

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

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

REPORT AND ORDER

Adopted: November 16, 2017

Released: November 17, 2017

By the Commission: Chairman Pai and Commissioners Clyburn, O’Rielly, and Carr issuing separate statements.

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION 1
II. BACKGROUND 4
III. DISCUSSION 10
A. Exclusion for Pole Replacements that Have No Potential to Affect Historic Properties 10
B. Conforming Amendments and Reorganization of Historic Preservation Rules..... 25
IV. PROCEDURAL MATTERS..... 29
A. Final Regulatory Flexibility Analysis..... 29
B. Paperwork Reduction Act 30
C. Congressional Review Act..... 31
V. ORDERING CLAUSES 32
APPENDIX A – Final Rules
APPENDIX B – Comments and Reply Comments
APPENDIX C – Final Regulatory Flexibility Analysis

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.

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)¹ generally serves the public policy objective of preserving the nation’s historic

¹ 54 U.S.C. § 306108.

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*.²

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.³ 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.⁴ Where an agency and the ACHP agree that the potential effects of a 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

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

³ 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 *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1082-84, paras. 24-28 (*2004 NPA Order*), *aff'd sub nom. CTIA–The Wireless Ass'n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (*CTIA v. FCC*); see also *CTIA v. FCC*, 466 F.3d at 112-15 (affirming determination that certain types of facility deployments constitute the Commission's undertakings).

⁴ 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) (<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 to provide 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, Appendix C, §§ IV, V, VII.A (*2004 NPA*); see also *2004 NPA Order*, 20 FCC Rcd at 1106-13, 1132-33, paras. 89-109, 162-64. 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*, § VI; *NPA Order*, 20 FCC Rcd at 1113-30, paras. 110-157. And in the event adverse effects on historic properties are identified, applicants must submit plans to modify their projects so as to avoid, minimize, or mitigate any such effects. *2004 NPA*, §§ VII.D, IX.B, X.D; *NPA Order*, 20 FCC Rcd at 1222, Appx. C, § D.

procedures and criteria that may streamline or truncate the historic preservation review of undertakings in that category.⁵ 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.⁶

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,⁷ and the broader *2004 NPA*, which excludes some categories of construction from review and specifies procedures for review of others.⁸ 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.⁹ 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.¹⁰

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.¹¹ 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 on Federal Lands and Property (*Federal Lands Program Comment*) that substantially streamlines historic preservation requirements when such deployments are subject to special

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

⁶ 36 CFR § 800.3(a)(1).

⁷ *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 47 CFR Part 1, Appendix B (*Collocation Agreement*); 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).

⁸ See *2004 NPA*; *NPA Order*. See also *supra* note 4.

⁹ 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).

¹⁰ *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) (2016).

¹¹ *2004 NPA*, § III.B.

use permits issued by Federal land management agencies.¹² 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.¹³

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.”¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷

9. Hundreds of parties submitted comments on the *NPRM*,¹⁸ 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.¹⁹ 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.²⁰ For example, CTIA argues that there is no reason to treat poles that already host wireless facilities differently from those that do not.²¹ 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 resources, particularly from exclusions that are not appropriately cabined.²² Others express concern that factors such as the materials, color, or size of replacement poles may compromise the integrity of historic

¹² 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*).

¹³ *Id.*, 82 Fed. Reg. at 23827, § VIII.B.

¹⁴ *2017 Wireless Infrastructure NPRM*, 32 FCC Rcd at 3331, para. 2.

¹⁵ *Id.* at 3353-54, paras. 66-68.

¹⁶ *Id.* at 3353-54, para. 68.

¹⁷ *Id.* at 3354, para. 68.

¹⁸ 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.

¹⁹ AT&T Comments at 31; WIA Comments at 66.

²⁰ 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).

²¹ See CTIA Comments at 38.

²² New Mexico SHPO Comments at 2; Chickasaw Nation Comments at 6.

districts.²³ 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.²⁴ 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 no more than 10 feet away from the original pole, based on the distance between the centerpoint of the replacement pole and the centerpoint of the original pole; *provided* that 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;
 - (B) Has a height that does not exceed the height of the original pole by more than 5 feet or 10 percent of the height of the original pole, whichever is greater; and
 - (C) Has an appearance consistent with the quality and appearance of the original pole.²⁵

²³ 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); Missouri SHPO *Ex Parte* Comments (filed Nov. 6, 2016) (Missouri SHPO *ex parte*) at 1 (a replacement pole substantially larger in circumference than the original, even if it is in same style, could have adverse effects on the feeling and integrity of a historic district); *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).

²⁴ 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; Missouri SHPO *ex parte* at 1; Delaware SHPO Comments at 4.

