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

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

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By the Commission: Chairman Pai and Commissioner O'Rielly issuing separate statements; Commissioner Clyburn concurring and issuing a statement.

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I. INTRODUCTION

1. The deployment of next-generation wireless broadband has the potential to bring enormous benefits to the Nation's communities. By one assessment, the next generation of wireless broadband is expected to directly involve $275 billion in new investment, and could help create 3 million new jobs and boost annual GDP by $500 billion.[1] Reflecting these benefits, use of wireless broadband service and capacity has been growing dramatically, and such growth is widely expected to continue due to the increasing use of high-bandwidth applications like mobile streaming, the greater expected capacity of 5G connections, and the deployment of the Internet of Things (IoT).[2] Continuing to meet this demand and realizing the potential benefits of next-generation broadband will depend, however, on having an updated regulatory framework that promotes and facilitates next generation network infrastructure facility deployment.

2. This Notice of Proposed Rulemaking and Notice of Inquiry (NPRM and NOI, respectively) commences an 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. Because providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next generation technologies, there is an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.

3. We expect the measures on which we seek comment to be only a part of our efforts to expedite wireless infrastructure deployment. We invite commenters to propose other innovative approaches to expediting deployment. Further, our process for implementing Section 106 of the National Historic Preservation Act is governed by certain Nationwide Programmatic Agreements and affects States as well as federally recognized Tribal Nations. We look forward to working with these partners on

[1] *See* accenturestrategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities," http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf ("Smart Cities Paper").

[2] *See* Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021, at 15 (100 Mbps 5G connections are expected to drive high traffic volumes). Cisco estimates that a 5G connection will generate 4.7 times more traffic than the average 4G connection. *See id.* at 3. Another estimate projects that peak period bandwidth demand will increase at a compounded annual rate of 52 percent. *See* Information Technology & Innovation Foundation, "5G and Next Generation Wireless: Implications for Policy and Competition," June 2016, at 1, http://www2.itif.org/2016-5g-next-generation.pdf. Overall, it is estimated that, by 2019, mobile data traffic in the United States will have grown by nearly six times over the traffic level that existed in 2014, when the Commission last addressed wireless facility siting issues in a rulemaking. *See* CTIA-The Wireless Association®, "Mobile Data Demand: Growth Forecasts Met," Thomas K. Sawanobori, Dr. Robert Roche, June 22, 2015, at 1, http://www.ctia.org/docs/default-source/default-document-library/062115mobile-data-demands-white-paper-new.pdf.

proposals involving the Section 106 review process that require amendments or supplements to these agreements.[3]

II. NOTICE OF PROPOSED RULEMAKING

A. Streamlining State and Local Review

4. This NPRM examines regulatory impediments to wireless infrastructure investment and deployment and seeks comment on measures to help remove or reduce such impediments. In this section, we address the process for reviewing and deciding on wireless facility deployment applications conducted by State and local regulatory agencies. We seek comment on several potential measures or clarifications intended to expedite such review pursuant to our authority under Section 332 of the Communications Act.

5. Congress enacted the Telecommunications Act of 1996 as a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ."[4] One provision of that enactment, Section 332(c)(7), strikes a balance between "preserv[ing] the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communications facilities like cell phone towers" and "reduc[ing] . . . the impediments imposed by local governments upon the installation of facilities for wireless communications."[5] Thus, Section 332(c)(7)(A) preserves "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities," subject to significant limitations – including Section 332(c)(7)(B)(ii), which requires States and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with [the relevant] government or instrumentality, taking into account the nature and scope of such request."[6] The purpose of the latter provision is to counteract delays in State and local governments' consideration of wireless facility siting applications, which thwart timely rollout and deployment of wireless service. Congress took further action to streamline this process in 2012 by enacting Section 6409(a) of the Spectrum Act, which provides that "a State or local government may not deny, and shall approve," applications to deploy or modify certain types of wireless facilities.[7]

6. The Commission has taken a number of important actions to date implementing Section 332(c)(7) of the Communications Act (Act) and Section 6409(a) of the Spectrum Act, each of which has been upheld by federal courts.[8] We seek to assess the impact of the Commission's actions to date, in

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[3] *See* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, App'x B (Collocation NPA); Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App'x C (NPA). *See also Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016).

[4] Telecommunications Act of 1996, S. Rep. 104-230, at 1 (Feb. 1, 1996) (Conf. Report).

[5] *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 814 (2015); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

[6] *See* 47 U.S.C. § 332(c)(7)(B)(ii). Such decisions must be "in writing and supported by substantial evidence contained in a written record." *Id.* § 332(c)(7)(B)(iii).

[7] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1455(a).

[8] *See, e.g.*, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*2009 Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) (*2014 Infrastructure Order*), erratum, 30 FCC Rcd 31 (2015), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

order to evaluate the measures we discuss in the NPRM, as well as other possible actions, and to determine whether those measures are likely to be effective in further reducing unnecessary and potentially impermissible delays and burdens on wireless infrastructure deployment associated with State and local siting review processes. Thus, we ask parties to submit facts and evidence on the issues discussed below and on any other matters relevant to the policy proposals set forth here. We seek information on the prevalence of barriers, costs thereof, and impacts on investment in and deployment of wireless services, including how such costs compare to the overall costs of deployment. We seek information on the specific steps that various regulatory authorities employ at each stage in the process of reviewing applications, and which steps have been most effective in efficiently resolving tensions among competing priorities of network deployment and other public interest goals. In addition, parties should detail the extent to which the Commission's existing rules and policies have or have not been successful in addressing local siting review challenges, including effects or developments since the *2014 Infrastructure Order*, the Commission's most recent major decision addressing these issues.[9]

7. Further, in seeking comment on new or modified measures to expedite local review, we invite commenters to discuss what siting applicants can or should be required to do to help expedite or streamline the siting review process. Are there ways in which applicants are causing or contributing to unnecessary delay in the processing of their siting applications? If so, we seek comment on how we should address or incorporate this consideration in any action we take in this proceeding. For example, to what extent have delays been the result of incomplete applications or failures to properly respond to requests to the applicant for additional information, and how should measures we adopt or revise to streamline application review ensure that applicants are responsible for supplying complete and accurate filings and information? Further, are there steps the industry can take outside the formal application review process that may facilitate or streamline such review? Are there siting practices that applicants can or should adopt that will facilitate faster local review while still achieving the deployment of infrastructure necessary to support advanced wireless broadband services?

1. "Deemed Granted" Remedy for Missing Shot Clock Deadlines

8. The Commission has previously considered, but not adopted, proposals to establish a "deemed granted" remedy for violations of Section 332(c)(7)(B)(ii) in the context of applications outside the scope of the Spectrum Act.[10] That is, the Commission has declined to establish that a non-Spectrum Act siting application would be "deemed granted" if a State or local agency responsible for land-use decisions fails to act on it by the applicable shot clock deadline. The Commission's existing policy for non-Spectrum Act siting applications provides that State or local agencies are obligated to act within a presumptively "reasonable period of time" – *i.e.*, the 90-day shot clock for collocation applications and the 150-day shot clock for other applications – and, upon the agency's "failure to act" by the pertinent deadline, the applicant may sue the agency pursuant to Section 332(c)(7)(B)(v) within 30 days after the date of that deadline.[11] In such litigation, the agency may attempt to "rebut the presumption that the established timeframes are reasonable" – for example, by demonstrating that slower review in a particular

[9] To the extent that parties have submitted information in response to the Wireless Telecommunications Bureau's *Streamlining PN* that is relevant to these questions, we invite them to submit such data in the present docket. *See Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13368 (WTB 2016) (*Streamlining PN*); comment period extended by *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, Order, 32 FCC Rcd 335 (WTB 2017). In addition, to the extent parties discuss the conduct or practices of government bodies or wireless facility siting applicants, we strongly urge them to identify the particular entities that they assert engaged in such conduct or practices.

[10] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39. The Commission reaffirmed this ruling as to applications not subject to the Spectrum Act in the *2014 Infrastructure Order*. *See* 29 FCC Rcd at 12961, para. 226.

[11] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14008-10, 14013-14, paras. 37-42, 49-50.

case was reasonable in light of the "nature and scope of the request," or for other reasons.[12] If the agency fails to make such a showing, it may face "issuance of an injunction granting the application."[13] By contrast, for applications subject to Section 6409(a) of the Spectrum Act, the Commission adopted a "deemed granted" remedy: if a State or local agency fails to act on such an application by the 60-day deadline, the application will be "deemed granted."[14]

9. We now take a fresh look and seek comment on a "deemed granted" remedy for State and local agencies' failure to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications outside the context of the Spectrum Act. We invite commenters to address whether we should adopt one or more of the three options discussed below regarding the mechanism for implementing a "deemed granted" remedy. We describe each of these options below and explain our analysis of the Commission's legal authority to adopt each of them. We seek comment on the benefits and detriments of each option and invite parties to discuss our legal analysis. We also seek comment on whether there are other options for implementing a "deemed granted" remedy.

10. *Irrebuttable Presumption.* In the *2009 Shot Clock Declaratory Ruling*, the Commission created a "rebuttable presumption" that the shot clock deadlines established by the Commission were reasonable. The Commission anticipated that this would give State and local regulatory agencies "a strong incentive to resolve each application within the time frame defined as reasonable."[15] Thus, when an applicant sues pursuant to Section 332(c)(7)(B)(v) to challenge an agency's failure to act on an application by the applicable deadline, the agency would face the burden of "rebut[ting] the presumption that the established timeframes are reasonable,"[16] and if it fails to satisfy this burden, the court could "issu[e] . . . an injunction granting the application."[17] We believe one option for establishing a "deemed granted" remedy for a State or local agency's failure to act by the applicable deadline would be to convert this *rebuttable presumption* into an *irrebuttable* presumption. Thus, our determination of the reasonable time frame for action (*i.e.*, the applicable shot clock deadline) would "set an absolute limit that – in the event of a failure to act – results in a deemed grant."[18]

11. We believe we have legal authority to adopt this approach, for the following reasons. First, we see no reason to continue adhering to the cautious approach articulated in the *2009 Shot Clock Declaratory Ruling – i.e.*, that Section 332(c)(7) "indicates Congressional intent that courts should have

[12] *Id.* at 14010-11, paras. 42, 44.

[13] *Id.* at 14009, para. 38; *see also City of Rancho Palos Verdes*, 504 U.S. 116 (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional-tort damages).

[14] *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 216. In such cases, applicants may sue and seek a declaratory judgment confirming that an application was "deemed granted" due to the State or local agency's failure to act within the 60-day shot clock deadline status, while an agency could sue to challenge an applicant's claim that an application was "deemed granted." *Id.* at 12963-64, paras. 234-36. *See also id.* at 12961, para. 226 ("deemed grant" status takes effect only after applicant notifies the reviewing jurisdiction in writing); *id.* at 12962, para. 231 (listing issues a locality could raise in litigation to challenge an applicant's claimed "deemed grant"). The Commission clarified that, prior to the 60-day deadline, State and local agencies may review applications to determine whether they constitute covered requests" and may "continue to enforce and condition approval [of such applications] on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes." *Id.* at 12955, para. 211; *see also id.* at 12951, 12956, paras. 202, 214 n.595.

[15] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 38.

[16] For example, the locality could rebut the presumption that the established deadlines are reasonable" by showing that, in light of the "nature and scope of the request" in a particular case, it "reasonably require[d] additional time" to negotiate a settlement or to prepare a written explanation of its decision. *Id.* at 14011, para. 44.

[17] *Id.* at 14008-09, para. 38.

[18] *2014 Infrastructure Order*, at 12991, para. 226 (describing impact of irrebuttable presumption in context of applications subject to the Spectrum Act).

the [sole] responsibility to fashion . . . remedies" on a "case-specific" basis.[19] The Commission advanced that theory without citing any legislative history or other sources, and the Fifth Circuit, in its decision upholding the *2009 Shot Clock Declaratory Ruling*, apparently declined to rely on it. Instead, the Fifth Circuit found *no* indication in the statute and its legislative history of any clear Congressional intent on whether the Commission could "issue an interpretation of § 332(c)(7)(B)(v) that would guide courts' determinations of disputes under that section," and went on to affirm that the Commission has broad authority to render definitive interpretations of ambiguous provisions such as this one in Section 332(c)(7).[20] The Fifth Circuit further found – and the Supreme Court affirmed – that courts must follow such Commission interpretations.[21]

12. We thus believe we have authority to adopt irrebuttable presumptions establishing as a matter of rule the maximum reasonable amount of time available to review a wireless facilities application, and seek comment on this conclusion. As the Fifth Circuit found, the inherent ambiguity in "the phrase 'reasonable period of time,' as it is used in § 332(c)(7)(B)(ii)," leaves ample "room for agency guidance on the amount of time state and local governments have to act on wireless facility zoning applications."[22] We see nothing in the statute that explicitly compels a case-by-case assessment of the relevant circumstances for each individual application, nor any provision specifically requiring that those time frames be indefinitely adjustable on an individualized basis, rather than subject to dispositive maximums that may be deemed reasonable as applied to specified categories of applications.[23] While Section 332(c)(7)(B)(ii) provides that a locality must act on each application "within a reasonable time, *taking into account the nature and scope of such request*,"[24] this does not necessarily mean that a reviewing court "must consider the specific facts of individual applications"[25] to determine whether the locality acted within a reasonable time frame; the Commission is well-positioned to take into account the "nature and scope" of particular categories of applications in determining the maximum reasonable amount of time for localities to address each type.

13. Moreover, the Fourth Circuit, in affirming the *2014 Infrastructure Order*, held that the "deemed granted" remedy adopted in the context of the Spectrum Act was permissible under the Tenth Amendment, was consistent with the statutory purpose (*i.e.*, ensuring that deployment "applications are not mired in the type of protracted approval processes that the Spectrum Act was designed to avoid"),[26] and was well within the Commission's authority. We do not view Sections 332(c)(7)(B)(ii) and (v) as materially different from the Spectrum Act in this regard, and we therefore believe that the same "deemed granted" remedy is within the Commission's authority under those statutory provisions as well, where the Commission exercises its statutory authority in accordance with *City of Arlington* to establish standards,

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[19] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

[20] *City of Arlington v. FCC*, 668 F.3d at 251. *See also id.* at 250-51 ("Had Congress intended to insulate § 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly[.] * * * Here, however, Congress did not clearly remove the FCC's ability to implement the limitations set forth in § 332(c)(7)(B) . . . .").

[21] *City of Arlington v. FCC*, 668 F.3d at 249-50; 133 S. Ct. at 1871-73. *See also National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (Commission's interpretation of an ambiguous statutory provision overrides earlier court decisions interpreting the same provision).

[22] *City of Arlington*, 668 F.3d at 255.

[23] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

[24] 47 U.S.C. § 332(c)(7)(B)(ii).

[25] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

[26] *Montgomery County*, 811 F.3d 121, 128.

in specific contexts, for what constitutes "a reasonable period of time after the request is duly filed."[27] We seek comment on this analysis.

14. *Lapse of State and Local Governments' Authority.* In the alternative (or in addition) to the irrebuttable presumption approach discussed above, we believe we may implement a "deemed granted" remedy for State and local agencies' failure to act within a reasonable time based on the following interpretation of ambiguous provisions in the statute. Section 332(c)(7)(A) assures these agencies that their "authority over decisions concerning the placement, construction, and modification of personal wireless service facilities" is preserved—but significantly, qualifies that assurance with the provision "*except as provided*" elsewhere in Section 332(c)(7). We seek comment on whether we should interpret this phrase as meaning that if a locality fails to meet its obligation under Section 332(c)(7)(B)(ii) to "act on [a] request for authorization to place, construct, or modify personal wireless facilities within a reasonable period of time," then its "authority over decisions concerning" that request lapses and is no longer preserved. Under this interpretation, by failing to act on an application within a reasonable period of time, the agency would have defaulted its authority over such applications (*i.e.*, lost the protection of Section 332(c)(7)(A), which otherwise would have preserved such authority), and at that point no local land-use regulator would have authority to approve or deny an application. Arguably, we could establish that in those circumstances, there is no need for an applicant to seek such approval. We seek comment on this interpretation and on the desirability of taking this approach.

15. *Preemption Rule.* A third approach to establish a "deemed granted" remedy—standing alone or in tandem with one or both of the approaches outlined above—would be to promulgate a rule to implement the policies set forth in Section 332(c)(7). Sections 201(b) and 303(r), as well as other statutory provisions, generally authorize the Commission to adopt rules or issue other orders to carry out the substantive provisions of the Communications Act.[28] Further, the Fifth Circuit affirmed the determination in the *2009 Shot Clock Declaratory Ruling* that the Commission's "general authority to make rules and regulations to carry out the Communications Act includes the power to implement § 332(c)(7)(B)(ii) and (v)."[29] Accordingly, we seek comment on whether we could promulgate a "deemed granted" rule to implement Section 332(c)(7). We also seek comment on whether Section 253, standing alone or in conjunction with Section 332(c)(7) or other provisions of the Act, provides the authority for the Commission to promulgate a "deemed granted" rule.[30]

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[27] *See City of Arlington*, 133 S. Ct. at 1868; 47 U.S.C. § 332(c)(7)(B)(ii).

[28] *See* 47 U.S.C. §§ 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."), 303(r) (directing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"). *See also* 47 U.S.C. § 154(i); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999) ("§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.") (emphasis in original); *City of Arlington*, 133 S. Ct. at 1866 (in specific context of Section 332(c)(7), stating: "Section 201(b) . . . empowers the . . . Commission to 'prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions.' Of course, that rulemaking authority extends to the subsequently added portions of the Act.") (quoting § 201(b) and citing *Brand X*).

