 2007).

<sup>79</sup> The 2012 U.S. Census data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in the Census Bureau data for 2012, which is based on 2007 data. As a basis of estimating how many of these 89,476 local government organizations were small, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000 in 2011. See U.S. Census Bureau, *City and Town Totals Vintage: 2011*, <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small.

<sup>80</sup> NAICS Code 517210. See <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en/ECN.NAICS2012.517210>.

<sup>81</sup> 13 CFR § 121.201, NAICS Code 517210.

<sup>82</sup> U.S. Census Bureau, *Subject Series: Information*, tbl. 5, “Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210.”

<sup>83</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

<sup>84</sup> See <http://wireless.fcc.gov/uls>. For the purposes of this IRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

<sup>85</sup> See *Trends in Telephone Service* at tbl. 5.3.

<sup>86</sup> See *id.*

<sup>87</sup> 47 CFR Part 90.

Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.<sup>88</sup> There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.<sup>89</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>90</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>91</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. We note that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

10. *Public Safety Radio Licensees.* Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.<sup>92</sup> Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. For this category we apply the SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons.<sup>93</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>94</sup> Of this total,

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<sup>88</sup> The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of Part 95 of the Commission's rules. See generally 47 CFR Part 95.

<sup>89</sup> 13 CFR § 121.201, NAICS Code 517210.

<sup>90</sup> U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>91</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

<sup>92</sup> See subparts A and B of Part 90 of the Commission's Rules, 47 CFR §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

<sup>93</sup> See 13 CFR § 121.201, NAICS Code 517210.

<sup>94</sup> U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210,"

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955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>95</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.<sup>96</sup> There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.<sup>97</sup> We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

11. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons.<sup>98</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>99</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>100</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. According to the Commission's records, there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by this Notice.<sup>101</sup> The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

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[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>95</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

<sup>96</sup> This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change daily. We do not expect this number to be significantly smaller today. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

<sup>97</sup> Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA – Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

<sup>98</sup> See 13 CFR § 121.201, NAICS Code 517210.

<sup>99</sup> U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>100</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

<sup>101</sup> This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller today. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.

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12. *Multiple Address Systems.* Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses.

13. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define “small entity” for MAS licensees as an entity that has average annual gross revenues of less than \$15 million over the three previous calendar years.<sup>102</sup> A “Very small business” is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than \$3 million over the preceding three calendar years.<sup>103</sup> The SBA has approved these definitions.<sup>104</sup> The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission’s licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS licenses in 176 EAs was conducted.<sup>105</sup> Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

14. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission’s definition. The applicable definition of small entity is the “Wireless Telecommunications Carriers (except satellite)” definition under the SBA rules.<sup>106</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>107</sup> For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>108</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>109</sup> Thus under this category and the associated small business size standard, the Commission

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<sup>102</sup> See Amendment of the Commission’s Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 para. 123 (2000).

<sup>103</sup> *Id.*

<sup>104</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

<sup>105</sup> See “Multiple Address Systems Spectrum Auction Closes,” Public Notice, 16 FCC Rcd 21011 (2001).

<sup>106</sup> 13 CFR § 121.201, NAICS Code 517210.

<sup>107</sup> *Id.*

<sup>108</sup> U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210,” [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ5&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table).

<sup>109</sup> Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

(continued....)

estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our action.<sup>110</sup>

15. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).<sup>111</sup>

16. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>112</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>113</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules.

17. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>114</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>115</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>116</sup> Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

18. *EBS* - The SBA’s Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by

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<sup>110</sup> *See id.*

<sup>111</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

<sup>112</sup> 47 CFR § 21.961(b)(1).

<sup>113</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.

<sup>114</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

<sup>115</sup> *Id.* at 8296 para. 73.