²⁵ 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. See *Collocation Agreement*, §§ VI.A.5, VII.B.2 & 3.

11. We conclude that, where these conditions are met, the construction of a replacement utility pole—*i.e.*, a new pole in place of a preexisting pole that is being removed—will have no potential to affect historic properties (even assuming such properties are present), regardless of whether the original pole was built for the purpose of supporting communications equipment. We further conclude that excluding such replacements from historic preservation review advances the public interest.²⁶ 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.²⁷ One commenter disputes our authority, citing statutory provisions and ACHP regulations that entitle Tribal Nations or Native Hawaiian organizations with interests in historic properties that may be affected by agency undertakings to participate in the NHPA Section 106 historic preservation review process and require agencies to consult with them.²⁸ We find the cited authorities to be inapposite: They apply only to undertakings for which Section 106 review is required. The provision on which we rely here, 36 CFR § 800.3(a)(1), applies to categories of undertakings that, by their nature, cannot have any potential effects on any historic properties that may be present and confirms that agencies have no Section 106 review or consultation obligations with respect to such undertakings.

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.²⁹ 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 make more consistent 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*.³⁰

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

²⁶ See, e.g., Sprint Comments at 33; Crown Castle Comments at 40.

²⁷ 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.

²⁸ See Letter from Terry Clouthier, Tribal Historic Preservation Officer, Thlopthlocco Tribal Town, to Marlene H. Dortch, Secretary, FCC, at 2-3 (filed Nov. 8, 2017) (Thlopthlocco Tribal Town *ex parte*).

²⁹ AT&T Comments at 31; WIA Comments at 66.

³⁰ See *Federal Lands Program Comment*, § VIII.B, 82 Fed. Reg. at 23827.

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.³¹

14. Replacement poles placed in essentially the same previously disturbed 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 poles meeting the definition of a “tower” are excluded from Section 106 review while other types of pole replacements continue to require review.³² 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, because the statutory test is whether a federal undertaking has a potential effect on historic properties, and is not based on the prior uses of a particular structure. We also find that adopting an exclusion for replacement utility poles will promote greater consistency by providing similar treatment for similar replacement structures.³³ 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.³⁴

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 exclusion of utility pole replacements in the ACHP’s 2017 *Federal Lands Program Comment*.³⁵

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.”³⁶ 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

³¹ 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>).

³² See 2004 NPA, § III.B.

³³ 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.

³⁴ 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). For all these reasons, we disagree with the contention that the existing *Collocation Agreement* “should be sufficient to streamline the process” of installing replacement poles because it already “excludes most of these types of projects from review.” Missouri SHPO *ex parte* at 1.

³⁵ See *Federal Lands Program Comment*, 82 Fed. Reg. at 23827, § VIII.B; cf. 2014 *Wireless Infrastructure Order*, 29 FCC Rcd at 12907, para. 91 (explaining rationale for analogous exclusion of collocations on utility poles).

³⁶ 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.

towers will be excluded from review.³⁷ 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 than or that differ in other material ways from the poles being replaced might compromise the integrity of historic properties and districts.³⁸ We therefore exclude from historic preservation review only those replacement poles that are situated no more than ten feet away from the original hole; are no more than 10 percent or five feet taller than the original pole, whichever is greater; and are consistent with the quality and appearance of the original pole.³⁹

18. The provision limiting the exclusion to a new pole located no more than 10 feet from the original structure ensures that the new pole is truly a "replacement" and that the replacement will not substantially alter the setting of any historic properties that may be nearby.⁴⁰ We find that the minimal change in location permitted here, which will make pole replacements easier to construct as a practical matter,⁴¹ creates no risk of effects on historic properties in light of the fact that no new ground disturbance will be permitted.⁴² Moreover, we find that the deployment of a replacement pole no more than 10 feet from the original pole has no potential to cause effects on historic properties that might be present, because of the close proximity to the original pole and the *de minimis* size increase permissible to fall into this exception.⁴³ We cannot reach the same conclusion, however, with regard to replacement poles placed a considerable distance (*e.g.*, 30 feet) away from the originals.⁴⁴

³⁷ 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 *2004 NPA*, § 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 (similar).

³⁸ See NCSHPO Comments at 5; Pechanga Comments at 7-8.

³⁹ 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.

⁴⁰ 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").