[29] *City of Arlington*, 668 F.3d at 249; *see also id.* at 252-54 (finding that the Commission's interpretation was a permissible construction of the ambiguous provisions in § 332(c)(7), and the interpretation was entitled to deference); *id.* at 247 & n.83 (summarizing Commission's analysis and citing 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r) as basis for the Commission's general authority to adopt rules and orders to implement the Act), *aff'd in pertinent part*, 133 S. Ct. at 1866. *See also 2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14001-03, paras. 23-26 (legal analysis interpreting Sections 332(c)(7), 201(b), and 303(r)).

[30] State or local governments' failures to act within reasonable time frames arguably could violate Section 253(a) if they have the "effect of prohibiting" wireless carriers' provision of service; and this might justify our addressing this problem by adopting a rule to implement the policies of Section 253(a) as well as Section 332(c)(7). *See infra* Sections III.A and C (discussing implications of the overlapping provisions in Sections 253(a) and

(continued....)

16. In considering adoption of rules implementing Section 332(c)(7)(B)(i), (ii), and (iii), we are aware of a statement in the Conference Report issued in connection with the Telecommunications Act of 1996 that "[i]t is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all . . . disputes arising under this section."[31] Does this statement, standing alone, affect our authority to adopt rules governing disputes about localities' failure to comply with their obligations under Section 332(c)(7)(B)(ii) to act on siting applications within a reasonable time? Or is a generic rule distinguishable from a proceeding addressing a dispute between a particular applicant and a particular State or local regulator? Can a statement in legislative history foreclose us from complying with an explicit mandate elsewhere in the Communications Act? Does it prevent us from exercising the rulemaking authority explicitly granted by Sections 201(b) and 303(r)?[32] We are mindful of the D.C. Circuit's admonition that "a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself," and that "[w]e will not permit a committee report to trump clear and unambiguous statutory language."[33] We invite commenters to address these issues.

2. Reasonable Period of Time to Act on Applications

17. In 2009, the Commission determined that, for purposes of determining what is a "reasonable period of time" under Section 332(c)(7)(B)(ii), 90 days should be sufficient for localities to review and act on (either by approving or denying) complete collocation applications, and that 150 days is a reasonable time frame for them to review and act on other types of complete applications to place, construct, or modify wireless facilities.[34] In its *2014 Infrastructure Order*, the Commission implemented Section 6409(a) of the Spectrum Act (enacted by Congress in 2012)[35] by, among other things, creating a new 60-day shot clock within which localities must act on complete applications subject to the definitions in the Spectrum Act.[36]

18. We ask commenters to discuss whether the Commission should consider adopting different time frames for review of facility deployments not covered by the Spectrum Act. For example, we seek comment on whether we should harmonize the shot clocks for applications that are not subject to the Spectrum Act with those that are, so that, for instance, the time period deemed reasonable for non-Spectrum Act collocation applications would change from 90 days to 60 days.[37] Alternatively, should we establish a 60-day shot clock for some subset of collocation applications that are not subject to the

(Continued from previous page)
253(c)(7)(B)(i)(II) banning State or local legal requirements that "prohibit or have the effect of prohibiting" the provision of wireless telecommunications service).

[31] S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.).

[32] *See supra.*

[33] *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987). *See also United States v. Gonzales*, 520 U.S. 1, 6 (1997) (rejecting "resort to legislative history" to interpret a "straightforward statutory command," where "the legislative history only muddies the waters."); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (even where there are "contrary indications in the statute's legislative history[,] . . . we do not resort to legislative history to cloud a statutory text that is clear.").

[34] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14004, 14012-13, paras. 32, 45-48 (2009) (*2009 Shot Clock Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[35] Section 6409(a) of the Spectrum Act, 47 U.S.C. § 1455(a), mandates that State and local land-use regulators "must approve, and may not deny" applications to deploy wireless facilities within a specified, narrow category.

[36] *2014 Infrastructure Order*, 29 FCC Rcd at 12956-57, para. 215. The Commission also defined each of the terms used in the Spectrum Act to specify the types of facilities subject to mandatory approval. *See id.* at 12926-51, paras. 145-204; 47 CFR § 1.40001(b).

[37] *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 215; 47 CFR § 1.40001(c)(2).

Spectrum Act, for example, applications that meet the relevant dimensional limits but are nevertheless not subject to the Spectrum Act because they seek to collocate equipment on non-tower structures that do not have any existing antennas?[38] Should we adopt different presumptively reasonable time frames for resolving applications for more narrowly defined classes of deployments such as (a) construction of new structures of varying heights (*e.g.*, 50 feet tall or less, versus 50 to 200 feet tall, versus taller than 200 feet); (b) construction of new structures in or near major utility or transportation rights of way, or that are in or near established clusters of similar structures, versus those that are not; (c) deployments in areas that are zoned for residential, commercial, or industrial use, or in areas where zoning or planning ordinances contemplate little or no additional development; or (d) replacements or removals that do not fall within the scope of Section 6409(a) of the Spectrum Act (for example, because they exceed the dimensional limits for requests covered by that provision)? We also request comment on whether to establish different time frames for (i) deployment of small cell or Distributed Antenna System (DAS) antennas or other small equipment versus more traditional, larger types of equipment or (ii) requests that include multiple proposed deployments or, equivalently, "batches" of requests submitted by a single provider to deploy multiple related facilities in different locations, versus proposals to deploy one facility.[39] Should we align our definitions of categories of deployments for which we specify reasonable time frames for local siting review with our definitions of the categories of deployments that are categorically excluded from environmental or historic preservation review?[40]

19. We seek comment on what time periods would be reasonable (outside the Spectrum Act context) for any new categories of applications, and on what factors we should consider in making such a decision. For what types or categories of wireless siting applications may shorter time periods be reasonable than those established in the *2009 Shot Clock Declaratory Ruling*? We invite commenters to submit information to help guide our development of appropriate time frames for various categories of deployment. We ask commenters to submit any available data on whether localities already recognize different categories of deployment in their processes, and on the actual amounts of time that localities have taken under particular circumstances.

20. We also seek comment on whether the Commission should provide further guidance to address situations in which it is not clear when the shot clock should start running, or in which States and localities on one hand, and industry on the other, disagree on when the time for processing an application begins. For instance, we have heard anecdotally that some jurisdictions impose a "pre-application" review process, during which they do not consider that a request for authorization has been filed. We seek comment on how the shot clocks should apply when there are such pre-application procedures; at what point should the clock begin to run? Are there other instances in which there is a lack of clarity or disagreement about when the clock begins to run? We ask parties to address whether and how the Commission should provide clarification of how our rules apply in those circumstances.

21. Finally, we seek comment on whether there are additional steps that should be considered to ensure that a deemed granted remedy achieves its purpose of expediting review. For example, to what extent can the attachment of conditions to approvals of local zoning applications slow the deployment of infrastructure? Are applicants encountering requirements to comply with codes that are not reasonably

[38] *See 2014 Infrastructure Order*, 29 FCC Rcd at 12935, para. 168 (finding that the term "existing . . . base station" in Section 6409((a)(2) covers only structures that, at the time of the application, supports or houses base station equipment); 47 CFR § 1.40001(b)(1)(iv).

[39] The Wireless Telecommunications Bureau also sought comment on these issues in the *Streamlining PN*. *See* 31 FCC Rcd at 13370-71.

[40] *See* 47 CFR §§ 1.1306, 1.1307.

related to health and safety?[41] To the extent these conditions present challenges to deployment, are there steps the Commission can and should take to address such challenges?

3. Moratoria

22. Another concern relating to the "reasonable periods of time" for State and local agencies to act on siting applications is that some agencies may be continuing to impose "moratoria" on processing such applications, which inhibit the deployment of the infrastructure needed to provide robust wireless services. If so, such moratoria might contravene the *2014 Infrastructure Order*, which clearly stated that the shot clock deadlines for applications continue to "run[] regardless of any moratorium."[42] The Commission explained that this conclusion was "consistent with a plain reading of the *2009 Declaratory Ruling*, which specifies the conditions for tolling and makes no provision for moratoria," and concluded that this means that "applicants can challenge moratoria in court when the shot clock expires without State or local government action."[43] We see no reason to depart from this conclusion. We ask commenters to submit specific information about whether some localities are continuing to impose moratoria or other restrictions on the filing or processing of wireless siting applications, including refusing to accept applications due to resource constraints or due to the pendency of state or local legislation on siting issues, or insisting that applicants agree to tolling arrangements. Commenters should identify the specific entities engaging in such actions and describe the effect of such restrictions on parties' ability to deploy or upgrade network facilities and provide service to consumers. We propose to take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarifications of the moratorium ban or preempting specific State or local moratoria. Commenters should discuss the benefits and detriments of any such additional measures and our legal authority to adopt them.

B. Reexamining National Historic Preservation Act and National Environmental Policy Act Review

23. In the following sections, we undertake a comprehensive fresh look at our rules and procedures implementing the National Environmental Policy Act (NEPA)[44] and the National Historic Preservation Act (NHPA)[45] as they relate to our implementation of Title III of the Act in the context of wireless infrastructure deployment, given the ongoing evolution in wireless infrastructure deployment towards smaller antennas and supporting structures as well as more frequent collocation on existing structures.

24. We note that any revisions to our rules or procedures implementing NEPA require consultation with the Council for Environmental Quality (CEQ).[46] In addition, any changes to the programmatic agreements governing our review under the NHPA would require the agreement of the Advisory Council on Historic Preservation (ACHP) and the National Conference of State Historic Preservation Officers (NCSHPO), and other revisions to our rules governing NHPA review may benefit

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[41] In the context of the deemed granted remedy under the Spectrum Act, the Commission clarified that localities could "continue to enforce and condition approval [of such applications] on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes." *See 2014 Infrastructure Order*, 29 FCC Rcd at 12955, para. 211.

[42] *2014 Infrastructure Order*, 29 FCC Rcd at 12971, para. 265; *see generally id.* at 12971-72, paras. 263-67.

[43] *Id.* at 12971, para. 265.

[44] 42 U.S.C. § 4321 *et seq.*

[45] 54 U.S.C. § 300101 *et seq.*

[46] 40 CFR § 1507.3(a) ("Each agency shall consult with [CEQ] while developing its procedures and before publishing them in the Federal Register for comment. … The procedures shall be adopted only after an opportunity for public review and after review by [CEQ] for conformity with [NEPA] and [CEQ's] regulations.").

from their perspectives.[47] Furthermore, some of the changes discussed below might significantly or uniquely affect Tribal governments and their land and resources. The ACHP, in a filing in this proceeding, has stressed that the expertise and experience of these and other stakeholders is crucial to understanding the issues raised herein, and we emphasize that we intend to continue to work closely with ACHP and others.[48] We direct the Wireless Telecommunications Bureau (WTB), in coordination with the Consumer and Governmental Affairs Bureau, Office of Intergovernmental Affairs, and other Bureaus and Offices as appropriate, to consult with other agencies and organizations, including the CEQ, ACHP, and NCSHPO, as warranted to develop the record and obtain their perspectives on the issues herein. We further direct the Office of Native Affairs and Policy (ONAP), in coordination with WTB and other Bureaus and Offices as appropriate, to conduct government-to-government consultation as appropriate with Tribal Nations. Tribal Nations may notify ONAP of their desire for consultation via email to tribalinfrastructure@fcc.gov.

1. Background

25. *NEPA and the NHPA.* NEPA requires agencies of the Federal Government to identify and evaluate the environmental effects of proposed "major Federal actions significantly affecting the quality of the human environment . . . ."[49] In turn, Section 106 of the NHPA states that "prior to the issuance of any license," the head of a Federal agency "shall take into account the effect of the undertaking on any historic property" and "shall afford the [ACHP] a reasonable opportunity to comment with regard to the undertaking."[50] Similar to a "major Federal action," an "undertaking" includes, among other things, projects, activities, or programs that "requir[e] a Federal permit, license, or approval[.]"[51] Courts have generally treated Federal actions under NEPA as closely analogous to undertakings under the NHPA.[52]

26. *Commission Precedent: Scope of Obligations.* The Commission has assumed responsibility for NEPA and NHPA review of wireless communications facilities construction based on the Commission's actions in two areas: licensing and antenna structure registration (ASR). As a historical matter, the Commission's initial focus on antenna sites made sense, reflecting the relatively more involved role the Commission played in the space. For instance, in 1974, when the Commission first promulgated rules implementing NEPA,[53] all licenses conferred authority to operate from a specific site, and the Commission was required to issue a construction permit for that site before granting the license.[54] In 1982, however, Congress amended the Communications Act to eliminate construction permits by default in some services and to authorize the Commission to waive the construction permit

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[47] Agency implementation of Section 106 of the NHPA is governed by the rules of the ACHP, which specify the process under which Federal agencies shall perform their historic preservation reviews. 36 CFR § 800.2(a).

[48] *See* Letter from Milford Wayne Donaldson, FAIA, Chairman, Advisory Council on Historic Preservaton, to the Honorable Ajit Pai, Chairman, FCC, WT Docket Nos. 17-79, 15-180 (filed Apr. 13, 2017) at 1.

[49] 42 U.S.C. § 4332(2)(C).

[50] 54 U.S.C. § 306108.

[51] 54 U.S.C. § 300320(3). *See also* 40 CFR § 1508.18(b).

[52] *See, e.g., Karst Env'tl Educ. and Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001). *But see Indiana Coal Council, Inc. v. Lujan,* 774 F. Supp. 1385, 1401 (D.D.C. 1991) ("Congress appears to have established different thresholds in the NHPA and in NEPA for determining whether an activity triggers the obligation . . . .").

[53] *Implementation of the National Environmental Policy Act*, Report and Order, 49 FCC 2d 1313, 1333, para. 46 (1974).

[54] *See* 47 U.S.C. § 319 (a) ("[n]o license shall be issued . . . for the operation of any station unless a permit for its construction has been granted . . . .").

requirement in the public interest in other services.[55] Currently, the Commission requires construction permits only in the broadcast services. Furthermore, licenses in many services, including most licenses in the commercial wireless services, now authorize transmissions over a particular band of spectrum within a wide geographic area without further limitation as to transmitter locations. In 1990, the Commission amended Section 1.1312 of the rules to specify that where construction of a Commission-regulated radio communications facility is permitted without prior Commission authorization (*i.e.*, without a construction permit), the licensee or applicant determines prior to construction whether the facility may have a significant environmental effect.[56] The D.C. Circuit subsequently found that the Commission's retention of limited approval authority over tower construction in Section 1.1312 to the extent necessary to ensure this review was not arbitrary and capricious.[57]

27. *The Commission's Rules.* The Commission's rules require an applicant to prepare and file an environmental assessment (EA)[58] if its proposed construction meets any of several environmentally sensitive conditions specified in the rules.[59] If an EA is required, the application will not be processed and the applicant may not proceed with construction until environmental processing is completed.[60] All other constructions are categorically excluded from environmental processing unless the processing bureau determines, in response to a petition or on its own motion, that the action may nonetheless have a significant environmental impact.[61]

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[55] 47 U.S.C. § 319(d); *see* Pub.L. 97-259, 96 Stat. 1087, § 119 (1982).

[56] 47 CFR § 1.1312(a); *see Amendment of Environmental Rules,* Report and Order, 5 FCC Rcd 2942 (1990) (*Pre-Construction Review Order*).

[57] *CTIA – The Wireless Ass'n v. FCC*, 466 F.3d 105, 114 (D.C. Cir. 2006). In the underlying Report and Order, the Commission had declined to revisit whether it should treat tower construction as an undertaking under the NHPA, while noting its belief that under Section 319 and Federal environmental statutes, it "has sufficient approval authority to trigger the requirements of section 106." *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1093 para. 24 (2004) (*NPA Order*). Two Commissioners dissented in part, expressing the view that in the absence of a construction permit or a site-by-site license, the Commission's retention of jurisdiction to require historic preservation review exceeded its statutory authority. *See id.* at 1230 (Statement of Commissioner Kathleen Q. Abernathy), 1233 (Statement of Commissioner Kevin J. Martin).

[58] Under CEQ rules, an EA is to be prepared for actions that ordinarily may have a significant environmental impact. *See* 40 CFR §§ 1501.4(b), 1507.3(b)(2)(iii). If an EA shows that a proposed action will have no significant environmental impact, then the agency issues a Finding Of No Significant Impact, 40 CFR § 1508.13, and the proposed action can proceed. However, if an EA indicates that the action will have a significant environmental impact, the action cannot proceed unless the agency prepares an environmental impact statement (EIS). *See* 40 CFR § 1501.4 (requiring an EIS for actions that normally have a significant environmental impact).

[59] *See* 47 CFR §§ 1.1307(a), 1.1308(a), 1.1312(b). These are facilities that are to be located in an officially designated wilderness area, an officially designated wildlife preserve, or a flood plain; that may affect listed threatened or endangered species or their critical habitats, or are likely to jeopardize proposed threatened or endangered species or destroy or adversely modify proposed critical habitats; that may affect districts, sites, buildings, structures or objects that are listed, or eligible for listing, in the National Register of Historic Places; that may affect Native American religious sites; that will involve significant change in surface features (*e.g.*, wetland fill or deforestation); that will be located in residential neighborhoods and equipped with high intensity white lights; that will cause human exposure to radiofrequency emissions that exceed specified levels; or that will exceed 450 feet in height. *See* 47 CFR § 1.1307(a), (b), (d) Note.

[60] 47 CFR §§ 1.1308(d), 1.1312(b).

[61] *See* 47 CFR § 1.1307 (c), (d). An agency may establish categorical exclusions to cover actions "which do not individually or cumulatively have a significant effect on the human environment" and thus require no EA or EIS. *See* 40 CFR §§ 1508.4, 1507.3(b)(2)(ii). CEQ regulations require that an agency that chooses to establish categorical exclusions must also provide for "extraordinary circumstances," 40 CFR § 1508.4, under which a normally excluded action may have a significant effect.