<sup>116</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

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educational institutions. Educational institutions are included in this analysis as small entities.<sup>117</sup> Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.<sup>118</sup> The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees. U.S. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small. To gauge small business prevalence for these cable services we must, however, use the most current census data for the previous category of Cable and Other Program Distribution and its associated size standard which was all such firms having \$13.5 million or less in annual receipts.<sup>119</sup> According to U.S. Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year.<sup>120</sup> Of this total, 948 firms had annual receipts of under \$10 million, and 48 firms had receipts of \$10 million or more but less than \$25 million.<sup>121</sup> Thus, the majority of these firms can be considered small.

19. *Location and Monitoring Service (LMS).* LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.<sup>122</sup> A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.<sup>123</sup> These definitions have been approved by the SBA.<sup>124</sup> An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

20. *Television Broadcasting.* This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."<sup>125</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the

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<sup>117</sup> The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

<sup>118</sup> U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012>.

<sup>119</sup> 13 CFR § 121.201, NAICS Code 517110.

<sup>120</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Receipts by Enterprise Employment Size for the United States: 2007, NAICS Code 517510 (rel. Nov. 19, 2010).

<sup>121</sup> *Id.*

<sup>122</sup> Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Second Report and Order*, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 CFR § 90.1103.

<sup>123</sup> *Id.*

<sup>124</sup> *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

<sup>125</sup> U.S. Census Bureau, 2012 NAICS Definitions, "515120 Television Broadcasting," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

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public.<sup>126</sup> These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.<sup>127</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25,000,000 or less, 25 had annual receipts between \$25,000,000 and \$49,999,999 and 70 had annual receipts of \$50,000,000 or more.<sup>128</sup> Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

21. The Commission has estimated the number of licensed commercial television stations to be 1,384.<sup>129</sup> Of this total, 1,264 stations (or about 91 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on February 24, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 394.<sup>130</sup> Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

22. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>131</sup> must be included. Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.<sup>132</sup>

23. *Radio Stations.* This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.”<sup>133</sup> The SBA has established a small

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<sup>126</sup> U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

<sup>127</sup> 13 CFR § 121.201; 2012 NAICS Code 515120.

<sup>128</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, “Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515120 Television Broadcasting),” [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>129</sup> *Broadcast Station Totals as of December 31, 2016*, Press Release (MB, rel. January 5, 2017) (*January 5, 2017 Broadcast Station Totals Press Release*), <https://www.fcc.gov/document/broadcast-station-totals-december-31-2016>.

<sup>130</sup> *January 5, 2017 Broadcast Station Totals Press Release*.

<sup>131</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 CFR § 21.103(a)(1).

<sup>132</sup> There are also 2,344 LPTV stations, including Class A stations, and 3689 TV translator stations. Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

<sup>133</sup> <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

business size standard for this category as firms having \$38.5 million or less in annual receipts.<sup>134</sup> Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.<sup>135</sup> Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.<sup>136</sup> Therefore, based on the SBA's size standard the majority of such entities are small entities.

24. According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database as of June 2, 2016, about 11,386 (or about 99.9 percent) of 11,395 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed commercial radio stations to be 11,415.<sup>137</sup> We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,101.<sup>138</sup> Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

25. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.<sup>139</sup> The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation.<sup>140</sup> We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive.

26. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.<sup>141</sup> This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.<sup>142</sup> The SBA has established a small business size standard which consists of all radio stations whose annual receipts are \$38.5 million dollars or less.<sup>143</sup> U.S. Census data for 2012 indicate that 2,849 radio station firms operated during that year.<sup>144</sup> Of that

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<sup>134</sup> 13 CFR § 121.201, NAICS Code 515112 Radio Stations.

<sup>135</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, "Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515112 Radio Stations)," [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>136</sup> *Id.*

<sup>137</sup> *January 5, 2017 Broadcast Station Totals Press Release.*

<sup>138</sup> *January 5, 2017 Broadcast Station Totals Press Release.*

<sup>139</sup> "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both." 13 CFR § 121.103(a)(1).

<sup>140</sup> 13 CFR § 121.102(b).

<sup>141</sup> NAICS Code 515112.