⁴¹ See Letter from Scott K. Bergmann, Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC (filed Nov. 9, 2017) (CTIA *ex parte*) at 2 (explaining that industry practice when installing replacement poles is "generally to dig a *new* hole near the original hole, install the new pole, move wires or other equipment from the old pole to the new pole, then remove the old pole. The old pole usually cannot be removed first to allow its use for the new pole, as this would leave no existing pole to hold the wires and other equipment."); Letter from Kevin M. Cookler, Lerman Senter PLLC, Counsel for WEC Energy Group, Inc., to Marlene H. Dortch, Secretary, FCC (filed Nov. 8, 2017) (WEC Energy *ex parte*) (describing its "typical operating procedure . . . for replacing a utility distribution pole . . . as follows – (1) the replacement utility pole is set in the ground next to the existing utility pole; (2) the existing distribution lines and other cable and telecommunications attachments are transferred to the new pole; and (3) the original pole is removed only after all of the attachments are transferred to the new pole.").

⁴² The Commission similarly found in the *2014 Wireless Infrastructure Order* that allowing a ten-foot difference in location between an existing and a new antenna collocated on a building or other structure would not affect historic properties, assuming they exist. See *2014 Wireless Infrastructure Order*, 29 FCC Red at 12911, para. 98.

⁴³ See *id.* at 12911, para. 98.

⁴⁴ Cf. WEC Energy *ex parte* at 2 (arguing for exclusion for replacement poles 30 feet away from the originals).

19. 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.⁴⁵ Utility poles are typically 25 to 40 feet tall, and we find that an increase in height limited to 10 percent or five feet would be *de minimis* and thus would have no potential to affect historic properties.⁴⁶ The flexibility of the five foot alternative addresses concerns expressed in the record that manufacturers typically offer standard utility poles in five-foot increments, and that a height increase of less than five feet often may be insufficient to accommodate new antennas or other equipment on a pole while maintaining the necessary separation from preexisting infrastructure on the pole.⁴⁷

20. 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.⁴⁸ But we cannot conclude at this time 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 an agency to act unilaterally.⁴⁹ On the other hand, we disagree with the contention raised by some parties that allowing even small increases in height without historic preservation review ultimately could have effects due to the possibility that multiple incremental replacements over time eventually would result in significantly larger poles.⁵⁰ We do not find this speculative concern persuasive: We are aware of no evidence of such repeated “stacked” replacements of utility poles occurring under existing program alternatives, and we believe the likelihood such activities will occur in the future is remote due to the substantial cost of removing and replacing poles.⁵¹

21. We import the phrase “consistent with the quality and appearance of the originals” from the corresponding exclusion in the *Federal Lands Program Comment*,⁵² to ensure that there can be no

⁴⁵ See *Collocation Agreement*, § I.E.1; *2004 NPA*, §§ 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.

⁴⁶ 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”).

⁴⁷ See CTIA *ex parte* at 3 (poles usually manufactured in five-foot increments); WEC Energy *ex parte* at 3 (same); Letter from Andre J. Lachance, Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC (filed Nov. 6, 2017) (Verizon *ex parte*) at 2 (replacement poles typically are taller than original poles due to the need “to ensure that antennas mounted below power lines are high enough to provide adequate coverage or to allow sufficient separation for antennas mounted above power lines”); Letter from Joshua S. Turner, Wiley Rein LLP, counsel to Crown Castle, to Marlene H. Dortch, FCC (filed Nov. 8, 2017) (Crown Castle *ex parte*) at 2 (“a 10% increase in height is insufficient to provide the separation that many utilities require between the power space and an antenna located at the top of the pole (which is where most utilities require small cell antennas to be installed)”).

⁴⁸ 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.”).

⁴⁹ 36 CFR § 800.3(a)(1). Cf. *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12946-47, para. 193 (explaining why 20-foot height increase would be excessive in similar context).

⁵⁰ See Missouri SHPO Comments at 3-4; Missouri SHPO *ex parte* at 1; Letter from D. Bambi Kraus, President, National Association of Tribal Historic Preservation Officers, to Chairman Ajit Pai, FCC, at 3 (filed Nov. 9, 2017) (NATHPO *ex parte*).

⁵¹ Going forward, however, if parties become aware of any evidence that pole owners are using such a stratagem intentionally as a means to evade the limitations in our rules, we invite them to bring such evidence to our attention.

⁵² See *infra*, Appx. A, new rule § 1.1320(b)(3)(ii)(B); cf. *Federal Lands Program Comment*, 82 Fed. Reg. at 23827, § VIII.B.3. The continued application of the existing specifications in the *Collocation Agreement*, see *supra* note

visual effects on any nearby historic properties. We note that a change in materials, such as replacing a wooden pole with a metal pole, is permissible so long as this standard is met.⁵³

22. We adopt an additional limitation to ensure that the pole replacement project—including the removal of the original pole as well as construction of the replacement pole—will entail no new ground disturbance.⁵⁴ 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.⁵⁵ 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 undisturbed soils,” are taken directly from the *Federal Lands Program Comment*.⁵⁶ We further specify that the limitation on ground disturbance in previously undisturbed areas applies to increases in both depth and lateral disturbance.⁵⁷

23. We continue to require that if, after construction commences, the party discovers any human or burial remains or other historic properties (despite the previous ground disturbance), construction must cease immediately, and the party must promptly notify and consult with the Commission, the SHPO/THPO, and any affected Tribal Nation or Native Hawaiian organization to

(Continued from previous page) _____

25, address concerns that increases in the width of replacement poles may cause effects to historic properties. *See, e.g.*, California SHPO Comments at 2 (existing size limitations may not consider the width of antenna increases).