28. The Commission fulfills its obligations under the NHPA with respect to radio spectrum licensees through Section 1.1307(a)(4) of the rules, which requires an EA if the proposed construction may affect historic properties.[62] In particular, Section 1.1307(a)(4) directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the ACHP's rules as modified by the Collocation NPA and the NPA, two programmatic agreements that took effect in 2001 and 2005, respectively.[63] These programmatic agreements, which were executed pursuant to Section 800.14(b) of the ACHP's rules, substitute for the procedures that Federal agencies must ordinarily follow in performing their historic preservation reviews.[64]

29. Under the Collocation NPA, most antenna collocations on existing structures are excluded from Section 106 historic preservation review, with a few exceptions to address potentially problematic situations. The NPA establishes detailed processes for reviewing new towers and those collocations that remain subject to review. Among other efficiencies, in cases where the applicant has not found that the proposed construction will have an adverse effect, the NPA permits the applicant's determination to become final if the State Historic Preservation Officer (SHPO) does not respond to the applicant's submission within 30 days without any affirmative action by the Commission.[65]

30. In addition, the NPA requires applicants to use reasonable and good faith efforts to identify and contact any Tribal Nation or Native Hawaiian Organization (NHO) that may attach religious and cultural significance to historic properties that may be affected by an undertaking.[66] To facilitate this process, the Commission developed the Tower Construction Notification System (TCNS), which automatically notifies Tribal Nations and NHOs of proposed constructions within geographic areas that they have confidentially identified as potentially containing historic properties of religious and cultural significance to them. The NPA provides that use of the TCNS constitutes a reasonable and good faith effort to identify potentially interested Tribal Nations and NHOs.[67]

31. While Tribal Nations and NHOs, like SHPOs, are subject to a 30-day guideline for responses,[68] applicants are required to seek guidance from the Commission if a Tribal Nation or NHO

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[62] 47 CFR § 1.1307(a)(4).

[63] *See* Collocation NPA; NPA. The Collocation NPA was amended in 2016 to establish further exclusions from review for small antennas. *See Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas,* Public Notice, 31 FCC Rcd 4617 (WTB 2016).

[64] 36 CFR § 800.14(b)(2). *See generally* 36 CFR Part 800, Subpart B (historic preservation review procedures that Federal agencies must follow in the absence of an approved program alternative under Section 800.14(b)).

[65] NPA, §§ VII.B.2, VII.C.2 (providing that if the applicant determines that no historic properties exist within the Area of Potential Effect (APE) or that the undertaking will have no effect on historic properties, that determination is deemed final unless the SHPO objects within 30 days; if the applicant determines that the project will have no adverse effect, after 30 days it may provide a copy of its submission to the Commission, which has 15 days to notify the applicant of any concerns or else the process is complete). Another efficiency is that within the APE for visual effects, and with the exception of resources significant to Tribal Nations and Native Hawaiian Organizations, applicants are only required to consider effects on resources that are listed on the National Register of Historic Places or that have been previously identified as eligible for listing, rather than making affirmative efforts to identify unidentified eligible resources. *Id.,* § VI.D.1.a.

[66] NPA, §§ IV.B, IV.C. *See also* 54 U.S.C. § 302706(b).

[67] NPA, § IV.B.

[68] *Id.*, § IV.F.4 ("[o]rdinarily, 30 days from the time the relevant tribal or NHO representative may reasonably be expected to have received an inquiry shall be considered a reasonable time").

does not respond to the applicant's inquiries.[69] In 2005, the Commission issued a Declaratory Ruling establishing a process that enables an applicant to proceed toward construction when a Tribal Nation or NHO does not timely respond to a TCNS notification.[70] The Commission staff, in collaboration with industry, has subsequently developed a similar process (the "Good Faith Protocol") to address situations where a Tribal Nation or NHO expresses initial interest in a project, but then fails to communicate further with the Applicant after having been provided any additional information or fees that it has requested.

2. Updating Our Approach to the NHPA and NEPA

a. Need for Action

32. Improving spectrum efficiency for future 4G and 5G services by providing end users with higher quality connections, more bandwidth and lower latency will require significant densification of DAS and small cell facilities.[71] To achieve this anticipated level of service, wireless providers will need flexibility to strategically place thousands of DAS and small cell facilities throughout the country within the next few years. Yet, they face challenges in their efforts to obtain authorizations for deploying this necessary infrastructure, not only from local governments but also in completing the Commission's environmental and historic preservation review processes under NEPA and Section 106 of the NHPA.

33. Many wireless providers have raised concerns about the Commission's environmental and historic preservation review processes because, they say, these reviews increase the costs of deployment and pose lengthy and often unnecessary delays, particularly for small facility deployments.[72]

34. The historic preservation review process under Section 106 of the NHPA has raised particular concerns among wireless providers. This process not only requires that providers make their own determinations as to whether a project will have effects on historic properties, but also requires obtaining input from SHPOs and Tribal Nations, and wireless providers argue that this process results in significant delays in the execution of their deployment plans.[73]

35. A large number of wireless providers complain that the Tribal component of the Section 106 review process is particularly cumbersome and costly.[74] Providers have argued that Tribal Nation

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[69] *Id.*, § IV.G; *see also id.*, § IV.H (providing that TCNS contact is only an initial effort to contact the Tribal Nation or NHO, and does not in itself fully satisfy the applicant's obligations or substitute for government-to-government consultation unless the Tribal Nation or NHO affirmatively disclaims further interest).

[70] *See Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092 (2005) (*2005 Declaratory Ruling*).

[71] *See, e.g.*, Joint Venture Publications, Bridging the Gap: 21st Century Wireless Telecommunications Handbook at 12-15 (Sept. 2016), http://www.jointventure.org/publications/joint-venture-publications/1473-bridging-the-gap-21stcentury-wireless-telecommunications-handbook (Bridging the Gap Report); Ixia, Small Cells, Big Challenge: A Definitive Guide to Designing and Deploying HetNets at 41 (Nov. 2013), https://www.ixiacom.com/resources/small-cells-big-challenge.

[72] *See, e.g.*, Sprint Comments, WT Docket No. 16-421, at 44-48; Verizon Comments, WT Docket No. 16-421, at 34-39.

[73] *See, e.g.*, Competitive Carrier Association Comments, WT Docket No. 16-421, at 35-36; Crown Castle Comments, WT Docket No. 15-180, at 3-4; Verizon Comments, WT Docket No. 16-421, at 37; Verizon Comments, WT Docket No. 15-180, at 4-5.

[74] *See, e.g.,* Competitive Carrier Association Comments, WT Docket No. 16-421, at 35-36; Crown Castle Comments, WT Docket No. 15-180, at 3-4; CTIA Comments, WT Docket No. 16-421, at 5; NTCH, WT Docket No. 16-421, Comments at 7-9; Sprint Comments, WT Docket No. 16-421, at 45. Verizon Comments, WT Docket No. 16-421, at 37; Verizon Comments, WT Docket No. 15-180, at 4-5.

review has caused substantial delays[75] that significantly exceed those attributable to the SHPO review process,[76] and Tribal compensation in connection with the review of submissions to TCNS has become a highly contentious subject. These Tribal reviews do not relate to Tribal lands, but to areas of Tribal interest, which include Tribal burial grounds and other sites that Tribes regard as sacred off Tribal lands.[77] We observe that TCNS data reveals that, in recent years, the areas of interest claimed by Tribal Nations have increased. TCNS data reveals that the average number of Tribal Nations notified per tower project increased from eight in 2008 to 13 in August 2016 and 14 in March 2017. Six of the 19 Tribal Nations claiming ten or more full States within their geographic area of interest in March 2017 had increased that number since August 2016, with three Tribal Nations claiming 20 or more full States in addition to select counties. In 2015, 50 Tribal Nations noted fees associated with their review process in TCNS; by March 2017, Commission staff was aware of at least 95 Tribal Nations routinely charging fees, including 85 with fees noted in TCNS and 10 that staff was aware of from other sources. This data further suggests that the average cost per Tribal Nation charging fees increased by 30% and the average fee for collocations increased by almost 50% between 2015 and August 2016.

36. Many wireless providers argue that, as a result, the cumulative Tribal fees that they pay both per site and for their overall deployment programs have increased precipitously. According to Sprint, its costs associated with Tribal participation "have become prohibitive and are unnecessarily diverting capital from deployment" as its per site costs have "increased 14-fold in the last six years, from less than $500 per site in 2011 to more than $6,300 today."[78] Furthermore, the progression toward smaller and more numerous cell sites is likely increasing the number of submissions that are subject to fee requests. Moreover, Verizon notes that the total fees it pays for Tribal participation "increased from just over $300,000 in 2012 to almost $4 million in 2015. And the average spend per site is now $2,344."[79] Further, Competitive Carriers Association (CCA) contends that one of its members "reports that rooftop macrocell collocations in Chicago have generated between $11,000 -12,000 per site in Tribal fees, and that does not even account for the necessary expenses to collocate on a site," though CCA recognizes "a duty to protect Tribal ancestral lands and properties," and states a desire to "work collaboratively with Tribes to more clearly define the pre-consultation process and cost."[80]

37. Wireless providers and facility owners argue that these developments have combined to increase the urgency of reexamining the Commission's rules and policies to ensure that they are clear on licensees' and applicants' obligations, and that these rules and polices at present are effectively requiring that applicants pay fees that are not legally required by law. We seek concrete information on the amount of time it takes for Tribal Nations to complete the Section 106 review process and on the costs that Tribal participation imposes on facilities deployment and on the provision of service. We also seek comment and specific information on the extent of benefits attributable to Tribal participation under the

[75] *See, e.g.*, Crown Castle Comments, WT Docket No. 15-180, at 3-4; Verizon Comments, WT Docket No. 15-180, at 4-5.

[76] Verizon Comments, WT Docket No. 16-421, at 36-40. Verizon states that in July 2016 it had 2,450 pending requests for Tribal review, and that "more than half had been pending for more than 90 days, almost a third had been pending for more than six months, and 20 had been pending for more than a year."

[77] See *infra* para. 50-51.

[78] Sprint Comments, WT Docket No. 16-421, at 45.

[79] Verizon Comments, WT Docket No. 16-421, at 35.

[80] Tim Donovan, SVP of Legislative Affairs, CCA, and Rebecca Murphy Thompson, EVP & General Counsel, CCA, A Game of Monopoly: Mobility Fund II & Infrastructure (Feb. 24, 2017), http://ccablog.tumblr.com/post/157659003646/a-game-of-monopoly-mobility-fund-ii.

Commission's Section 106 procedures, particularly in terms of preventing damage to historic and culturally significant properties.[81]

38. In addition, in May 2016, PTA-FLA filed a Petition for Declaratory Ruling arguing that "Tribal fees have become so exorbitant in some cases to approach or even *exceed* the cost of actually erecting the tower."[82] PTA-FLA states that the Commission should "prohibit the payment of fees to Tribal Nations" because the payment of such fees "has demonstrably contributed to the expansion of required reviews and attendant delays."[83] In the alternative, PTA-FLA states that "the reviewing fees should be limited to no more than $50" unless a Tribal Nation "demonstrates that the review is exceptionally complex," and that the total fee should never exceed $200.[84] In addition, PTA-FLA argues that Tribal Nations "should be required to identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact" on an area in which Tribal Nations "actually resided or habituated" so that tower constructors can have a better idea of what sites to avoid before tower planning even begins."[85] In cases where Tribal Nations "need to preserve secrecy of particular sacred sites to avoid unwanted intrusions," PTA-FLA states that "such sites should be identified to the Commission in confidence" so that the Commission can "advise prospective constructors in the area that a site" will require consultation with a Tribal Nation.[86] Finally, PTA-FLA argues that the NPA and Collocation Agreement "should be amended to exempt from review sites that will obviously have no effects" on a Tribal Nation's sacred burial grounds.[87] We incorporate PTA-FLA's petition into this proceeding, and we seek comment below on its proposals.

39. Some wireless providers contend that the SHPO review process also results in significant delays in deployment. We seek comment on the costs associated with SHPO review under the Commission's historic preservation review process, including direct financial costs; costs that delay imposes on carriers, tower owners, and the public; and any other costs. What are the costs associated with SHPO review of typical small facility deployments, and how do these compare with the costs for tower construction projects? Does the SHPO review process duplicate historic preservation review at the local level, particularly when local review is conducted by a Certified Local Government or a governmental authority that issues a Certificate of Appropriateness?[88] In addition, we seek comment on how often SHPO review results in changes to a construction project due to a SHPO's identification of potential harm to historic properties or confers other public benefits.

40. Some argue that NEPA compliance imposes extraordinarily high costs on wireless providers and results in significant delays.[89] Sprint notes that it has spent "tens of millions of dollars" to investigate pursuant to NEPA requirements deployments which, it alleges, present "minimal likelihood of

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[81] *See, e.g.,* Letter from Gary D. Batton, Chief, Choctaw Nation of Oklahoma, to Ajit Pai, Chairman, FCC, WT Docket No. 17-79, at 1-2 (filed Mar. 30, 2017).

[82] Petition for Declaratory Ruling, PTA-FLA, Inc., WT Docket No. 15-180, at 8 (filed May 3, 2016) (PTA-FLA Petition for Declaratory Ruling) (emphasis in original).

[83] *Id.* at 14.

[84] *Id.*

[85] *Id.* at 14-15.

[86] *Id.* at 15.

[87] *Id.* at 16.

[88] A "Certified Local Government" is a local government whose local historic preservation program is certified under Chapter 3025 of the National Historic Preservation Act. *See* 54 U.S.C. §§ 300302, 302501 *et seq.* A "Certificate of Appropriateness" is an authorization from a local government allowing construction or modification of buildings or structures in a historic district.

[89] *See, e.g.*, Verizon Comments, WT Docket 16-421, at 34-39; Sprint Comments, WT Docket 16-421, at 44-48.

harm."[90] It states that the Commission's NEPA rules impose huge network costs with little or nothing in the way of corresponding benefits to the environment.[91] More specifically, some commenters complain about delays associated with EAs – which T-Mobile states may "languish for an extended period of time—sometimes years,"[92] partly because when EAs are required, the Commission is not subject to any processing timelines or dispute resolution procedures.[93] T-Mobile also complains that in cases where an EA is not filed, parties may file environmental objections under the Commission's rules with respect to a planned facility, and such cases are not subject to timelines for resolution.[94] A number of commenters propose that EAs for deployments on flood plains should be eliminated if a site will be built at least one foot above the base flood elevation and a local building permit has been obtained.[95] We seek comment on the costs and relative benefits of the Commission's NEPA rules. What are the costs associated with NEPA compliance, other than costs associated with historic preservation review? How do the costs of NEPA compliance for tower construction compare to such costs for small facilities, and what specific benefits does the review confer?

41. Finally, some note that facilities requiring Federal review must also undergo pre-construction review by local governmental authorities, and assert that the inability to engage in these dual reviews simultaneously can add significant time to the process. Verizon states that local siting and Federal historic preservation "reviews cannot and do not run concurrently, because the local reviews may result in changes to the location or parameters (height, width, and size) of the facility which must be established before the historic preservation review process can begin."[96] Verizon also states that providers cannot commence construction of their facilities until after completion of the historic preservation review process, which they state typically takes several months.[97] We seek comment on whether local permitting, NEPA review, and Section 106 review processes can feasibly be conducted simultaneously, and on whether there are barriers preventing simultaneous review to the extent it is feasible. To what extent do significant siting changes or the potential for such changes during the local process make simultaneous review impractical or inefficient? Alternatively, have reviewing or consulting parties in the Commission's NEPA or Section 106 review processes declined to process an application until a local permitting process is complete? We seek comment on whether and under what circumstances simultaneous review would, on the whole, minimize delays and provide for a more efficient process and what steps, if any, the Commission should take to facilitate or enable such simultaneous review.

b. Process Reforms

(i) Tribal Fees

42. In this section, we identify and seek comment on several issues relevant to fees paid to Tribal Nations in the Section 106 process. In addition to commenting on the legal framework and on potential resolutions to the issues, we encourage commenters to provide specific factual information on current Tribal and industry practices and on the impacts of those practices on licensees/tower owners, Tribal Nations, and timely deployment of advanced broadband services to all Americans. We further welcome information on the practices of other Federal agencies for our consideration.

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[90] Sprint Comments, WT Docket No. 16-421, at 47-48.

[91] *See, e.g.,* T-Mobile Comments, WT Docket No. 16-421, at 39.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *See, e.g.*, Verizon Comments, WT Docket No. 16-241, at 38-39.

[96] Verizon Comments, WT Docket No. 15-180, at 4-5.

[97] *Id.*

43. Neither the NHPA nor the ACHP's implementing regulations address whether and under what circumstances Tribal Nations and NHOs may seek compensation in connection with their participation in the Section 106 process. The ACHP has, however, issued guidance on the subject in the form of a memorandum in 2001 and as part of a handbook last issued in 2012. The ACHP 2001 Fee Guidance explains that "the agency or applicant is not required to pay the tribe for providing its views."[98] Further, "[i]f the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process."[99] The guidance also states, however, that when a Tribal Nation "fulfills the role of a consultant or contractor" when conducting reviews, "the tribe would seem to be justified in requiring payment for its services, just as any other contractor," and the company or agency "should expect to pay for the work product."[100] As we explain below, we seek comment on how the ACHP's guidance can be applied in the context of our existing procedures and the proposals in this proceeding. Moreover, we seek comment on practices or procedures of other Federal agencies with respect to addressing the various roles a Tribal Nation may play in the Section 106 process and how to identify those services for which a Tribal Nation would be justified in seeking fees.

44. *Circumstances When Fees Are Requested.* The NPA requires applicants to make a reasonable and good faith effort to identify Tribal Nations and NHOs that may attach religious and cultural significance to historic properties affected by an undertaking, and this effort is commonly accomplished through the TCNS. Some Tribal Nations require the payment of a fee prior to performing even preliminary review of all or nearly all projects submitted to them via the TCNS.