<sup>142</sup> [http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2007 NAICS Search](http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2007%20NAICS%20Search).

<sup>143</sup> 13 CFR § 121.201.

<sup>144</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, "Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515112 Radio Stations)," [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).



number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.<sup>145</sup> Based on U.S. Census data, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

27. *Multichannel Video Distribution and Data Service (MVDDS)*. MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.<sup>146</sup> These definitions were approved by the SBA.<sup>147</sup> On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.<sup>148</sup> Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.<sup>149</sup>

28. *Satellite Telecommunications*. This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>150</sup> The category has a small business size standard of \$32.5 million or less in average annual receipts, under SBA rules.<sup>151</sup> For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.<sup>152</sup> Of this total, 299 firms had annual receipts of less than \$25 million.<sup>153</sup> Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

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<sup>145</sup> *Id.*

<sup>146</sup> Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9711, para. 252 (2002).

<sup>147</sup> See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

<sup>148</sup> See “Multichannel Video Distribution and Data Service Spectrum Auction Closes,” *Public Notice*, 19 FCC Rcd 1834 (2004).

<sup>149</sup> See “Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,” *Public Notice*, 20 FCC Rcd 19807 (2005).

<sup>150</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517410 Satellite Telecommunications,” <http://www.census.gov/naics/2012/def/ND517410.HTM>.

<sup>151</sup> 13 CFR § 121.201, NAICS Code 517410.

<sup>152</sup> U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, “Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012, NAICS Code 517410,” [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>153</sup> *Id.*

(continued....)

29. *All Other Telecommunications.* The “All Other Telecommunications” category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.<sup>154</sup> The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.<sup>155</sup> For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.<sup>156</sup> Thus, a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

30. *Fixed Microwave Services.* Microwave services include common carrier,<sup>157</sup> private-operational fixed,<sup>158</sup> and broadcast auxiliary radio services.<sup>159</sup> They also include the Local Multipoint Distribution Service (LMDS),<sup>160</sup> the Digital Electronic Message Service (DEMS),<sup>161</sup> the 39 GHz Service (39 GHz),<sup>162</sup> the 24 GHz Service,<sup>163</sup> and the Millimeter Wave Service<sup>164</sup> where licensees can choose between common carrier and non-common carrier status.<sup>165</sup> The SBA nor the Commission has defined a small business size standard for microwave services. For purposes of this IRFA, the Commission will use the SBA’s definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons is considered small.<sup>166</sup> Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>167</sup> U. S. Census Bureau data for 2012, show that there were 967

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<sup>154</sup> <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en/ECN.NAICS.2012.517919>.

<sup>155</sup> 13 CFR § 121.201, NAICS Code 517919.

<sup>156</sup>

[https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>157</sup> See 47 CFR Part 10, Subpart I.

<sup>158</sup> Persons eligible under Parts 80 and 90 of the Commission’s rules can use Private-Operational Fixed Microwave services. See 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

<sup>159</sup> Auxiliary Microwave Service is governed by Part 74 and Part 78 of Title 47 of the Commission’s rules. Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

<sup>160</sup> See 47 CFR Part 101, Subpart L.

<sup>161</sup> See 47 CFR Part 101, Subpart G.

<sup>162</sup> See 47 CFR Part 101, Subpart N.

<sup>163</sup> See *id.*

<sup>164</sup> See 47 CFR Part 101, Subpart Q.

<sup>165</sup> See 47 CFR §§ 101.533, 101.1017.

<sup>166</sup> 13 CFR § 121.201, NAICS Code 517210.

<sup>167</sup> 13 CFR § 121.201, NAICS Code 517210.