⁵³ See WEC Energy *ex parte* at 4 (asserting that a “replacement utility pole made of steel should be considered to be the same quality and appearance as a wood pole”).

⁵⁴ See *infra* Appx. A, new rule § 1.1320(b)(3)(ii)(A). This restriction on new ground disturbance includes any excavation associated with removing the preexisting pole as well as that involved with erecting the new replacement pole. *See, e.g.*, Letter from Jeff Pappas, New Mexico State Historic Preservation Officer, to Chairman Ajit Pai, FCC (Nov. 7, 2017) at 1 (expressing concern that the removal of a preexisting utility pole might cause ground disturbance or have other adverse effects even if construction of the new replacement poles causes no new ground disturbance); Kaw Nation *ex parte* at 3 (arguing that “[g]round disturbance [sh]ould include any excavation required for the removal and replacement of existing infrastructure.”); NATHPO *ex parte* at 2 (arguing that additional safeguards are needed because previously disturbed ground “rarely, if ever, includes tribal input on the activity that disturbed the land” in the past, and most rights-of-way “have rarely, if ever, been surveyed for tribal historic properties.”). We note that NCSHPO contends it is “physically impossible” to remove and replace a pole “without additional ground disturbance.” Letter from Erik M. Hein, Executive Director, National Conference of State Historic Preservation Officers, to Marlene Dortch, FCC, at 2 (Nov. 9, 2017) (NCSHPO *ex parte*). There is substantial evidence in the record, however, that ground disturbance greater than the size of the pole itself already occurred when the pole was first installed. *See, e.g.*, Crown Castle *ex parte* at 2. Because the order imposes a limit on new ground disturbance, there can be no additional impact.

⁵⁵ 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”).

⁵⁶ See *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).

⁵⁷ *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 . . .”).

evaluate the discovery and develop any appropriate measures to handle it.⁵⁸ Human or burial remains also must be handled in a manner consistent with any applicable State or Federal laws.⁵⁹

24. 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

25. 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.”⁶⁰ Our rules previously commingled detailed provisions implementing the historic preservation review process under Section 106 with the provisions implementing the National Environmental Policy Act.⁶¹ 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.⁶²

26. 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.⁶³ 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.⁶⁴ 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, 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

⁵⁸ 2004 NPA, § IX.A-D; *cf.* 36 CFR § 800.13(b)(3) (ACHP regulation concerning procedures for treatment of newly-discovered historic properties after construction has commenced). *Cf.* NCSHPO *ex parte* at 2 (requesting that provision be made for unanticipated discoveries of historic material); NATHPO *ex parte* at 2.

⁵⁹ 2004 NPA, § IX.C.

⁶⁰ See 2017 *Wireless Infrastructure NPRM*, 32 FCC Rcd at 3339, 3344, paras. 23, 37.

⁶¹ 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.

⁶² See *infra* Appx. A, new rule § 1.1320(b)(3); see generally *infra*, Appx. A, new rule § 1.1320.

⁶³ 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”).

⁶⁴ *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).

comply with our historic preservation review requirements, and thus may expedite the completion of such review, thus facilitating more expeditious deployment of wireless infrastructure.

27. 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.⁶⁵ There was no corresponding provision in the Commission's preexisting rules.⁶⁶ 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,⁶⁷ 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.⁶⁸

28. 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.⁶⁹ Paragraph (b)(2) recognizes that the Commission's program alternatives not only establish streamlined procedures but also exempt some categories of undertakings from review.⁷⁰ 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 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.⁷¹ Paragraph

⁶⁵ 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).

⁶⁶ 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).

⁶⁷ See *infra* Appx. A, new rule § 1.1320(a)(1) (cross-referencing 36 CFR §§ 800.3–800.13).

⁶⁸ See *infra* Appx. A, new rule § 1.1320(a)(2) (cross-referencing the *Collocation Agreement*, the *2004 NPA*, and the *Positive Train Control Program Comment*). 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.

⁶⁹ See *infra* Appx. A, new rule § 1.1320(b)(1) (cross-referencing 36 CFR § 800.2(a)(2)).