45. The ACHP Handbook clearly states that no "portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any form of tribal involvement."[101] We note that ACHP guidance permits payments to a Tribal Nation when it fulfills a role similar to any other consultant or contractor. At what point in the TCNS process, if any, might a Tribal Nation act as a contractor or consultant?[102] We seek comment on any facts that might affect the answer to that question. Does the particular request of the applicant determine whether a Tribal Nation is acting as a contractor or

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[98] *See* ACHP, Fees in the Section 106 Review Process (2001), http://www.achp.gov/regs-fees.html (ACHP 2001 Fee Guidance).

[99] *Id.*

[100] *Id. See also* ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, at 13 (2012), http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf (ACHP 2012 Handbook) ("[No] portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any form of tribal involvement. However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods."). The ACHP 2012 Handbook also indicates that with respect to properties where the agency concludes that no historic properties are affected, Tribal concurrence in that decision is not required, though Tribal Nations and NHOs can state any objections to the ACHP, which if it agrees may provide its opinion to the agency. *See id.* at 23.

[101] ACHP 2012 Handbook at 13.

[102] *See* PTA-FLA Petition at 14 (asserting that the payment of fees for Tribal review should be prohibited).

consultant? For example, the ACHP Handbook notes that if an applicant asks for "specific information and documentation" from a Tribal Nation, then the Tribal Nation is being treated as a contractor or consultant.[103] Should we infer if the applicant does not ask explicitly for such information and documentation, then no payment is necessary? We also seek comment on whether Tribal review for some types of deployment is less in the nature of a contractor or consultant. For example, would collocations or applications to site poles in rights of way be less likely to require services outside of the Tribal Nation's statutory role? In reviewing TCNS submissions for collocations or for siting poles in rights of way, under what circumstances might a Tribal Nation incur research costs for which it or another contractor might reasonably expect compensation?

46. Once a Tribal Nation or NHO has been notified of a project, an applicant must provide "all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected" and provide the Tribal Nation or NHO with a reasonable opportunity to respond.[104] We seek comment on this requirement and on any modifications the Commission can and should make. In particular, we seek comment on whether the information in FCC Form 620 or FCC Form 621 is sufficient to meet the requirement that "all information reasonably necessary..." has been provided to the Tribal Nation. If not, are there modifications to these forms that would enable the Commission to meet this requirement? For example, should the FCC Form 620 and FCC Form 621 be amended to address the cultural resources report that an applicant prepares after completing a Field Survey?[105] Additionally, we seek comment on whether a Tribal Nation's or NHO's review of the materials an applicant provides under NPA Section VII is ever, and if so under what circumstances, the equivalent of asking the Tribal Nation or NHO to provide "specific information and documentation" like a contractor or consultant would, thereby entitling the Tribal Nation to seek compensation under ACHP guidance and the NPA. If a Tribal Nation chooses to conduct research, surveying, site visits or monitoring absent a request of the applicant, would such efforts require payment from the applicant? If an archaeological consultant conducted research, surveying, site visits, or monitoring absent a request of the applicant, would the applicant normally be required to pay that contractor or consultant? We seek comment on how the ACHP Handbook's statement that an "applicant is free to refuse [payment] just as it may refuse to pay for an archaeological consultant," as well as its statement that "the agency still retains the duties of obtaining the necessary information [to fulfill its Section 106 obligations] through reasonable methods," impacts our analysis of payments for Tribal participation.[106]

47. We note that some Tribal Nations have indicated that they assess a flat upfront fee for all applications as a way to recover costs for their review of all TCNS applications, thereby eliminating the administrative burden of calculating actual costs for each case. We seek comment on this manner of cost recovery and whether such cost recovery is consistent with ACHP's fee guidance in its 2012 Handbook.[107] Tribal Nations have also indicated that they have experienced difficulties in collecting compensation after providing service as a reason for upfront fee requests. We seek comment on whether this concern could be alleviated if we clarify when a Tribal Nation is acting under its statutory role and when it is being hired as a contractor or consultant under our process. We also seek comment on whether there might be a more appropriate way to address this concern.

48. What steps, if any, can the Commission take to issue our own guidance on the circumstances in our process when the Tribal Nation is expressing its views and no compensation by the

[103] ACHP 2012 Handbook at 13.

[104] NPA, § IV.F.

[105] *See id.* at § VI.D.2.

[106] ACHP 2012 Handbook at 13.

[107] *See id.*

agency or the applicant is required under ACHP guidance, and the circumstances where the Tribal Nation is acting in the role of a consultant or contractor and would be entitled to seek compensation? We seek comment on what bright-line test, if any, could be used. How does the reasonable and good faith standard for identification factor, if at all, into when a Tribal request for fees must be fulfilled in order to meet the standard? We seek comment on how disputes between the parties might be resolved when a Tribal Nation asserts that compensable effort is required to initiate or conclude Section 106 review. We seek comment on whether there are other mechanisms to reduce the need for case-by-case analysis of fee disputes. While we seek comment generally on our process, we also seek comment particularly in the context of deployment of infrastructure for advanced communications networks.

49. To the extent that supplementing current ACHP guidance would help clarify when Tribal fees may be appropriate while both facilitating efficient deployment and recognizing Tribal interests, what input, if any, should the Commission provide to the ACHP on potential modifications to ACHP guidance?

50. *Amount of Fees Requested.* One factor that appears to be driving tower owners and licensees to seek Commission guidance in the fee area is not the mere existence of fees, but instead the amount of compensation sought by some Tribal Nations. How, if at all, does the "reasonable and good faith" standard for identification factor into or temper the amount of fees a Tribal Nation may seek in compensation? Are there any extant fee rates or schedules that might be of particular use to applicants and Tribal Nations in avoiding or resolving disputes regarding the amount of fees?

51. One party has requested in a petition that the Commission establish a fee schedule or otherwise resolve fee disputes.[108] We seek comment on the legal framework applicable to this request. How might the impact of fee disputes on the deployment of infrastructure for advanced communications networks provide a basis for establishing a fee schedule in this context using the Communications Act as authority? Do the NHPA or other statutes limit our ability to establish such a fee schedule, and if so, how? How might the Miscellaneous Receipts Act (MRA)[109] and General Accountability Office (GAO) precedent on improper augmentation temper the parameters of our actions in the area?[110] We seek comment on whether other Federal agencies have established fee schedules or addressed the matter in any way, *e.g.*, either formally or informally or with respect to particular projects. How does due regard for Tribal sovereignty and the Government's treaty obligations affect our latitude for action in this area?

52. If we were to establish a fee schedule, we seek comment on what weight or impact it might have on our process. For example, to what extent would fees at or below the level established by a fee schedule be considered presumptively reasonable? We further seek comment on what legal framework would be relevant to resolution of disputes concerning an upward or downward departure from the fee schedule.[111] Should the fees specified in such a schedule serve as the presumptive maximum

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[108] *See,* PTA-FLA Petition at 14 (contending that "reviewing fees should be no more than $50 unless the tribe demonstrates that the review is exceptionally complex. In no event should the fee exceed $200").

[109] 31 U.S.C. § 3302(b).

[110] While a fee schedule or direction to make certain payments to a Tribal Nation would not directly involve money being received by the Commission, the GAO has explained both in the MRA context and in the context of improper augmentation that control over funds (who receives, who pays) is a significant part of its analysis. For example, directing a party to pay a fee that an agency might itself properly pay out of its appropriation can raise questions relating to both the MRA and improper augmentation of the agency's appropriation. *See* B-300248 (January 15, 2004) (Small Business Administration both violated the MRA and improperly augmented its appropriation by having parties pay fees to a third party instead of using its appropriation to fund the activity).

[111] We observe that around the time the NPA was completed, the Commission and the United South and Eastern Tribes (USET) agreed to Voluntary Best Practices to promote cooperation between the Commission's applicants and USET's members. USET appended to the Best Practices a model cost recovery schedule that it stated was intended solely to cover Tribal costs. Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act (Oct. 25, 2004). The cost

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an applicant would be expected to pay, and under what circumstances might an upward departure from the fee schedule be appropriate? In addition to the concepts cited in the prior paragraph, are there other legal principles at play in the resolution of a dispute over a fee that might not arise in the context of merely setting a fee schedule? Have any other Federal agencies formally or informally resolved fee disputes between applicants and Tribal Nations, and if so, under what legal parameters? We also seek comment on what categories of services should be included, and whether the categories should be general or more specific. How would we establish the appropriate level for fees? How could a fee schedule take into account both regional differences and changes in costs over time, *i.e.*, inflation?[112] We also seek comment on whether the Commission should only establish a model fee schedule and whether that would be consistent with the Tribal engagement requirements contemplated by Section 106.

53. *Geographic Areas of Interest.* Tribal Nations have increased their areas of interest within the TCNS as they have improved their understanding of their history and cultural heritage. As a result, applicants must sometimes contact upwards of 30 different Tribal Nations and complete the Section 106 process with each of them before being able to build their project. We seek comment on whether there are actions the Commission can and should take to mitigate this burden while complying with our obligation under the NHPA and promoting the interests of all stakeholders. For example, the TCNS allows Tribal Nations and NHOs to select areas of interest at either a State or county level, but many Tribal Nations have asked to be notified of any project within entire States, and in a few instances, at least 20 different States. We seek comment on whether we could and should encourage, or require, the specification of areas of interest by county. We also seek comment on whether we should require some form of certification for areas of interest, and if so, what would be the default if a Tribal Nation fails to provide such certification.[113]

54. We seek comment on whether TCNS should be modified to retain information on areas where concerns were raised and reviews conducted, so that the next filer knows whether there is a concern about cultural resources in that area or not. To what extent should applicants be able to rely on prior clearances, given that resources may continue to be added to the lists of historic properties? To the extent we consider allowing applicants to rely on prior clearances, how should we accommodate Tribal Nations' changes to their areas of interest? We further seek comment on how the Commission can protect information connected to prior site reviews, especially those areas where a tower was not cleared because there may be artifacts. We also seek comment on whether the Commission can make any other changes to TCNS or our procedures to improve the Tribal review process.

55. In addition, applicants routinely receive similar requests for compensation or compensable services from multiple Tribal Nations. While we recognize that each Tribal Nation is sovereign and may have different concerns, we seek comment on when it is necessary for an applicant to compensate multiple Tribal Nations for the same project or for the same activity related to that project, in particular site monitoring during construction. We also seek comment on whether, when multiple Tribal Nations request compensation to participate in the identification of Tribal historic properties of religious and cultural significance, whether there are mechanisms to gain efficiencies to ensure that duplicative

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recovery schedule indicated that there should be no charge for identification of potentially interested Tribal Nations and for the initial contact, but that charges for review of survey material and site visitation would range between $300 and $500, as appropriate to recover the Tribal Nation's costs and accounting for regional differences. *See id.* at Attachment, "USET Model Explanatory Cost Recovery Schedule." We are unaware that any USET Member Tribe (or other Tribal Nation) ever formally adopted the model cost recovery schedule.

[112] We note that the fee ranges found in the Cost Recovery Schedule associated with the USET Voluntary Best Practices are now 13 years old.

[113] *See, e.g.,* PTA-FLA Petition at 14-15 (proposing a requirement for Tribal Nations to "identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact on tribal grounds").

review is not conducted by each Tribal Nation. Is it always necessary to obtain such services from all responding Tribal Nations that request to provide the service, and if so, why? Might one Tribal Nation when functioning in the role of a contractor perform certain services and share the work product with other Tribal Nations, *e.g.*, site monitoring? Could an applicant hire a qualified independent site monitor and share its work product with all Tribal Nations that are interested? How would we ensure that such a monitor is qualified so that other Tribal Nations' interests will be adequately considered? Should we require that such a monitor meet some established minimum standards? We also seek comment on whether monitors should be required to prepare a written report and provide a copy to applicants.

56. *Remedies and Dispute Resolution*. While the ACHP has indicated that Tribal concurrence is not necessary to find that no historic properties of religious and cultural significance to Tribal Nations or NHOs would be affected by an undertaking,[114] the agency is responsible for getting the information necessary to make that determination.[115] We seek comment on how these two directives interact. The ACHP 2001 Fee Guidance states that "if an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward."[116] We seek comment on whether and under what circumstances the Commission should authorize a project to proceed when a Tribal Nation refuses to respond to a Section 106 submittal without payment.

57. Under the NPA, when a Tribal Nation or NHO refuses to comment on the presence or absence of effects to historic properties without compensation, the applicant can refer the procedural disagreement to the Commission.[117] We seek comment on whether the Commission can adjudicate these referrals by evaluating whether the threshold of "reasonable and good faith effort" to identify historic properties has been met, given that the Tribal Nation can always request government-to-government consultation in the event of disagreement.

58. We seek comment on when the Commission must engage in government-to-government consultation to resolve fee disputes, including when the compensation level for an identification activity has been established by a Tribal government.

59. *Negotiated Alternative*. We note that since September 2016, the Commission has been facilitating meetings among Tribal and industry stakeholders with the goal of resolving challenges to Tribal requirements in the Section 106 review process, including disagreements over Tribal fees.[118] We seek comment on whether the Commission should continue seeking to develop consensus principles and, if so, how those principles should be reflected in practice. For example, we seek comment on whether we should seek to enter into agreements regarding best practices with Tribal Nations and their representatives.

(ii) Other NHPA Process Issues

60. *Lack of Response*. As discussed above, while both SHPOs and Tribal Nations/NHOs are expected ordinarily to respond to contacts within 30 days, the NPA and the Commission's practice establish different processes to be followed when responses are not timely.[119] We seek comment on what measures, if any, we should take to further speed either of these review processes, either by amending the NPA or otherwise, while assuring that potential effects on historic preservation are fully evaluated. What

[114] *See* ACHP 2012 Handbook at 23. *See also* 36 CFR § 800.4.

[115] *See* 36 CFR § 800.4 (imposing the requirement to identify historic properties on "the agency").

[116] *See* ACHP 2001 Fee Guidance.

[117] *See* NPA, § IV.G.

[118] *See id.* at § IV.J ("the Commission will use its best efforts to arrive at agreements regarding best practices with Indian tribes and NHOs and their representatives").

[119] *See* Section II.B.1, *supra.*

effect would such proposals have on addressing Section 106-associated delays to deployment? Should different time limits apply to different categories of construction, such as new towers, DAS and small cells, and collocations? Have advances in communications during the past decade, particularly with respect to communications via the Internet, changed reasonable expectations as to timeliness of responses and reasonable efforts to follow up?

61. With respect to Tribal Nations and NHOs, we seek comment on whether the processes established by the *2005 Declaratory Ruling* and the Good Faith Protocol adequately ensure the completion of Section 106 review when a Tribal Nation or NHO is non-responsive.[120] We seek comment on whether the process can be revised in a manner that would permit applicants to self-certify their compliance with our Section 106 process and therefore proceed once they meet our notification requirements, without requiring Commission involvement, in a manner analogous to the "deemed granted" remedy for local governments.[121] Would such an approach be consistent with the NPA and with the Commission's legal obligations? We note that Commission staff has discovered on numerous occasions that applicants have failed to perform their Tribal notifications as our processes require. If we were to permit applicants to self-certify that they have completed their Tribal notification obligations, we seek comment on how we could ensure that the certifications are truthful and well-founded.

62. *Batching*. In the PTC Program Comment,[122] the ACHP established a streamlined process for certain facilities associated with building out the Positive Train Control (PTC) railroad safety system. Among other aspects of the PTC Program Comment, eligible facilities may be submitted to SHPOs and through TCNS in batches.[123]

63. We seek comment on whether we should adopt either a voluntary or mandatory batched submission process for non-PTC facilities. What benefits could be realized through the use of batching? What lessons can be learned from the experience with PTC batching? What guidelines should we provide, if any, regarding the number of facilities to be included in a batch, their geographic proximity, or the size of eligible facilities? Should there be other conditions on eligibility, such as the nature of the location or the extent of ground disturbance? Should different time limits or fee guidelines, if any are adopted, apply to batched submissions? What changes to our current TCNS and E-106 forms and processes might facilitate batching? We seek comment on these and any other policy or operational issues associated with batching of proposed constructions.

64. *Other NHPA Process Reforms*. We seek comment on whether there are additional procedural changes that we should consider to improve the Section 106 review process in a manner that does not compromise its integrity.

(iii) NEPA Process

65. We seek comment on ways to improve and further streamline our environmental compliance regulations while ensuring we meet our NEPA obligations. For example, should we consider new categorical exclusions for small cells and DAS facilities? If so, under what conditions and on what basis? Should we revise the Commission's rules so that an EA is not required for siting in a floodplain[124]

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[120] *See id.*

[121] *See* Section II.A.1, *supra*.

[122] *See Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, WT Docket 13-240, Public Notice, 29 FCC Rcd 5340, Attachment (WTB 2014) (PTC Program Comment).

[123] *See id.* at § VII.A. *See also* Batching Guidance for TCNS and E106 Submissions Under the Positive Train Control Program Comment (rev. Dec. 19, 2014), http://wireless.fcc.gov/ptc/Batching_Guidance_121914.pdf.