(continued....)

firms in this category that operated for the entire year. Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.<sup>168</sup>

31. According to Commission data in the Universal Licensing System (ULS) as of September 22, 2015 there were approximately 61,970 common carrier fixed licensees, 62,909 private and public safety operational-fixed licensees, 20,349 broadcast auxiliary radio licensees, 412 LMDS licenses, 35 DEMS licenses, 870 39 GHz licenses, and five 24 GHz licenses, and 408 Millimeter Wave licenses in the microwave services. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

32. *Non-Licensee Owners of Towers and Other Infrastructure.* Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration ("ASR") system and comply with applicable rules regarding review for impact on the environment and historic properties.

33. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.<sup>169</sup> Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands, and that nearly all of these qualify as small businesses under the SBA's definition for "All Other Telecommunications."<sup>170</sup> The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of \$32.5 million or less.<sup>171</sup> For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.<sup>172</sup> Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small. In addition, there may be other non-licensee

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<sup>168</sup> See U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>169</sup> We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

<sup>170</sup> 13 CFR § 121.201, NAICS Code 517919. Under this category, a business is small if it has \$32.5 million or less in annual receipts.

<sup>171</sup> 13 CFR § 121.201, NAICS Code 517919.

<sup>172</sup>

[https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells, that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

**E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

34. The Commission is not imposing any additional reporting or record keeping requirements. Rather, as discussed in the next section, the Commission is reducing National Historic Preservation Act compliance burdens, including those on small entities, by eliminating the historic preservation review requirement for construction of replacement utility poles that are capable of supporting antennas or other wireless communications equipment and are substantially similar to the preexisting poles, subject to certain conditions. The Commission is also reorganizing the rules governing its historic preservation review procedures by consolidating them into a single new Rule 1.1320. This should clarify the rules and make compliance easier for small entities.

**F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

35. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”<sup>173</sup>

36. This Order streamlines the process of deploying next-generation wireless broadband by eliminating the need for historic preservation review for construction of replacement utility poles in certain circumstances. We anticipate that adoption of this replacement pole exclusion will provide significant efficiencies in the deployment of such facilities, particularly for small entities that may not have the compliance resources and economies of scale of larger entities, while still avoiding adverse impacts on historic properties. The exclusion will also promote consistency between the process that carriers and pole construction companies must follow to comply with our historic preservation review requirements and those they must follow when building replacement poles that are subject to the requirements of other agencies pursuant to the Advisory Council on Historic Preservation’s *Program Comment for Communications Projects on Federal Lands and Property*.<sup>174</sup> By adopting this new exclusion, we continue to fulfill our statutory responsibilities regarding historic preservation, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of small cell facilities and other wireless infrastructure across the country.

37. Further, the Order incorporates the new exclusion for replacement poles into our rules in a manner that more clearly articulates licensees’ and applicants’ obligations not only as to this specific issue, but more generally as to the entire historic preservation review process. Thus, we are reorganizing our existing regulations to clarify the general requirements regarding historic preservation review, as well as to specify the contours of the new exclusion. This simpler presentation of our requirements in the new rule should make it easier for licensees and applicants to understand and comply with our historic preservation review requirements, and thus may expedite the completion of such review and facilitate more expeditious deployment of wireless infrastructure, further reducing the intrinsic cost and delay associated with such deployment.

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<sup>173</sup> 5 U.S.C. § 603(c)(1) - (c)(4).

<sup>174</sup> 82 Fed. Reg. 23818, 23827, § VIII.B (May 24, 2017).

38. As discussed above, the overall approach we have taken is to remove regulatory requirements associated with NHPA compliance with respect to one specified category of undertakings and to simplify and clarify the existing requirements applicable in other contexts. In crafting this regulatory relief, we have not identified any additional steps that we could take with respect to small entities that could not also be applied to all entities that construct or deploy wireless infrastructure. While the new exclusion for replacement utility poles is not specifically directed at small entities, we recognize that our actions in the Order can potentially decrease costs for all those subject to NHPA obligations, including small entities.

**G. Report to Congress**

39. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>175</sup> In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Report and Order* and FRFA (or summaries thereof) also will be published in the Federal Register.<sup>176</sup>

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<sup>175</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>176</sup> *Id.* § 604(b).