⁷⁰ See *infra* Appx. A, new rule § 1.1320(b)(2); *cf.* *Collocation Agreement*, §§ III-VIII; *2004 NPA*, § III.

⁷¹ 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.

(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*.⁷² Finally, paragraph (c) of the new rule sets forth the responsibilities of Commission applicants and licensees relating to the historic preservation review process.⁷³

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

29. 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

30. 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

31. 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

32. 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.

33. 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.

⁷² See 47 CFR § 1.1307(a)(4)(i) (2016); *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12906-09, paras. 90-95; *Collocation Agreement*, §§ V, VI, & VII.

⁷³ 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. *2004 NPA*, §§ 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*, the *Collocation Agreement*, or the ACHP's regulations, as specified in the rule. We are using 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. We also use the definitions of "applicant" and "tower" from sections the *2004 NPA*. With respect to "collocation," however, we are incorporating the more recent and clearer definition from the 2016 amendments to the *Collocation Agreement*. We use the definition of "undertaking" from the relevant portion of the definition in the ACHP's regulations, 36 CFR § 800.16(y), with a proviso taken from section I.B. of the *2004 NPA* clarifying that maintenance and servicing of towers, antennas, and related equipment are not deemed to be undertakings.

34. 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 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 § 1.1320 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 of this part.
 - (ii) The Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings, Appendix C of this part.
 - (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 no more than 10 feet away from the original pole, based on the distance between the centerpoint of the replacement pole and the centerpoint of the original pole; *provided* that 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;
 - (B) Has a height that does not exceed the height of the original pole by more than 5 feet or 10 percent of the height of the original pole, whichever is greater; and
 - (C) Has an appearance consistent with the quality and appearance of the original pole.
- (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 paragraph,

- (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 § 1.1304(a)(4) solely because of the age of the structure.

NOTE 1 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, Appendix C of this part, §§ III-X, or any other applicable program alternative.
- (d) *Definitions.* For purposes of this section, the following definitions apply:

Applicant means a Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.

Antenna means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a tower, structure, or building as part of the original installation of the antenna. For most services, an antenna will be mounted on or in, and is distinct from, a supporting structure such as a tower, structure or building. However, in the case of AM broadcast stations, the entire tower or group of towers constitutes the antenna for that station. For purposes of this section, the term antenna does not include unintentional radiators, mobile stations, or devices authorized under part 15 of this title.

Collocation means the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure.

Tower means any structure built for the sole or primary purpose of supporting Commission-licensed or authorized antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that tower but not installed as part of an antenna as defined herein.

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of the Commission, including those requiring a Commission permit, license or approval. Maintenance and servicing of towers, antennas, and associated equipment are not deemed to be undertakings subject to review under this section.

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 (San Antonio *et al.*)
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
Lightower 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),⁷⁴ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (NPRM)*.⁷⁵ 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.⁷⁶

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)⁷⁷ 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.⁷⁸ 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 comments.⁷⁹ The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

⁷⁴ 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).

⁷⁵ 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*).

⁷⁶ See 5 U.S.C. § 604.

⁷⁷ 54 U.S.C. § 306108.

⁷⁸ Smart Communities and Special Districts Coalition Comments at 41, 55, 81.

⁷⁹ 5 U.S.C. § 604(a)(3).

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 herein⁸⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁸¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸² 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).⁸³ 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.⁸⁴ 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.⁸⁵ These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.⁸⁶ 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.”⁸⁷ Nationwide, as of 2007, there were approximately 1,621,215 small organizations.⁸⁸ 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.”⁸⁹ U.S. Census Bureau data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United States.⁹⁰ We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”⁹¹ Thus, we estimate that most governmental jurisdictions are small.

⁸⁰ See 5 U.S.C. § 604(a)(3).

⁸¹ 5 U.S.C. § 601(6).

⁸² 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.”

⁸³ 15 U.S.C. § 632.

⁸⁴ See 5 U.S.C. § 601(3)-(6).

⁸⁵ 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 (June 2016).

⁸⁶ 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 (June 2016).

⁸⁷ 5 U.S.C. § 601(4).

⁸⁸ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2010).

⁸⁹ 5 U.S.C. § 601(5).

⁹⁰ 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).

⁹¹ 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

(continued...)

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.⁹² The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁹³ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁹⁴ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁹⁵ 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.⁹⁶ 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.⁹⁷ Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁹⁸ 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.⁹⁹ These services include Citizen 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.¹⁰⁰ There are a variety

(Continued from previous page) _____

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.

⁹² NAICS Code 517210. See <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210>.

⁹³ 13 CFR § 121.201, NAICS Code 517210.

⁹⁴ 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.”

⁹⁵ *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.”

⁹⁶ 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.

⁹⁷ See *Trends in Telephone Service* at tbl. 5.3.