[124] For more information on floodplain definitions and management, see Executive Order 11988 as amended by Executive Order 13690 and accompanying guidance, Guidelines for Implementing Executive Order 11988,

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when appropriate engineering or mitigation requirements have been met?[125] Are there other measures we could take to reduce unnecessary processing burdens consistent with NEPA?

c. NHPA Exclusions for Small Facilities

66. As part of our effort to expedite further the process for deployment of wireless facilities, including small facility deployments in particular, we seek comment below on whether we should expand the categories of undertakings that are excluded from Section 106 review. With respect to each of the potential exclusions discussed below, we seek comment on the alternatives of adopting additional exclusions directly in our rules, or incorporating into our rules a program alternative pursuant to the ACHP rules. The Commission may exclude activities from Section 106 review through rulemaking upon determining that they have no potential to cause effects to historic properties, assuming such properties are present.[126] Where potential effects are foreseeable and likely to be minimal or not adverse, a program alternative under the ACHP's rules may be used to exclude activities from Section 106 review.[127] We seek comment about whether the exclusions discussed below meet the test for an exclusion in 36 CFR § 800.3(a)(1) or whether they would require a program alternative. To the extent that a program alternative would be necessary, we seek comment on which of the program alternatives authorized under the ACHP's rules would be appropriate.[128] Particularly, for those potential exclusions where a program alternative would be required, commenters should discuss whether a new program alternative is necessary or whether an amendment to the NPA or a second amendment to the Collocation NPA would be the appropriate procedural mechanism.

(i) Pole Replacements

67. We seek comment on whether the Commission should take further measures to tailor Section 106 review for pole replacements. As noted above, wireless companies are increasingly deploying new infrastructure using smaller antennas and supporting structures, including poles. Under the existing NPA, pole replacements are excluded from Section 106 review if the pole being replaced meets the definition of a "tower" under the NPA (constructed for the sole or primary purpose of supporting Commission-authorized antennas), provided that the pole being replaced went through Section 106 review.[129] The NPA also more generally excludes construction in or near communications or utility rights of way, including pole replacements, with certain limitations. In particular, the construction is excluded if the facility does not constitute a substantial increase in size over nearby structures and it is not within the boundaries of a historic property. However, proposed facilities subject to this exclusion must complete the process of Tribal and NHO participation pursuant to the NPA.[130]

68. We seek comment on whether additional steps to tailor Section 106 review for pole replacements would help serve our objective of facilitating wireless facility siting, while creating no or foreseeably minimal potential for adverse impacts to historic properties. For example, should the

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Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (October 8, 2015).

[125] *See, e.g.,* Verizon Comments, WT Docket No. 16-241, at 38-39.

[126] 36 CFR § 800.3(a)(1). Based on its authority under Section 800.3(a)(1), the Commission has established targeted unilateral exclusions from historic preservation review requirements for certain small facility collocations on utility structures and on buildings and other non-tower structures, provided they meet certain specified criteria. *2014 Infrastructure Order*, 29 FCC Rcd at 12901-12, paras. 76-103.

[127] 36 CFR § 800.14(c).

[128] 36 CFR § 800.14.

[129] NPA, § III.B; *see also* § II.A.14 (definition of "Tower").

[130] NPA § III.E. "Substantial increase in size" is defined by reference to Section I.E of the Collocation NPA.

replacement of poles be excluded from Section 106 review, regardless of whether a pole is located in a historic district, provided that the replacement pole is not "substantially larger" than the pole it is replacing (as defined in the NPA)? We envision that this proposed exclusion could address replacements for poles that were constructed for a purpose other than supporting antennas, and thus are not "towers" within the NPA definition, but that also have (or will have) an antenna attached to them. This exclusion would also apply to pole replacements within rights of way, regardless of whether such replacements are in historic districts. We seek comment on this proposal and on whether any additional conditions would be appropriate. For example, consistent with the existing exclusion for replacement towers, commenters should discuss whether the exclusion should be limited 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. How would the "leased or owned property" be defined within a utility right of way that may extend in a linear manner for miles?

(ii) Rights of Way

69. We seek comment on whether to expand the NPA exemption from Section 106 review for construction of wireless facilities in rights of way. First, as noted above, current provisions of the NPA exclude from Section 106 review construction in utility and communications rights of way subject to certain limitations.[131] We seek comment on whether to adopt a similar exclusion from Section 106 review for construction or collocation of communications infrastructure in transportation rights of way and whether such an exclusion would be warranted under 36 CFR § 800.3(a)(1). We recognize the Commission's previous determination in the *NPA Order* that, given the concentration of historic properties near many highways and railroads, it was not feasible to draft an exclusion for transportation corridors that would both significantly ease the burdens of the Section 106 process and sufficiently protect historic properties.[132] The Commission also recognized, however, that transportation corridors are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest.[133]

70. In addition, since the *NPA Order*, wireless technologies have evolved and many wireless providers now deploy networks that use smaller antennas and compact radio equipment, including DAS and small cell systems. In view of the changed circumstances that are present today, we find that it is appropriate to reconsider whether we can exclude construction of wireless facilities in transportation rights of way in a manner that guards against potential effects on historic properties. We seek comment on whether such an exclusion should be adopted, subject to certain conditions that would protect historic properties, and, if so, what those conditions should be. For example, should we require that poles be installed by auguring or that cable or fiber be installed by plow or by directional drilling? What stipulations are needed if a deployment may be adjacent to or on National Register-eligible or listed buildings or structures, or in or near a historic district? Would it be appropriate to have any limitation on height, in addition to the requirement in the current rights of way exclusion that the structures not constitute a substantial increase in size over existing nearby structures? How should any new exclusion address Tribal and NHO participation, especially for historic properties with archaeological components?[134] We also seek comment on how to define the boundaries of a transportation right of way for these purposes.

71. In addition to considering whether to adopt an exclusion for construction in transportation rights of way, we also seek comment on whether to amend the current right of way exclusion to apply

[131] NPA, § III.E.

[132] *NPA Order*, 20 FCC Rcd at 1097, para. 62.

[133] *Id.*

[134] In its Petition for Declaratory Ruling, PTA-FLA argues that sites falling within designated utility or highway rights of way should be excluded from Tribal review. *See* PTA-FLA Petition at 16.

regardless of whether the right of way is located on a historic property. As noted above, the current right of way exclusion applies only if (1) the construction does not involve a substantial increase in size over nearby structures and (2) the deployment would not be located within the boundaries of a historic property.[135] We seek comment on whether this provision should be amended to exclude from Section 106 review construction of a wireless facility in a utility or communications right of way located on a historic property, provided that the facility would not constitute a substantial increase in size over existing structures. To the extent that utility and communications rights of way on historic properties already are lined with utility poles and other infrastructure, would allowing additional infrastructure have the potential to create effects? Commenters should discuss whether, if the exclusion is extended to historic properties, any additional conditions would be appropriate to address concerns about potential effects, for example any further limitation on ground disturbance.[136] If so, how should ground disturbance be defined?[137] We also seek comment about whether Tribal and NHO participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties.

(iii) Collocations

72. Next, we seek comment on options to further tailor our review of collocations of wireless antennas and associated equipment. The Commission's rules have long excluded most collocations of antennas from Section 106 review, recognizing the benefits to historic properties that accrue from using existing support structures rather than building new structures. The Commission has also recently expanded these exclusions in the First Amendment to the Collocation NPA to account for the smaller infrastructure associated with new technologies. We seek comment now on whether additional measures to further streamline review of collocations are appropriate, whether as a matter of 36 CFR § 800.3(a)(1) or under program alternatives, including those discussed below and any other alternatives.

73. First, we seek comment on whether some or all collocations located between 50 and 250 feet from historic districts should be excluded from Section 106 review. Under current provisions in the Collocation NPA, Section 106 review continues to be required for collocations on buildings and other non-tower structures located within 250 feet of the boundary of a historic district to the extent those collocations do not meet the criteria established for small wireless antennas.[138] We seek comment on whether this provision should be revised to exclude from Section 106 review collocations located up to 50 feet from the boundary of a historic district. We seek comment on this proposal and on whether any additional criteria should apply to an exclusion under these circumstances.

74. Next, we seek comment on the participation of Tribal Nations and NHOs in the review of collocations on historic properties or in or near historic districts. Although, as stated above, the Collocation NPA excludes most antenna collocations from routine historic preservation review under Section 106, collocations on historic properties or in or near historic districts are generally not excluded,[139] and in these cases, the NPA provisions for Tribal and NHO participation continue to apply.

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[135] NPA, § III.E.

[136] The existing definition of "substantial increase in size" prevents excavation outside the current tower site. Collocation NPA, § I.E.

[137] *See, e.g.,* Collocation NPA, § VI.A.6 (limiting application of small antenna exclusion to where the "depth and width of any proposed collocation does not exceeds the depth and width of any previous ground disturbance (including footings and other anchoring mechanisms)," with an exception for up to four lightning rods).

[138] Collocation NPA, § V.A.2.

[139] Collocations on structures located on historic properties or in historic districts are excluded from Section 106 review in certain circumstances. The 2016 Amendments to the Collocation Agreement created exclusions from Section 106 review for small or minimally visible wireless antennas and associated equipment on structures in historic districts or on historic properties and replacements of small wireless antennas and associated equipment. Collocation NPA, §§ VII.A, B, C, VIII.

Consistent with our effort in this NPRM to take a fresh look at ways to improve and facilitate the review process for wireless facility deployments, we seek comment on whether to exclude from the NPA procedures for Tribal and NHO participation collocations that are subject to Section 106 review solely because they are on historic properties or in or near historic districts, other than properties or districts identified in the National Register listing or determination of eligibility as having Tribal significance. For instance, should we exclude from review non-substantial collocations on existing structures involving no ground disturbance or no new ground disturbance, or non-substantial collocations on new structures in urban rights of way or indoors? Should we exclude from the NPA provisions for Tribal and NHO participation collocations of facilities on new structures in municipal rights of way in urban areas that involve no new ground disturbance and no substantial increase in size over other structures in the right of way? Should we exclude collocations of facilities on new structures in industrial zones or facilities on new structures in or within 50 feet of existing utility rights of way? Commenters should discuss whether collocations in these circumstances have the potential to cause effects on properties significant to Tribal history or culture. If so, are any effects likely to be minimal or not adverse? Does the likelihood of adverse effects depend on the circumstances of the collocation, for example whether it will cause new ground disturbance?[140] We also seek comment on alternatives to streamline procedures for Tribal and NHO participation in these cases, for example different guidance on fees or deeming a Tribal Nation or NHO to have no interest if it does not respond to a notification within a specified period of time.

75. Finally, we seek comment on whether we can or should exclude from routine historic preservation review certain collocations that have received local approval. In particular, one possibility would be to exclude a collocation from Section 106 review, regardless of whether it is located on a historic property or in or near a historic district, provided that: (1) the proposed collocation has been reviewed and approved by a Certified Local Government[141] that has jurisdiction over the project; or (2) the collocation has received approval, in the form of a Certificate of Appropriateness[142] or other similar formal approval, from a local historic preservation review body that has reviewed the project pursuant to the standards set forth in a local preservation ordinance and has found that the proposed work is appropriate for the historic structure or district. By eliminating the need to go through historic preservation review at both local and Federal levels, creating an exclusion for collocations under these circumstances might create significant efficiencies in the historic preservation review process. We seek comment on this option and on any alternatives, including whether any additional conditions should apply and whether the process for engaging Tribal Nations and NHOs for these collocations should continue to be required.

d. Scope of Undertaking and Action

76. We also invite comment on whether we should revisit the Commission's interpretation of the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. In the *Pre-Construction Review Order*, the Commission retained a limited approval authority over facility construction to ensure environmental compliance in services that no longer generally require construction permits.[143] In light of the evolution of technology in the last 27 years and the corresponding changes in the nature and extent of wireless infrastructure deployment, we seek comment on whether this

[140] For example, in its Petition for Declaratory Ruling, PTA-FLA contends that constructions on sites that will have no effect on Tribal burial grounds, including sites which have been previously disturbed, should be exempted from Tribal review. *See* PTA-FLA Petition at 16.

[141] A "Certified Local Government" is a local government whose local historic preservation program is certified under Chapter 3025 of the National Historic Preservation Act. *See* 54 U.S.C. §§ 300302, 302501 *et seq.*

[142] A "Certificate of Appropriateness" is an authorization from a local government allowing construction or modification of buildings or structures in a historic district.

[143] *Pre-Construction Review Order*, 5 FCC Rcd at 2943, paras. 9-11; *see also CTIA – The Wireless Association v. FCC*, 446 F.3d at 115 (holding that this interpretation was not arbitrary and capricious).

retention of authority is required and, if not, whether and how it should be adjusted. Commenters should address the costs of NEPA and NHPA compliance and its utility for environmental protection and historic preservation for different classes of facilities, as well as the extent of the Commission's responsibility to consider the effects of construction associated with the provision of licensed services under governing regulations and judicial precedent.[144] For example, should facilities constructed under site-specific licenses be distinguished from those constructed under geographic area licenses? Can we distinguish DAS and small cell facilities from larger structures for purposes of defining what constitutes the Commission's action or undertaking, and on what basis?[145] Should review be required only when an EA triggering condition is met, as PTA-FLA suggests, and if so how would the licensee or applicant determine whether an EA is required in the absence of mandatory review?[146] To the extent there is a policy basis for distinguishing among different types of facilities, would exclusions from or modifications to the NEPA and/or NHPA review processes be a more appropriate tool to reflect these differences? Are the standards for defining the scope of our undertaking or major Federal action different under the NHPA than under NEPA? We also invite comment on whether to revisit the Commission's determination that registration of antenna structures constitutes the Commission's Federal action and undertaking so as to require environmental and historic preservation review of the registered towers' construction.[147]

77. In addition, since our environmental rules were adopted, an industry has grown of non-licensees that are in the business of owning and managing communications sites, so that most commercial wireless towers and even smaller communications support structures are now owned from the time of their construction by non-licensees. We seek comment on how this business model affects our environmental and historic preservation compliance regime. For example, how does the requirement to perform environmental and historic preservation review prior to construction apply when the licensee is not the tower owner? If the tower is built pursuant to a contract or other understanding with a collocator, what marketplace or other effects would result from interpreting the environmental obligation to apply to the licensee? What about cases where there is no such agreement or understanding? Does the requirement in the Collocation NPA to perform review for collocations on towers that did not themselves complete Section 106 review create problems in administration or market distortions where the owner of the underlying tower may not have been subject to our rules at the time of construction?[148] We invite comment on these and any related questions.

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[144] *See, e.g.,* 40 CFR § 1508.8 (providing that "significant effects" under NEPA include indirect effects that are "caused by the action and are later in time or [more distant but] still reasonably foreseeable"); 36 CFR § 800.5(a)(1) (providing that under the NHPA, effects to be considered include "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative"); 40 CFR § 1502.4(a) (forbidding segmentation of an action into its component parts to obviate NEPA review).

[145] *See* CTIA Comments, WT Docket No. 16-421, at 47; *but see 2014 Infrastructure Order*, 29 FCC Rcd at 12903-4, para. 83 (finding no basis to draw this distinction with respect to NHPA undertakings).

[146] *See* PTA-FLA Petition at 13 (requesting ruling "that site construction by non-licensees and/or licensees where neither FCC registration nor a Section 1.1308 environmental assessment by the Commission is required do not constitute a federal undertaking and therefore are not subject to the Section 106 process"); *id.* at 9-13 (argument supporting this interpretation).

[147] *Streamlining the Commission's Antenna Structure Clearance Procedure; Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, Report and Order, 11 FCC Rcd 4272, 4289, para. 41 (1995); *see, e.g., Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508 (4th Cir. 1992) (finding that FERC's certification of an incinerator was a ministerial action and not a major Federal action or undertaking where FERC had no discretion to deny certification or to consider environmental values).

[148] Collocation NPA, § IV.A.1.

3. Collocations on Twilight Towers

78. Section 1.1307(a)(4) of the Commission's rules directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the ACHP's rules as modified by the Collocation NPA and the NPA, two programmatic agreements that took effect in 2001 and 2005 respectively.[149] Under the Collocation NPA, collocations on towers constructed on or before March 16, 2001 are generally excluded from routine historic preservation review regardless of whether the underlying tower has undergone Section 106 review.[150] The Collocation NPA provides that collocations on towers constructed after March 16, 2001, by contrast, are excluded from historic preservation review only if the Section 106 review process for the underlying tower and any associated environmental reviews has been completed.[151] The NPA, which became effective on March 7, 2005, establishes detailed procedures for reviewing the effects of communications towers on historic properties.

79. There are a large number of towers that were built between the adoption of the Collocation NPA in 2001 and when the NPA became effective in 2005 that either did not complete Section 106 review or for which documentation of Section 106 review is unavailable. These towers are often referred to as "Twilight Towers." Although during this time the Commission's environmental rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties,[152] the text of the rule did not at that time require parties to perform this evaluation by following the ACHP's rules or any other particular process. Thus, some in the industry have argued that, prior to the NPA, it was unclear whether the Commission's rules required consultation with the relevant SHPO and/or THPO, Tribal engagement, or any other procedures, and that this uncertainty was the reason why many towers built during this period did not go through the clearance process.[153] Because the successful completion of the Section 106 process is a predicate to the exclusion from review of collocations on towers completed after March 16, 2001, licensees cannot collocate on these Twilight Towers unless either each collocation completes Section 106 review or the underlying tower goes through an individual post-construction review process.

80. The Commission has worked with stakeholders in an effort to develop a programmatic solution that would allow Twilight Towers more readily to be used for collocations.[154] Most recently, in

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[149] *See* 47 CFR § 1.1307(a)(4).

[150] Collocation NPA, § III. Collocations on towers constructed on or before March 16, 2001 are excluded from Section 106 review unless (1) the mounting of the antenna will result in a substantial increase in size of the tower; or (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; or (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a SHPO or the ACHP, that the collocation has an adverse effect on one or more historic properties.

[151] Collocation NPA, § IV.

[152] *See* 47 CFR 1.1307(a)(4) (2004) (requiring EA if facility may affect property listed or eligible for listing in the National Register of Historic Places).