⁹⁸ See *id.*

⁹⁹ 47 CFR Part 90.

¹⁰⁰ 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.

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.¹⁰¹ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.¹⁰² Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.¹⁰⁶ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.¹⁰⁷ 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

¹⁰¹ 13 CFR § 121.201, NAICS Code 517210.

¹⁰² 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.

¹⁰³ *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."

¹⁰⁴ 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.

¹⁰⁵ See 13 CFR § 121.201, NAICS Code 517210.

¹⁰⁶ 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.

¹⁰⁷ *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."

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.¹⁰⁸ There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.¹⁰⁹ 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.¹¹⁰ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.¹¹¹ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.¹¹² 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.¹¹³ 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.

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.¹¹⁴ A "Very small

¹⁰⁸ 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.

¹⁰⁹ 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.

¹¹⁰ See 13 CFR § 121.201, NAICS Code 517210.

¹¹¹ 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.

¹¹² *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."

¹¹³ 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.

¹¹⁴ See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 para. 123 (2000).

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.¹¹⁵ The SBA has approved these definitions.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ Under that SBA category, a business is small if it has 1,500 or fewer employees.¹¹⁹ For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.¹²⁰ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.¹²¹ 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 action.¹²²

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

¹¹⁵ *Id.*

¹¹⁶ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

¹¹⁷ See “Multiple Address Systems Spectrum Auction Closes,” Public Notice, 16 FCC Rcd 21011 (2001).

¹¹⁸ 13 CFR § 121.201, NAICS Code 517210.

¹¹⁹ *Id.*

¹²⁰ 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.

¹²¹ 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.”

¹²² See *id.*

Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).¹²³

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.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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.¹²⁷ Auction 86 concluded in 2009 with the sale of 61 licenses.¹²⁸ 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 educational institutions. Educational institutions are included in this analysis as small entities.¹²⁹ 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

¹²³ *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).

¹²⁴ 47 CFR § 21.961(b)(1).

¹²⁵ 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.

¹²⁶ *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).

¹²⁷ *Id.* at 8296 para. 73.

¹²⁸ *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).

¹²⁹ 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.

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.¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³ 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.¹³⁴ 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.¹³⁵ These definitions have been approved by the SBA.¹³⁶ 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."¹³⁷ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.¹³⁸ 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.¹³⁹ The 2012 Economic Census reports that 751 firms in this category

¹³⁰ 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>.

¹³¹ 13 CFR § 121.201, NAICS Code 517110.

¹³² 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).

¹³³ *Id.*

¹³⁴ 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.

¹³⁵ *Id.*

¹³⁶ *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

¹³⁷ 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>.

¹³⁸ 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>.

¹³⁹ 13 CFR § 121.201; 2012 NAICS Code 515120.

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.¹⁴⁰ 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 1,384.¹⁴¹ 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 394.¹⁴² 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) affiliations¹⁴³ 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.¹⁴⁴

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.”¹⁴⁵ The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts.¹⁴⁶ Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.¹⁴⁷ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts

¹⁴⁰ 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.

¹⁴¹ *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>.

¹⁴² *January 5, 2017 Broadcast Station Totals Press Release*.

¹⁴³ “[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).

¹⁴⁴ 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.

¹⁴⁵ <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

¹⁴⁶ 13 CFR § 121.201, NAICS Code 515112 Radio Stations.

¹⁴⁷ 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.

between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.¹⁴⁸ 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 11,415.¹⁴⁹ We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,101.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ U.S. Census data for 2012 indicate that 2,849 radio station firms operated during that year.¹⁵⁶ 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.¹⁵⁷ 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

¹⁴⁸ *Id.*

¹⁴⁹ *January 5, 2017 Broadcast Station Totals Press Release.*

¹⁵⁰ *January 5, 2017 Broadcast Station Totals Press Release.*

¹⁵¹ "[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).

¹⁵² 13 CFR § 121.102(b).

¹⁵³ NAICS Code 515112.

¹⁵⁴ [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).

¹⁵⁵ 13 CFR § 121.201.

¹⁵⁶ 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.

¹⁵⁷ *Id.*

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.¹⁵⁸ These definitions were approved by the SBA.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹

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.”¹⁶² The category has a small business size standard of \$32.5 million or less in average annual receipts, under SBA rules.¹⁶³ 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.¹⁶⁴ Of this total, 299 firms had annual receipts of less than \$25 million.¹⁶⁵ Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

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

¹⁵⁸ 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).

¹⁵⁹ 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).

¹⁶⁰ See “Multichannel Video Distribution and Data Service Spectrum Auction Closes,” *Public Notice*, 19 FCC Rcd 1834 (2004).

¹⁶¹ 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).

¹⁶² U.S. Census Bureau, 2012 NAICS Definitions, “517410 Satellite Telecommunications,” <http://www.census.gov/naics/2012/def/ND517410.HTM>.

¹⁶³ 13 CFR § 121.201, NAICS Code 517410.

¹⁶⁴ 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.

¹⁶⁵ *Id.*

also included in this industry.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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,¹⁶⁹ private-operational fixed,¹⁷⁰ and broadcast auxiliary radio services.¹⁷¹ They also include the Local Multipoint Distribution Service (LMDS),¹⁷² the Digital Electronic Message Service (DEMS),¹⁷³ the 39 GHz Service (39 GHz),¹⁷⁴ the 24 GHz Service,¹⁷⁵ and the Millimeter Wave Service¹⁷⁶ where licensees can choose between common carrier and non-common carrier status.¹⁷⁷ 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.¹⁷⁸ Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁷⁹ U. S. Census Bureau data for 2012, show that there were 967 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.¹⁸⁰

¹⁶⁶ <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS.2012.517919>.

¹⁶⁷ 13 CFR § 121.201, NAICS Code 517919.

¹⁶⁸

https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

¹⁶⁹ See 47 CFR Part 10, Subpart I.

¹⁷⁰ 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.

¹⁷¹ 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.

¹⁷² See 47 CFR Part 101, Subpart L.

¹⁷³ See 47 CFR Part 101, Subpart G.

¹⁷⁴ See 47 CFR Part 101, Subpart N.

¹⁷⁵ See *id.*

¹⁷⁶ See 47 CFR Part 101, Subpart Q.

¹⁷⁷ See 47 CFR §§ 101.533, 101.1017.

¹⁷⁸ 13 CFR § 121.201, NAICS Code 517210.

¹⁷⁹ 13 CFR § 121.201, NAICS Code 517210.

¹⁸⁰ 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,”

(continued....)

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 licensees, 35 DEMS licensees, 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.¹⁸¹ 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."¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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 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.

(Continued from previous page) _____

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

¹⁸¹ We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

¹⁸² 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.

¹⁸³ 13 CFR § 121.201, NAICS Code 517919.

¹⁸⁴

https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

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.”¹⁸⁵

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 make more consistent 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*.¹⁸⁶ 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.

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

¹⁸⁵ 5 U.S.C. § 603(c)(1) - (c)(4).

¹⁸⁶ 82 Fed. Reg. 23818, 23827, § VIII.B (May 24, 2017).

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.¹⁸⁷ 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.¹⁸⁸

¹⁸⁷ 5 U.S.C. § 801(a)(1)(A).

¹⁸⁸ *Id.* § 604(b).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Vincent van Gogh, one of the most gifted painters in history, said, “great things are done by a series of small things brought together.” It’s in this vein that we adopt this *Order* as a first step in streamlining the rules for wireless infrastructure deployment.

Specifically, we exclude replacement utility poles from the burdens currently imposed by our historic preservation rules. This will help pave the way for 5G networks and services, powered as they’ll be by small cell antennas and the like attached to poles. Significantly, we provide this relief only where the replacement utility pole won’t affect historic properties (thus rendering the review process unnecessary).

This is not a case of replacing van Gogh’s masterpiece, *Starry Night*, with the Crayola creations I make alongside my kids. It’s simply substituting in the Potato Eaters or Irises—or in our world, one pole for another. That simple change shouldn’t be accompanied by red tape.

I’d like to give special thanks to Commissioner Carr for agreeing to take the lead on the Commission’s review of wireless infrastructure issues, including this *Order*. I look forward to working with him as we move forward with additional infrastructure streamlining initiatives.

I’d also like to thank the dedicated staff who worked in this item: Deborah Broderson, Garnet Hanly, Linda Oliver, Bill Richardson, Jennifer Salhus, Dana Shaffer, David Sieradzki, Janet Sievert, Jill Springer, Jeff Steinberg, Don Stockdale, Suzanne Tetreault, Chana Wilkerson, and Mary Claire York.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Next generation wireless innovation deserves next generation infrastructure policy, but success calls for regulatory approaches that promote collaboration among relevant stakeholders. Federal agencies, state and local governments, Tribal nations, wireless and tower companies, are all integral in meeting and implementing those sought-after policy objectives.

Earlier this year, my office released a #Solutions2020 Call to Action Plan, which outlined several recommendations making the case for much needed collaboration. They include:

- Stakeholder committees that embrace upcoming construction and build-out opportunities;
- Encouraging public-private, public-public, and private-private partnerships on both the supply and demand side, to help solve different pieces of the infrastructure puzzle and aggregate demand for services where the economic case for buildout is weaker.
- Ensuring transparency on both sides of the table and an effective complaint process;
- Creating capacity for permitting and make ready work;
- Making municipal assets such as fiber, light and power poles, available on nondiscriminatory and attractive terms; and
- Creating a broadband ready building stock by integrating future looking broadband practices into development plans for residential and commercial real estate.