[153] *See, e.g.*, Letter from Brian M. Josef, Ass't Vice Pres. Reg. Affairs, CTIA and D. Zachary Champ, Dir. Gov't. Affairs, PCIA-The Wireless Infrastructure Assoc. to Chad Breckinridge, Assoc. Chief, Wireless Telecommunications Bureau (filed Feb. 19, 2016) at 3-4 (CTIA/PCIA Feb. 19th Letter); *but see* "Fact Sheet, Antenna Collocation Programmatic Agreement," Public Notice, 17 FCC Rcd 508, 511 (2002) ("this evaluation process includes consultation with the relevant [SHPO] and/or [THPO], as well as compliance with other procedures set out in the ACHP rules, 36 C.F.R. Part 800, Subpart B").

[154] *See, e.g.,* CTIA/PCIA Feb. 19th Letter; Email from Jennifer Sigler, Tribal Archaeologist, Eastern Shawnee Tribe of Oklahoma, to January2016TowerMtg@fcc.gov (Feb. 12, 2016); Email from Jan Biella, Pilar Cannizzaro, and Andy Wakefield, New Mexico Historic Preservation Division, to January2016TowerMtg@fcc.gov (Feb. 18, 2016).

August 2016, WTB circulated for discussion a draft term sheet (2016 Twilight Towers Draft Term Sheet) outlining a potential streamlined process for Twilight Towers to complete individual review.[155]

81. We seek comment on steps the Commission should take to develop a definitive solution for the Twilight Towers issue. As we undertake this process, our goal remains to develop a solution that will allow Twilight Towers to be used for collocations while respecting the integrity of the Section 106 process. Facilitating collocations on these towers will serve the public interest by making additional infrastructure available for wireless broadband services and the FirstNet public safety broadband network.[156] Moreover, facilitating collocations on existing towers will reduce the need for new towers, lessening the impact of new construction on the environment and on locations with historical and cultural significance.

82. In particular, we seek comment on whether to treat collocations on towers built between March 16, 2001 and March 7, 2005 that did not go through Section 106 historic preservation review in the same manner as collocations on towers built prior to March 16, 2001 that did not go through review. Under this approach, collocations on such towers would generally be excluded from Section 106 historic preservation review, subject to the same exceptions that currently apply for collocations on towers built on or prior to March 16, 2001, *i.e.*, collocations would be excluded from Section 106 review unless (1) the mounting of the antenna will result in a substantial increase in size of the tower; (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a SHPO or the ACHP that the collocation has an adverse effect on one or more historic properties.[157] We seek comment on whether allowing collocations without individual Section 106 review in these circumstances would rapidly make available a significant amount of additional infrastructure to support wireless broadband deployment without adverse impacts. In particular, we note that the vast majority of towers that have been reviewed under the NPA have had no adverse effects on historic properties, and we are aware of no reason to believe that Twilight Towers are any different in that regard. Moreover, these towers have been standing for 12 years or more and, in the vast majority of cases, no adverse effects have been brought to our attention.

83. Although we seek comment on such an approach, we are mindful of the concerns that have been expressed by Tribal Nations and SHPOs throughout the discussions on this matter that simply allowing collocations to proceed would not permit review in those cases where an underlying tower may have undetermined adverse effects. In particular, Tribal Nations have expressed concern that some of the towers that were constructed between 2001 and 2005 may have effects on properties of religious and cultural significance that have not been noticed because their people are far removed from their traditional homelands. We seek comment on these concerns. As an initial matter, we seek comment on our underlying assumption regarding the likelihood that Twilight Towers had in their construction or continue to have adverse effects that have not been noted. To the extent such effects exist, what is the likelihood

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[155] *See* National Association of Tribal Historic Preservation Officers, http://nathpo.org/wp/wp-content/uploads/2016/08/Twilight-Towers-Discussion-Draft-Term-Sheet-081916.pdf. The term sheet proposed for discussion a process that would include identification of Twilight Towers by their owners, limits on the number of towers each owner may submit for review per month, deadlines for submission to be set by the Commission, review fees consistent with customary practices subject to adjustment to reflect the circumstances of Twilight Tower review, a 60-day review deadline, and a dispute resolution process.

[156] *See* 47 U.S.C. § 1426(c)(3) (providing that "the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure").

[157] Collocation NPA, § III.

that they could be mitigated, and what is the likelihood that a new collocation would exacerbate those effects?[158]

84. We further seek comment on any alternative approaches. For example, should we consider a tower-by-tower process under which proposed collocations on Twilight Towers would trigger a streamlined, time-limited individual review, along the lines of the process discussed in the 2016 Twilight Towers draft term sheet?[159] If the Commission were to adopt such an approach, what elements should be included? For example, some in the industry have recommended a tower-by-tower approach that is voluntary and allows tower owners to submit a tower for review as market conditions justify, involves same processes and systems that are used for new and modified towers, asks ACHP to direct SHPOs and THPOs to submit prompt comments on such towers, and imposes no monetary penalty on tower owners.[160] We seek comment on whether to adopt this approach. Should towers be categorized, such that, for example, public safety towers receive priority for streamlined review? Alternatively, to what extent are there existing processes that function efficiently to allow collocations on Twilight Towers? Generally, given what we say above about the text of our rule, we do not anticipate taking any enforcement action or imposing any penalties based on good faith deployment during the Twilight Tower period.

85. We also seek comment on the procedural vehicle through which any solution should be implemented. Would permitting collocation on Twilight Towers require either an amendment to the Collocation NPA or another program alternative under 36 CFR § 800.14(b)? Is one form of program alternative preferable to another, and if so, why? If we were to pursue a streamlined or other alternative review procedure, would that require an amendment to the Collocation NPA or other program alternative?[161]

4. Collocations on Other Non-Compliant Towers

86. Finally, we invite comment on whether we should take any measures, and if so what, to facilitate collocations on non-compliant towers constructed after March 7, 2005. We note that unlike in the case of the Twilight Towers, the rules in effect when these towers were constructed explicitly required compliance with the review procedures set forth in the NPA. We invite commenters to propose procedures, including review processes, time frames, criteria for eligibility, and other measures, to address any or all of these towers.

III. NOTICE OF INQUIRY

87. In Sections 253 and 332(c)(7) of the Act, Congress codified its intent to streamline regulations that might otherwise slow down the deployment of broadband facilities, while balancing this goal against the long-standing and important role that State and local authorities play with respect to land-use decisions. In this section, we examine and seek comment on the scope of these statutory provisions and any new or updated guidance or determinations the Commission should provide pursuant to its authority under those provisions, including through the issuance of a Declaratory Ruling.

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[158] The premise of the Collocation NPA is that collocations falling within its terms are unlikely to adversely affect historic properties. *See* Collocation NPA, para. 8 ("Whereas, the parties hereto agree that the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse . . . .").

[159] *See* National Association of Tribal Historic Preservation Officers, http://nathpo.org/wp/wp-content/uploads/2016/08/Twilight-Towers-Discussion-Draft-Term-Sheet-081916.pdf.

[160] CTIA/PCIA Feb. 19th Letter at 6-7.

[161] *See* 36 CFR § 800.2(a) (requiring Federal agencies to perform Section 106 review pursuant to either Subpart B of the ACHP's rules or a valid program alternative).

A. Intersection of Sections 253(a) and 332(c)(7)

88. We start our examination with the relevant statutory terms. Sections 253 and 332(c)(7) of the Act contain very similar language addressing State and local regulations. Section 253(a) says that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[162] Section 332(c)(7) generally preserves State and local governments' "authority . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities,"[163] but provides that their "regulation of [such activities] . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[164] Section 332(c)(7) imposes additional limitations as well, stating that State or local regulation of facility siting "shall not unreasonably discriminate among providers of functionally equivalent services";[165] that State and local governments must act on siting requests "within a reasonable period of time";[166] that any decision to deny a siting request "shall be in writing and supported by substantial evidence contained in a written record";[167] and that State and local governments may not regulate wireless facility siting based on the environmental effects of radiofrequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.[168]

89. Both Section 253(a) and Section 332(c)(7) ban State or local regulations that "prohibit or have the effect of prohibiting" service.[169] Both sections also proscribe State and local restrictions that unreasonably discriminate among service providers.[170] These sections thus appear to impose the same substantive obligations on State and local governments, though the remedies provided under each are different. There are court decisions holding that "the legal standard is the same under either [Section 253 or 332(c)(7)]," and that there is "nothing suggesting that Congress intended a different meaning of the text 'prohibit or have the effect of prohibiting' in the two statutory provisions, enacted at the same time, in the same statute."[171] We seek comment on whether there is any reason to conclude that the substantive obligations of these two provisions differ, and if so in what way. Do they apply the same standards in the same or similar situations? Do they impose different standards in different situations? We invite commenters to explain how and why. We also seek comment on the interaction between Sections 253 and 332(c)(7). For instance, if a locality exceeds its authority over access to rights of way by denying (or failing to act on) a wireless facility siting application in a manner that effectively prohibits the provision of wireless telecommunications service, does the locality violate not only Sections 253(a) and (c), but also Section 332(c)(7)? Similarly, does a locality that violates Section 332(c)(7) by failing to act within a reasonable time also violate Section 253(a) if its failure to act effectively prohibits the provision of telecommunications service?

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[162] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[163] *Id.* § 332(c)(7)(A).

[164] *Id.* § 332(c)(7)(B)(i)(II).

[165] *Id.* § 332(c)(7)(B)(i)(I).

[166] *Id.* § 332(c)(7)(B)(ii).

[167] *Id.* § 332(c)(7)(B)(iii).

[168] *Id.* § 332(c)(7)(B)(iv).

[169] *Id.* §§ 253(a), 332(c)(7)(B)(i)(II).

[170] *Compare* 47 U.S.C. § 332(c)(7)(B)(i)(I) *with* 47 U.S.C. § 253(b) & (c) (specifying categories of State and local legal requirements that may be preempted unless they are "competitively neutral" and "nondiscriminatory").

[171] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (en banc); *see also T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 991-93 (9th Cir. 2009).

B. "Prohibit or Have the Effect of Prohibiting"

90. In interpreting the phrase "prohibit or have the effect of prohibiting," the Commission has made clear that Section 253(a) "proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality,"[172] and, similarly, that under Section 332(c)(7), State or local government decisions to deny a siting application on the basis that one or more carriers other than the applicant already provides wireless service in the geographic area have "the effect of prohibiting" the provision of wireless service, in violation of Section 332(c)(7)(B)(i)(II).[173] The Commission has also indicated that the relevant question in interpreting the phrase "prohibit or have the effect of prohibiting" is whether an action "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[174] We seek comment on whether the Commission should provide further guidance on how to interpret and apply this statutory language, and on what interpretations it should consider.

91. A number of courts have interpreted the phrase "prohibit or have the effect of prohibiting," as it appears in both Sections 253(a) and 332(c)(7), but they have not been consistent in their views. Under Section 253(a), the First, Second, and Tenth Circuits have held that a State or local legal requirement would be subject to preemption if it *may* have the effect of prohibiting the ability of an entity to provide telecommunications services,[175] while the Eighth and Ninth Circuits have erected a higher burden and insisted that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."[176] By the same token, different courts have imposed inconsistent burdens of proof to establish that localities violated Section 332(c)(7) by improperly denying siting application. The First, Fourth, and Seventh Circuits have imposed a "heavy burden" of proof on applicants to establish a lack of alternative feasible sites, requiring them to show "not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try."[177] By contrast, the Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the "least intrusive means" for filling a coverage gap in light of the aesthetic or other values that the local authority seeks to serve.[178] We invite commenters to address these issues of statutory interpretation so we may have the benefit of a full range of views from the interested parties as we determine what action, if any, we should

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[172] *See Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13095, para. 25 (1996).

[173] *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65.

[174] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Calif.*, 12 FCC Rcd 14191, 14206, para. 31 (1997).

[175] *Puerto Rico Tel. Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 & n.9 (10th Cir. 2004).

[176] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc); *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir. 2007). *But see* Letter from Michael Pastor, General Counsel, New York City Dept. of Information Technology and Telecommunications, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-3 (filed Apr. 12, 2017) (offering alternative interpretation).

[177] *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); *accord New Cingular Wireless PCS, LLC v. Fairfax County*, 674 F.3d 270, 277 (4th Cir. 2012); *T-Mobile Northeast LLC v. Fairfax County*, 672 F.3d 259, 266-68 (4th Cir. 2012) (*en banc*); *Helcher v. Dearborn County*, 595 F.3d 710, 723 (7th Cir. 2010).

[178] *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *City of Anacortes*, 572 F.3d at 995-99.

take to resolve them.[179] We also invite parties to address whether there is some new theory altogether that we should consider.

92. We also seek comment on the proper role of aesthetic considerations in the local approval process. The use of aesthetic considerations is not inherently improper; many courts have held that municipalities may, without necessarily violating Section 332(c)(7), deny siting applications on the grounds that the proposed facilities would adversely affect an area's aesthetic qualities, *provided* that such decisions are not founded merely on "generalized concerns" about aesthetics but are supported by "substantial evidence contained in a written record"[180] about the impact of specific facilities on particular geographic areas or communities.[181] We seek comment on whether we should provide more specific guidance on how to distinguish legitimate denials based on evidence of specific aesthetic impacts of proposed facilities, on the one hand, from mere "generalized concerns," on the other.

93. Finally, we note that WTB's *Streamlining PN* sought comment on application processing fees and charges for the use of rights of way.[182] We invite parties to comment on similar issues relating to the application of section 332(c)(7)'s "prohibit or have the effect of prohibiting" language on infrastructure siting on properties beyond rights of way. For instance, we seek comment on the up-front application fees that State or local government agencies impose on parties submitting applications for authority to construct or modify wireless facilities in locations other than rights of way. Can those fees, in some instances, "prohibit or have the effect of prohibiting" service? For instance, are those fees cost based? If commenters believe a particular State or locality's application fees are excessive, we invite them to provide detailed explanations for that view and to explain how such fees might be inconsistent with section 332 of the Act. Relatedly, do wireless siting applicants pay fees comparable to those paid by other parties for similar applications, and if not, are there instances in which such fees violate section

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[179] *Brand X*, 545 U.S. at 982-83 (when "Congress has delegated to an agency the authority to interpret a statute," any "ambiguity [is to] be resolved . . . by the agency," and a contrary "judicial precedent [does not] foreclose the agency from an interpreting an ambiguous statute.").

[180] 47 U.S.C. § 332(c)(7)(B)(iii) ("Any decision . . . to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."). "In a number of cases, courts have overturned denials of permits [for lack of 'substantial evidence'], finding (for example) that safety concerns and aesthetic objections rested upon hollow generalities and empty records." *Town of Amherst v. Omnipoint Communic'ns Enterprises, Inc.*, 173 F.3d 9, 16 (1st Cir. 1999) (dictum).

[181] *See, e.g., Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 725-26 (9th Cir. 2009); *City of Anacortes*, 572 F.3d at 994-95; *T-Mobile Central, LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1312 (10th Cir. 2008); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999); *AT&T Wireless PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423, 427, 430-31 (4th Cir. 1998). It is also indicative – although not dispositive – that the legislative history of the Telecommunications Act of 1996 refers to giving "localities the flexibility to treat facilities that create different *visual, aesthetic*, or safety concerns differently to the extent permitted under generally applicable zoning requirements . . . ." S. Rep. No. 104-230, at 208 (1996) (Conf. Rep.). Notably, NEPA requires Federal agencies to consider the aesthetic effects of Federal actions, and in some cases may warrant an agency's requiring an applicant to modify a proposed project so as to avoid or mitigate adverse aesthetic impacts, *see* 42 U.S.C. § 4331(b) ("it is the continuing responsibility of the Federal Government to use all practicable means... [to] assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings"); 40 CFR § 1508.8(b); *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973); and the Commission itself has applied aesthetic considerations in some cases involving NEPA review. *See, e.g., SBA Towers III, LLC Petitions to Deny and Requests for Environmental Review, Copper Harbor, Mich.*, 31 FCC Rcd 1755, 1765-67, paras. 38-42 (WTB/CIPD 2016); *AT&T Mobile Services, Inc. Construction of Tower at Fort Ransom, N.D.*, 30 FCC Rcd 11023, 11032, para. 28 (WTB/CIPD 2015).

[182] *See Streamlining PN*, 31 FCC Rcd at 13371-73 (Section II.B.3). The Public Notice also sought comment on local governments' practices that may "prohibit or have the effect of prohibiting" the provision of wireless service, *see id.* at 13369-70 (Section II.B.1), and raised questions about the reasonable period of time for State and local governments to process siting applications. 31 FCC Rcd at 13370-71 (Section II.B.2); *cf. supra*, Section II.A.1 & 2.

332's prohibition of regulations that "unreasonably discriminate among providers of functionally equivalent services"?

94. We also seek similar information about the recurring charges – as well as the other terms, conditions, or restrictions – that State or local government agencies impose for the siting of wireless facilities on publicly owned or controlled lands, structures such as light poles or water towers, or other resources other than rights of way. Do such fees or practices "prohibit or have the effect of prohibiting" service, or do they "unreasonably discriminate among providers of functionally equivalent services? Are there disparities between the charges or other restrictions imposed on some parties by comparison with those imposed on others? Do any agencies impose charges or other requirements that commenting parties believe to be particularly burdensome, such as franchise fees based on a percentage of revenues? Are other aspects of the process for obtaining approval particularly burdensome? Commenters should explain their concerns in sufficient detail to allow State and local governments to respond and to allow the Commission to determine whether it should provide guidance on these issues.[183]

C. "Regulations" and "Other Legal Requirements"

95. The terms of Section 253(a) specify that a "statute," "regulation," or "other legal requirement" may be preempted,[184] while the terms of Section 332(c)(7) refer to "decisions" concerning wireless facility siting and the "regulation" of siting.[185] We seek comment on how those terms should be interpreted. For instance, do the terms "statute," "regulation," and "legal requirement" in Section 253(a) have essentially the same meaning as the parallel terms "regulation" and "decisions" in Section 332(c)(7)? The Commission has held in the past that the terminology in Section 253(a) quoted above "recognizes that State and local barriers to entry could come from sources other than statutes and regulations" and "was meant to capture a broad range of state and local actions" that could pose barriers to entry—including agreements with a single party that result in depriving other parties of access to rights of way.[186] We believe there is a reasonable basis for concluding that the same broad interpretation should apply to the language of Section 332, and we seek comment on this analysis.