During my office's ex parte meetings on this item, tower and wireless companies recommended broader replacement pole proposals that embraced a number of these elements. For those parties, this Order may seem like a modest first step, but I support the replacement utility pole rules adopted today because, for the most part, we followed the proper collaborative approach.

In our initial draft, we identified a few criteria that would exempt replacement utility poles from the historic preservation review process, but industry proposed sensible changes to the location and height criteria. They include exempting replacement utility poles if they are sited in new holes within 10 feet of the original pole, provided that doing so does not result in new ground disturbance and if the heights of replacement poles are no more than 10 percent taller than the poles they replace. Then the staff reached out to the Advisory Council for Historic Preservation for its approval, and while the record is less clear on how much coordination our staff had with Tribal representatives, the infrastructure issues we will face in the future are likely to be more difficult than the one we address today. So, it is critical that we set the stage now for robust coordination with all relevant stakeholders, including Tribal representatives.

It was a pleasure working with Commissioner Carr and my colleagues on this wireless infrastructure reform effort, and I wish to thank the Wireless Telecommunications Bureau for their work on this item.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Today's item represents a first step in an extensive series of actions that the Commission will have to take to ensure that the necessary infrastructure is deployed to deliver next generation wireless services to the American consumer. While an item eliminating historic preservation review for replacement poles certainly does not fix the entirety of the problem, it should reduce some processing delays, along with the total amount of fees that providers are paying to get the necessary approvals for infrastructure siting.

The draft that was circulated and posted three weeks ago sent a message that the Commission was getting to work on these issues; however, it became apparent that the item may not have reflected how replacement poles were sited and, therefore, did not do as much as we had hoped. For example, replacement poles are not placed in the exact same location as the original pole. Instead, it is placed next to it, so that electrical wires and other attachments can be transferred over. Let's face it, no one wants electrical wiring just lying on the ground. Further, to hold the load of additional equipment, poles often need to be increased in size and the material of the pole sometimes needs to be changed from wood to metal.

The item we are voting on today takes into account these realities. Replacement poles that are within ten feet of the original will be excluded from historic preservation review, provided that they are in previously disturbed ground. And, the ground in most rights-of-way has been repeatedly disturbed. This also has the added benefit of allowing providers the ability to increase the circumference of their poles. Further, a replacement pole that is five feet taller than the original and changes in materials, as long as they are consistent in appearance and quality, are also exempted from review. While I would have preferred that a replacement pole could be increased in size by 10 feet without going through historic preservation review, allowing five additional feet is an improvement from the circulated draft.

I appreciate Commissioner Carr's leadership on infrastructure deployment and the Chairman's and my colleagues' willingness to accept my suggestions to provide additional flexibility to wireless providers. I approve, and I look forward to future items that will tackle additional infrastructure issues, such as twilight towers, the tribal review process, and permitting and zoning delays and fees. Hopefully, relief in these areas is soon to come.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Streamlining the deployment of wireless infrastructure is one of my top priorities at the Commission. As I have said before, the current regulatory regime is not going to work when it comes to the deployment of next-generation networks. It takes too long and it costs too much. So the FCC is looking at a number of areas for potential reform—the environmental and historic review procedures, the state and local process, the tribal review mechanisms, and federal regulations. I welcome the chance to help lead the Commission’s efforts on these fronts, and today’s Order is a first step in what is our broader effort to accelerate wireless infrastructure deployment.

In this Order, the Commission reaches the reasonable determination that swapping out utility poles for the purpose of adding antennas or other wireless equipment can be done without any impact on historic properties. This determination provides substantial relief by eliminating what would otherwise have been an unnecessary and time-consuming review process for each and every pole replacement.

Moreover, I am glad that my colleagues and I were able to work together and reach consensus on a number of changes to the item. For instance, the Order now allows a replacement pole to be sited up to 10 feet away from the original pole, provided that there is no new ground disturbance. Similarly, a replacement pole can now be up to 5 feet taller than the original pole, rather than being limited to a 10 percent increase. At the same time, we agreed to add language to the Order that emphasizes the important and long-standing requirement that parties must cease work if they discover any historical artifacts and immediately commence the notification and consultation process. Combined, these changes will expand the practical utility of today’s decision while continuing to ensure that there will be no impact on historic properties.

I look forward to continuing to work with my colleagues as well as all stakeholders as the Commission takes additional steps to streamline the rules governing wireless infrastructure deployment.