96. We also seek comment on the extent to which these statutory provisions apply to States and localities acting in a proprietary versus regulatory capacity, and on what constitutes a proprietary capacity. In the *2014 Infrastructure Order*, the Commission opined that the Spectrum Act and the rules and policies implementing it apply to localities' actions on siting applications when acting in their capacities as land-use *regulators*, but not when acting as managers of land or property that they own and operate primarily in their *proprietary* roles.[187] The Order cited cases indicating that "Sections 253 and 332(c)(7) do not preempt non-regulatory decisions of a State or locality acting in its proprietary capacity."[188] We seek comment on whether we should reaffirm or modify the *2014 Infrastructure*

[183] *Cf. infra* Section III.C (discussing State and local government agencies' roles as "proprietors" versus "regulators" of public resources including, but not limited to, rights of way).

[184] *See* 47 U.S.C. § 253(a) ("No State or local *statute* or *regulation*, or *other* State or local *legal requirement*, may prohibit or have the effect of prohibiting the ability of any entity to provide any . . . telecommunications service") (emphases added).

[185] *See* 47 U.S.C. §§ 332(c)(7)(A) ("Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over *decisions* regarding the placement, construction, and modification of personal wireless service facilities.") (emphasis added), 332(c)(7)(B)(i)(II) ("The *regulation* of the placement, construction, and modification of personal wireless service facilities . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services") (emphasis added).

[186] *See Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transmission Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21704, para. 11 (1999) (*Minnesota Preemption Order*).

[187] *2014 Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 239-40.

[188] *Id.* at 12965, para. 239 & n.646 (citations omitted).

Order's characterization of the distinction between State and local governments' regulatory roles versus their proprietary roles as "owners" of public resources. How should the line be drawn in the context of properties such as public rights of way (*e.g.*, highways and city streets), municipally-owned lampposts or water towers, or utility conduits? Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary),[189] by contrast with their interests in overseeing the use of public resources (regulatory)?[190] What about requests for proposals (RFPs) or contracts involving state or local entities? We invite commenters to identify any States or local governments that have imposed restrictions on the installation of new facilities or the upgrading of existing facilities in public rights of way, and describe those restrictions and their impacts. Do such restrictions have characteristics or effects that are comparable to moratoria on processing applications?[191].

D. Unreasonable Discrimination

97. We seek comment on whether certain types of facially neutral criteria that some localities may be applying when reviewing and evaluating wireless siting applications could run afoul of Section 253, Section 332(c)(7), or another provision of the Act.[192] For instance, we ask commenters to identify any State or local regulations that single out telecom-related deployment for more burdensome treatment than non-telecom deployments that have the same or similar impacts on land use, to explain how, and to address whether this type of asymmetric treatment violates Federal law.

98. We also seek comment on the extent to which localities may be seeking to restrict the deployment of utility or communications facilities above ground and attempt to relocate electric, wireline telephone, and other utility lines in that area to underground conduits. Obviously, it is impossible to operate wireless network facilities underground.[193] Undergrounding of utility lines seems to place a premium on access to those facilities that remain above ground, such as municipally-owned street lights. Is there a particular way that Section 253 or 332(c)(7) should apply in that circumstance? More generally, we seek comment on parties' experience with undergrounding requirements, including how wireless facilities have been treated in communities that require undergrounding of utilities. We also seek comment on whether and how the Communications Act applies in such instances. For instance, may localities deny applications to construct new above-ground wireless structures in such areas, or deny applications to install collocated equipment on structures that may eventually be dismantled? Could

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[189] *See Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993) (finding State agency acted in proprietary capacity, and not as a regulator, when establishing requirements for prospective subcontractors in context of procuring services for construction of a wastewater treatment project, because the actions under review were "analogous [to] private conduct" of non-governmental parties overseeing large construction projects).

[190] *Minnesota Preemption Order*, 14 FCC Rcd at 21707-08, para. 18 (finding preemption appropriate because, "[i]n this case, Minnesota is not merely acquiring fiber optic capacity for its own use; it is providing a private party with exclusive physical access to the freeway rights-of-way[,] . . . [which] has the potential to adversely affect competitors that do not have similar access. *This situation is very different from a traditional government procurement of telecommunications facilities or services.*") (emphasis added).

[191] *Cf. supra* Section II.A.3.

[192] *See, e.g.*, 47 U.S.C. § 253(a), (c); 47 U.S.C. § 332(c)(7)(B)(i)(I).

[193] *Cf. Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d at 580 ("If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services."); *Cox Communic'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260, 1269 (S.D. Cal. 2002) (holding that alleged discrimination caused by city ordinance that treated gas utility more favorably than wireless carrier was not *unreasonable*, because "the gas company installs most of its facilities underground, which impacts the City's zoning and visual concerns differently than above-ground facilities").

"undergrounding" plans "prohibit or have the effect of prohibiting" service by causing suitable sites for wireless antennas to become scarce? We seek comment on parties' experiences with undergrounding generally.

99. Section 332(c)(7)(B)(i)(I) prohibits States and localities from unreasonably discriminating among providers of "functionally equivalent services."[194] We seek comment on whether parties have encountered such discrimination, and ask that they provide specific examples. We also seek comment on what constitutes "functionally equivalent services" for this purpose. For instance, should entities that are considered to be utilities be viewed as an appropriate comparison? For the limited purpose of applying Section 332(c)(7)(B)(i)(I), can wireless and wireline services be considered "functionally equivalent" in some circumstances? Which types of discrimination are reasonable and which are unreasonable?

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

100. Pursuant to the Regulatory Flexibility Act (RFA),[195] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this NPRM. The IRFA is set forth in the Appendix. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[196]

B. Initial Paperwork Reduction Act Analysis

101. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.[197] In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.[198]

C. Other Procedural Matters

1. Ex Parte Rules – Permit-but-Disclose

102. Except to the limited extent described in the next paragraph, this proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[199] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda

[194] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[195] *See* 5 U.S.C. § 603.

[196] *See* 5 U.S.C. § 603(a).

[197] *See* Paperwork Reduction Act of 1995, Public Law 104-13.

[198] *See* 44 U.S.C. § 3506(c)(4).

[199] 47 CFR § 1.1200 *et seq.*

or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

103. In light of the Commission's trust relationship with Tribal Nations and Native Hawaiian Organizations (NHOs), and our obligation to engage in government-to-government consultation with them, we find that the public interest requires a limited modification of the *ex parte* rules in this proceeding.[200] Tribal Nations and NHOs, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record in order to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process. But we will exempt *ex parte* presentations involving elected and appointed leaders and duly appointed representatives of federally-recognized Tribal Nations and NHOs from the disclosure requirements in permit-but-disclose proceedings[201] and the prohibitions during the Sunshine Agenda period.[202] Specifically, presentations from elected and appointed leaders or duly appointed representatives of federally-recognized Tribal Nations or NHOs to Commission decision makers shall be exempt from disclosure. To be clear, while the Commission recognizes that consultation is critically important, we emphasize that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

2. Comment Filing Procedures

104. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). **All filings related to this NPRM and NOI shall refer to WT Docket No. 17-79.**

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://apps.fcc.gov/ecfs/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.

105. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325,

[200] *See, e.g., Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement*, Policy Statement, 16 FCC Rcd 4078 (2000) ("The Commission will endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands.").

[201] 47 CFR 1.1206.

[202] 47 CFR 1.1203.

Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

106. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

107. *Additional Information.* For additional information on this proceeding, contact Aaron Goldschmidt, Aaron.Goldschmidt@fcc.gov, of the Wireless Telecommunications Bureau, Competition & Infrastructure Policy Division, (202) 418-7146, or David Sieradzki, David.Sieradzki@fcc.gov, of the Wireless Telecommunications Bureau, Competition & Infrastructure Policy Division, (202) 418-1368.

V. ORDERING CLAUSES

108. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 4(i), 7, 201, 253, 301, 303, 309, and 332 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 253, 301, 303, 309, 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 Notice of Proposed Rulemaking and Notice of Inquiry IS hereby ADOPTED.

109. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[203] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[204] In addition, the Notice and IRFA (or summaries thereof) will be published in the *Federal Register*.[205]

A. Need for, and Objectives of, the Proposed Rules

2. In this Notice, we examine how we may further remove or reduce regulatory impediments to wireless infrastructure investment and deployment in order to promote the rapid deployment of advanced mobile broadband service to all Americans. First, the Notice seeks comment on certain measures or clarifications to expedite State and local processing of wireless facility siting applications pursuant to our authority under 332 of the Communications Act, including a "deemed granted" remedy in cases of unreasonable delay. Next, we undertake a comprehensive fresh look at our rules and procedures implementing the National Environmental Policy Act ("NEPA") and Section 106 of the National Historic Preservation Act ("Section 106"). As part of this review, we seek comment on potential measures to improve or clarify the Commission's Section 106 process, including in the area of fees paid to Tribal Nations in connection with their participation in the process, cases involving lack of response by relevant parties including affected Tribal Nations, and batched processing. We also seek comment on possible additional exclusions from Section 106 review, and we reexamine the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. Finally, the Notice seeks comment on so-called "Twilight Towers," wireless towers that were constructed during a time when the process for Section 106 review was unclear, that may not have completed Section 106 review as a result, and that are therefore not currently available for collocation without first undergoing review. We seek comment on various options addressing Twilight Towers, including whether to exclude collocations on such towers from Section 106 historic preservation review, subject to certain exceptions, or alternatively subjecting collocations on Twilight Towers to a streamlined, time-limited review. We expect the measures on which we seek comment in this Notice to be only a part of our efforts to expedite wireless infrastructure deployment and we invite commenters to propose other innovative approaches to expediting deployment.

B. Legal Basis

3. The authority for the actions taken in this Notice is contained in Sections 1, 2, 4(i), 7, 201, 253, 301, 303, 309, and 332 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 253, 301, 303, 309, 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.

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[203] *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).

[204] *See* 5 U.S.C. § 603(a).

[205] *See id.*

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. 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 proposed rules and policies, if adopted.[206] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[207] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[208] 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 SBA.[209] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. The Notice seeks comment on potential rule changes regarding State, local, and Federal regulation of the siting and deployment of communications towers and other wireless facilities. Due to the number and diversity of owners of such infrastructure and other responsible parties, particularly small entities that are Commission licensees as well as non-licensees, we classify and quantify them in the remainder of this section. The Notice seeks comment on our description and estimate of the number of small entities that may be affected by our actions in this proceeding.

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.[210] 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.[211] These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.[212] 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."[213] Nationwide, as of 2007, there were approximately 1,621,215 small organizations.[214] 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."[215] U.S. Census Bureau

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[206] 5 U.S.C. § 603(b)(3).

[207] 5 U.S.C. § 601(6).

[208] 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."

[209] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[210] *See* 5 U.S.C. § 601(3)-(6).

[211] *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).

[212] *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).

[213] 5 U.S.C. § 601(4).

[214] Independent Sector, The New Nonprofit Almanac & Desk Reference (2010).

[215] 5 U.S.C. § 601(5).

data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United States.[216] We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions."[217] Thus, we estimate that most governmental jurisdictions are small.

7. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.[218] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[219] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[220] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[221] 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.[222] 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.[223] Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[224] 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

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[216] 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).

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

[218] NAICS Code 517210. *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210.

[219] 13 CFR § 121.201, NAICS Code 517210.

[220] 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."

[221] *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."

[222] *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.

[223] *See Trends in Telephone Service* at tbl. 5.3.

[224] *See id.*

rules.[225] 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.[226] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.[227] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[228] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[229] 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.[230] 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.[231] For this industry,

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[225] 47 CFR Part 90.

[226] 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.

[227] 13 CFR § 121.201, NAICS Code 517210.

[228] 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.

[229] *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."

[230] *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.

[231] *See* 13 CFR § 121.201, NAICS Code 517210.

U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[232] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[233] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.[234] There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.235 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.[236] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[237] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[238] 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.[239] 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

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[232] 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.

[233] *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."

[234] This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change on a daily basis. 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.

[235] 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.

[236] *See* 13 CFR § 121.201, NAICS Code 517210.

[237] 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.

[238] *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."

[239] This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change on a daily basis. 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.

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.[240] A "Very small business" is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than $3 million over the preceding three calendar years.[241] The SBA has approved these definitions.[242] 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.[243] 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.[244] Under that SBA category, a business is small if it has 1,500 or fewer employees.[245] For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[246] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees

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

[241] *Id.*

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

[243] See "Multiple Address Systems Spectrum Auction Closes," Public Notice, 16 FCC Rcd 21011 (2001).

[244] 13 CFR § 121.201, NAICS Code 517210.

[245] *Id.*

[246] 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.

or more.[247] 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.[248]

15. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[249]

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.[250] 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.[251] 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.[252] 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.[253] Auction 86 concluded in 2009 with the sale of 61 licenses.[254] Of the ten winning bidders, two bidders that claimed small business status won

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[247] 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."

[248] *See id.*

[249] *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).

[250] 47 CFR § 21.961(b)(1).

[251] 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.

[252] *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).

[253] *Id.* at 8296 para. 73.

[254] *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).

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.[255] Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.[256] 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.[257] 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.[258] 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.[259] 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.[260] 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.[261] These definitions have been approved by the SBA.[262] 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.

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[255] 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.

[256] 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.

[257] 13 CFR § 121.201, NAICS Code 517110.

[258] 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).

[259] *Id.*

[260] 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.

[261] *Id.*

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

20. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."[263] These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.[264] 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.[265] The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of $25,000,000 or less, 25 had annual receipts between $25,000,000 and $49,999,999 and 70 had annual receipts of $50,000,000 or more.[266] 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.[267] 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.[268] Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

22. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations[269] 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.[270]

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[263] 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.

[264] 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.

[265] 13 CFR § 121.201; 2012 NAICS Code 515120.

[266] 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.

[267] *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.

[268] *January 5, 2017 Broadcast Station Totals Press Release.*

[269] "[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).

[270] 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.

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."[271] The SBA has established a small business size standard for this category as firms having $38.5 million or less in annual receipts.[272] Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.[273] 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.[274] 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.[275] We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,101.[276] 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.[277] 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.[278] 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.[279] 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.[280] 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.[281]

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[271] https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[272] 13 CFR § 121.201, NAICS Code 515112 Radio Stations.

[273] 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.

[274] *Id.*

[275] *January 5, 2017 Broadcast Station Totals Press Release.*

[276] *January 5, 2017 Broadcast Station Totals Press Release.*

[277] "[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).

[278] 13 CFR § 121.102(b).

[279] NAICS Code 515112.

[280] http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2007 NAICS Search.

[281] 13 CFR 121.201.

U.S. Census data for 2012 indicate that 2,849 radio station firms operated during that year.[282] 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.[283] Based on U.S. Census data, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

27. *Multichannel Video Distribution and Data Service (MVDDS).* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[284] These definitions were approved by the SBA.[285] 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.[286] 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.[287]

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."[288] The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.[289] 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.[290] Of this total, 299

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[282] 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.

[283] *Id.*

[284] 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).

[285] *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).

[286] *See* "Multichannel Video Distribution and Data Service Spectrum Auction Closes," *Public Notice*, 19 FCC Rcd 1834 (2004).

[287] *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).

[288] U.S. Census Bureau, 2012 NAICS Definitions, "517410 Satellite Telecommunications," http://www.census.gov/naics/2012/def/ND517410.HTM.

[289] 13 CFR § 121.201, NAICS Code 517410.

[290] 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.

firms had annual receipts of less than $25 million.[291] 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 also included in this industry.[292] 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.[293] 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.[294] 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,[295] private-operational fixed,[296] and broadcast auxiliary radio services.[297] They also include the Local Multipoint Distribution Service (LMDS),[298] the Digital Electronic Message Service (DEMS),[299] the 39 GHz Service (39 GHz),[300] the 24 GHz Service,[301] and the Millimeter Wave Service[302] where licensees can choose between common carrier and non-common carrier status.[303] 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

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[291] *Id.*

[292] https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517919.

[293] 13 CFR § 121.201, NAICS Code 517919.

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

[295] *See* 47 CFR Part 10, Subpart I.

[296] 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.

[297] 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.

[298] *See* 47 CFR Part 101, Subpart L.

[299] *See* 47 CFR Part 101, Subpart G.

[300] *See* 47 CFR Part 101, Subpart N.

[301] *See id.*

[302] *See* 47 CFR Part 101, Subpart Q.

[303] *See* 47 CFR §§ 101.533, 101.1017.

entity with no more than 1,500 persons is considered small.[304] Under that size standard, such a business is small if it has 1,500 or fewer employees.[305] 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.[306]

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

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

33. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.[307] 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."[308] 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.[309] For this category, U.S. Census data for 2012 show that

[304] 13 CFR § 121.201, NAICS Code 517210.

[305] 13 CFR § 121.201, NAICS Code 517210.

[306] *See* U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

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

[308] 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.

[309] 13 CFR § 121.201, NAICS Code 517919.

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.[310] 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.

D. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements for Small Entities

34. The Notice seeks comment on potential rule changes that may affect reporting, recordkeeping and other compliance requirements. Specifically the Notice seeks comment on a specific NHPA submission process known as batching. Currently, a streamlined process for certain facilities associated with building out the Positive Train Control (PTC) railroad safety system is in effect whereby eligible facilities may be submitted to State Historic Preservation Officers (SHPOs) and through the Tower Construction Notification System (TCNS) in batches instead of individually. The Notice seeks comment on whether we should require SHPOs and Tribal Historic Preservation Officers (THPOs) to review non-PTC facilities in batched submissions as well. If adopted, this may require modifications to reporting or other compliance requirements for small entities and or jurisdictions to enable such submissions. We anticipate that batch rather than individual submissions will add no additional burden to small entities and may reduce the cost and delay associated with the deployment of wireless infrastructure. In addition, the Notice seeks comment on whether the current Section 106 process can be revised in a manner that would permit applicants to self-certify their compliance with our Section 106 process and therefore proceed once they meet our notification requirements, without requiring Commission involvement. This self-certifying process may also require additional reporting or other compliance requirements for small entities. Similarly, we anticipate that a self-certification process will reduce the cost and delay associated with the deployment of wireless infrastructure for small entities by expediting the current Section 106 process.

E. Steps Taken to Minimize 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 developing its 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 or reporting requirements under the rule for 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 small entities.[311]

36. In this proceeding, the Commission seeks to examine regulatory impediments to wireless infrastructure investment and deployment, and how we may remove or reduce such impediments consistent with the law and the public interest. We anticipate that the steps on which the Notice seeks comment will help reduce burdens on small entities that may need to deploy wireless infrastructure by reducing the cost and delay associated with the deployment of such infrastructure. As discussed below, however, certain proposals may impose regulatory compliance costs on small jurisdictions.

37. The Notice seeks comment on potential ways to expedite wireless facility deployment. First, it seeks comment on certain measures or clarifications to expedite State and local processing of wireless facility siting applications pursuant to our authority under Section 332 of the Communications

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

311 *See* 5 U.S.C. § 603(c).

Act. Specifically, the Notice proposes to adopt one or more of three mechanisms for implementing a "deemed granted" remedy for State and local agencies' failure to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications outside the context of the Spectrum Act, including irrebuttable presumption, lapse of State and local governments' authority, and a preemption rule. The Notice also seeks comment on how to quantify a "reasonable period of time" within which to act on siting applications. Specifically, the Notice asks commenters to discuss whether the Commission should consider adopting different time frames for review of facility deployments not covered by Section 6409 of the Spectrum Act, by identifying more narrowly defined classes of deployments and distinct reasonable time frames to govern such classes. The Notice also seeks comment on what time periods would be reasonable (outside the Spectrum Act context) for any new categories of applications, and on what factors the Commission should consider in making such a decision. The Notice also seeks comment on whether the Commission should provide further guidance to address situations in which it is not clear when the shot clock should start running, or in which States and localities on one hand, and industry on the other, disagree on when the time for processing an application begins, and on whether there are additional steps that should be considered to ensure that a deemed granted remedy achieves its purpose of expediting review.

38. In addition, the Notice seeks comment on Moratoria. The Commission clarified in the *2014 Infrastructure Order* that the shot clock deadline applicable to each application "runs regardless of any moratorium."[312] The Notice asks commenters to submit specific information about whether some localities are continuing to impose moratoria or other restrictions on the filing or processing of wireless siting applications, including identification of the specific entities engaging in such actions and description of the effect of such restrictions on parties' ability to deploy network facilities and provide service to consumers. The Notice also proposes to take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarifications of the moratorium ban or preempting specific State or local moratoria. The proposed measures should reduce existing regulatory costs for small entities that construct or deploy wireless infrastructure. We invite commenters to discuss the economic impact of any of these proposed measures on small entities, including small jurisdictions, and on any alternatives that would reduce the economic impact on such entities.

39. Second, the Notice undertakes a fresh look at our rules and procedures implementing NEPA and the NHPA as they relate to our implementation of Title III of the Act in the context of wireless infrastructure deployment. The Notice seeks comment on potential measures in several areas that could improve the efficiency of our review under the NHPA and NEPA, including in the areas of fees, addressing delays, and batched processing. Specifically, the Notice seeks comment on the costs, benefits, and time requirements associated with the historic preservation review process under Section 106 of the NHPA, including SHPO and Tribal Nation review, as well as on the costs and relative benefits of the Commission's NEPA rules. The Notice also seeks comment on potential process reforms regarding Tribal Fees, including fee amounts, when fees are requested, the legal framework of potential fee schedules, the delineation of Tribal Nation's geographic area of interest, and on potential remedies, dispute resolution, and possible negotiated alternatives.

40. The Notice then seeks comment on other possible reforms to our NHPA process that may make it faster, including time limits and self-certification when no response to a Section 106 submission is provided, on whether we should require SHPOs and THPOs to review non-PTC facilities in batched submissions, and if so, how such a process should work and what sort of facilities would be eligible, and finally, whether there are additional procedural changes that we should consider to improve the Section 106 review process in a manner that does not compromise its integrity.

41. Further, the Notice seeks comment on ways to improve and further streamline our environmental compliance regulations while ensuring we meet our NEPA obligations. Toward that end,

[312] *2014 Infrastructure Order*, 29 FCC Rcd at 12971, para. 265.

the Notice seeks comment on whether to revise the Commission's rules so that an EA is not required for siting in a floodplain when appropriate engineering or mitigation requirements have been met and on whether to expand the categories of undertakings that are excluded from Section 106 review, to include pole replacements, deployments in rights-of-way, and collocations based on their minimal potential to adversely affect historic properties. The Notice also seeks comment on whether we should revisit the Commission's interpretation of the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. These potential changes to our rules and procedures implementing NEPA and the NHPA would reduce environmental compliance costs on entities that construct or deploy wireless infrastructure. These potential revisions are likely to provide an even greater benefit for small entities that may not have the compliance resources and economies of scale of larger entities. We invite comment on ways in which the Commission can achieve its goals, but at the same time further reduce the burdens on small entities.

42. Third, the Notice seeks comment on steps the Commission should take to develop a definitive solution for the Twilight Towers issue that will allow Twilight Towers to be used for collocations while respecting the integrity of the Section 106 process. Facilitating collocations on these towers will serve the public interest by making additional infrastructure available for wireless broadband services and the FirstNet public safety broadband network[313], as well as reduce the need for new towers, lessening the impact of new construction on the environment and on locations with historical and cultural significance, thereby reducing the associated regulatory burden, particularly the burden on small entities.

43. In particular, the Notice seeks comment on whether to treat collocations on towers built between March 16, 2001 and March 7, 2005 that did not go through Section 106 historic preservation review in the same manner as collocations on towers built prior to March 16, 2001 that did not go through review. Under this approach, collocations on such towers would generally be excluded from Section 106 historic preservation review, subject to the same exceptions that currently apply for collocations on towers built on or prior to March 16, 2001. We seek comment on whether allowing collocations without individual Section 106 review in these circumstances would rapidly make available a significant amount of additional infrastructure to support wireless broadband deployment without adverse impacts. The Notice also seeks comment on any alternative approaches and on the procedural vehicle through which any solution should be implemented. Finally, the Notice invites comment on what measures, if any, should be taken to facilitate collocations on non-compliant towers constructed after March 7, 2005, including whether we should pursue an alternative review process, or any other alternative approach, for any or all of these towers. These proposals would reduce the environmental compliance costs associated with collocations, especially for small entities that have limited financial resources. We invite commenters to discuss the economic impact of any of the proposals for the solution to the Twilight Towers issue on small entities, including small jurisdictions, and on any alternatives that would reduce the economic impact on such entities.

44. For the options discussed in this Notice, we seek comment on the effect or burden of the prospective regulation on small entities, including small jurisdictions, the extent to which the regulation would relieve burdens on small entities, and whether there are any alternatives the Commission could implement that could achieve the Commission's goals while at the same time minimizing or further reducing the burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

45. None.

[313] *See* Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act), 47 U.S.C. § 1426 (c)(3) (providing that "the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure.").

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

As a football fan, I'm still shaking my head at the Atlanta Falcons' epic collapse in the Super Bowl against the New England Patriots. As a regulator, what concerns me even more are the stories I've heard about the roadblocks to deploying wireless infrastructure that companies encountered leading up to the big game.

Tens of thousands of fans flooded Houston's NRG Stadium in February to send many terabytes of data in the form of texts, pictures, and videos. In order to handle this massive increase in network traffic, wireless carriers knew in advance they'd have to upgrade their infrastructure in order to boost network capacity in and around the stadium.

But meeting this commitment was much harder than it should've been. For instance, one company ended up paying thousands of dollars per utility pole for purposes of meeting historic preservation requirements. Now, it's hard to imagine that there is much to preserve, historically speaking, in the parking lot of NRG Stadium. After all, initial construction started in the early 2000s. Yet this company was forced to pay hundreds of thousands of dollars in total to complete this review—excessive costs that both delayed construction and were ultimately passed on to consumers.

This case isn't unique. I have heard time and time again how current rules and procedures impede the timely, cost-effective deployment of wireless infrastructure.

This will only become a bigger problem as our wireless networks evolve. A key feature of the transition from 4G to 5G is a change in network architecture. The future of wireless will evolve from large, macro-cell towers to include thousands of densely-deployed small cells, operating at lower power.

As networks evolve, our rules should too. Historic preservation and environmental review regulations designed for large macro-cell towers just don't make sense for small cells that can be the size of a pizza box. And cities shouldn't impose unreasonable demands or moratoria on wireless siting requests. This simply penalizes their own constituents who want better mobile service. To address these issues, we are seeking ideas for updating state, local, and Tribal infrastructure review to meet the realities of the modern marketplace.

If we do our job—if we can make the deployment of wireless infrastructure easier, consistent with the public interest—then we can help close the digital divide in our country. This is especially true for low-income and minority communities, which disproportionately rely on wireless service as their primary or sole on-ramp to the Internet. Working with our partners at the federal, state, local, and Tribal levels, I hope we can take another meaningful step towards bringing high-speed Internet access to all Americans and maintaining our nation's global leadership in the wireless space.

I'd like to thank the dedicated staff of the Wireless Telecommunications Bureau, including Paul D'Ari, Steve DelSordo, Angela DeMahy, Chas Eberle, Aaron Goldschmidt, Garnet Hanly, Leon Jackler, Don Johnson, Erica Rosenberg, Hilary Rosenthal, Jennifer Salhus, David Sieradzki, Michael Smith, Jill Springer, Jeff Steinberg, Joel Taubenblatt, Suzanne Tetreault, Peter Trachtenberg, and Mary Claire York. I would also like to thank David Horowitz, Andrea Kelly, Marcus Maher, Lee Martin, Linda Oliver, and Anjali Singh from the Office of General Counsel; Lyle Ishida and Dan Margolis from the Office of Native Affairs and Policy; and Michael Wagner from the Media Bureau. All of your efforts are much appreciated.

CONCURRING STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

We have all seen the statistics and read the headlines about the predicted explosive growth when it comes to the demand for wireless services. We are also very aware that consumers expect us to take our policy role seriously, when it comes to ensuring that the nation is prepared to meet this demand. Part of that preparation is ensuring that we can readily deploy the necessary infrastructure to support current, and future wireless offerings. 5G and IoT are just around the corner, and we are all eager to see how innovative wireless technologies will improve the way we live, work and play.

I have yet to come across a single community that wants to be left behind or overlooked as we embark on this new frontier. With that in mind, it is noteworthy that we all support efforts to streamline infrastructure deployment. But we must do so in a way that allows all sides to come to the table with a willingness to negotiate and work together.

As I have said before, approving applications to site antennas and other infrastructure, are difficult policy challenges for local governments. Many are overwhelmed by the increased volume of siting and permitting applications in a 4G and 5G world. Indeed, the localities considering siting applications vary immensely from geographic and demographic differences, to financial considerations, to differences in local law. They are on the front lines addressing the challenges of cost, complexity, and time faced by siting applicants, while answering and addressing the never ending questions, concerns and needs, of their communities.

We cannot afford to deal with any of these elements in a vacuum. Local officials and industry must work together to identify challenges, engage in coordinated efforts to update outdated regulations, and brainstorm deployment plans that are minimally disruptive to communities, and they must do so in an efficient and timely way. A collaborative local process and open dialogue between the public and private sector will minimize conflict, introduce predictability, and create incentives for information sharing and transparency.

I have met with industry representatives, as well as those from local governments, and I understand each of their grievances. Some localities charge fees that applicants view as excessive for permit applications, access to rights-of-way, and public structures, while others find themselves economically underwater after the negotiations are complete. And while it is important that municipalities are properly compensated for use of their rights-of-way and public structures, a balanced and equitable system would ensure that those fees paid by the companies are both fair and reasonable.

Siting applicants have themselves been criticized for submitting incomplete applications, which some localities point to as a source of delay in processing permits. That must be appropriately addressed. Some applications lack field engineering expertise, propose locations that are clearly not viable, or are submitted by entities that lack clear legal authority to do so. That cannot be ignored. Review of incomplete or inadequate applications, adds to the costs, burdens, and time imposed on local governments, and impacts the ability of localities to timely review properly completed applications. This cannot be denied. Applicants could help speed the review process by ensuring that their submissions are complete and reflect all necessary underlying work and municipalities must recognize that infrastructure builds enable, empower and improve their communities.

I think it is important to acknowledge that there are actions that can be taken on both sides of the aisle, and I thank my colleagues for agreeing to my requests to seek comment on actions applicants can take to help streamline the process, as well as to seek comment on the "deemed granted" approach, rather than proposing it outright.

The *NPRM* also proposes to take a "fresh" look at our rules implementing the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA), and while I am not opposed to reviewing our rules, we must be careful not subvert statutory intent, as we update our rules to reflect the evolving wireless landscape.

I encourage all parties to fully participate in this proceeding, and propose creative solutions that will allow us all to work together towards our common goal. In the end, it is the American consumer who will benefit from our efforts. They are ever most in mind when I make decisions, as they should be in yours.

Many thanks to the hard-working staff of the Wireless Telecommunications Bureau for your work on this item.

STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

I am pleased to support today's notice of proposed rulemaking and notice of inquiry seeking comment on potential ways to overcome some of the barriers being put in front of wireless infrastructure siting. Since I joined the Commission, I have engaged on this topic with many interested parties and discussed the importance of facilitating network deployments in many fora. The Commission can continue to release spectrum into the marketplace, but wireless services only become a reality if the infrastructure is in place to deliver them to the American consumer. While today's notice is narrower in scope than I would have liked, I recognize that stakeholders commented on several issues in response to last December's Wireless Telecommunications Bureau public notice.[1] Hopefully, the Commission will also consider those ideas expeditiously.

I have heard some argue that there should be more outreach to stakeholders before taking today's step, but I must respectfully disagree. While conversations can be productive, the Commission, in an open and transparent fashion, should obtain all the facts and ask the difficult questions to holistically consider any barriers placed before wireless infrastructure siting. The Commission cannot continuously hear accounts of deployment hurdles and sit idly by. If this generates the need for preemption, I have no hesitation to use authority provided by Congress to get new wireless services deployed.

Take, for instance, the tortured history of twilight towers, the resolution of which I have been urging since I came to the Commission and which has been outstanding since 2005. Twelve years later, there has been a lot of talk, but no action. It makes no sense to have towers upon which no collocations can occur. Facilities are needed as industry participants build out newly available bands and densify their systems. This issue must be resolved once and for all, and immediately.

I have also met with many people about the delays and expense of seeking the necessary local permitting and tribal approvals. This has been especially problematic for small cell systems, which should not require the same review and fees as a macro tower. Many localities and tribes are, undoubtedly, acting in good faith, and I thank them for their cooperation in approving the deployments necessary to provide Americans with the wireless services they demand, but bad actors are ruining it for everyone. Infrastructure siting is not a means to increase revenues; and delaying application reviews, imposing de facto moratoria, preventing densification and upgrades of networks, among other tactics, is not acceptable.

As we go forward, I am interested in hearing the suggestions of all interested parties and, as always, I will consider all views before making a final decision. I will review with particular interest submissions regarding our statutory authority to impose a deemed granted remedy under section 332. While I like the idea, the wording of the statute may complicate our ability to bypass the judicial system. Further, I have concerns about one petitioner's suggestion that the Commission set a fee schedule or resolve disputes with tribes. I generally do not believe this is the Commission's role.

I appreciate that the Chairman incorporated my requested edits, such as providing additional information about alternative twilight tower solutions, adding a statement that twilight towers should not

[1] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

be subject to any type of enforcement action or penalties, discussing potential improvements that we can make to the Commission's Tower Construction Notification System and our internal processes, seeking comment on whether the current Commission forms are sufficient to provide all the required upfront information for tribal review, and exploring whether specific types of collocations, such as those on existing structures with no ground disturbance or indoors, should be exempt from historic preservation and environmental reviews, amongst others.

Finally, I thank the staff for their efforts on this item and for all the work to come on what is one of the most important proceedings before the Commission.

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

As a football fan, I'm still shaking my head at the Atlanta Falcons' epic collapse in the Super Bowl against the New England Patriots. As a regulator, what concerns me even more are the stories I've heard about the roadblocks to deploying wireless infrastructure that companies encountered leading up to the big game.

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If we do our job—if we can make the deployment of wireless infrastructure easier, consistent with the public interest—then we can help close the digital divide in our country. This is especially true for low-income and minority communities, which disproportionately rely on wireless service as their primary or sole on-ramp to the Internet. Working with our partners at the federal, state, local, and Tribal levels, I hope we can take another meaningful step towards bringing high-speed Internet access to all Americans and maintaining our nation's global leadership in the wireless space.

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CONCURRING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

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I have yet to come across a single community that wants to be left behind or overlooked as we embark on this new frontier. With that in mind, it is noteworthy that we all support efforts to streamline infrastructure deployment. But we must do so in a way that allows all sides to come to the table with a willingness to negotiate and work together.

As I have said before, approving applications to site antennas and other infrastructure, are difficult policy challenges for local governments. Many are overwhelmed by the increased volume of siting and permitting applications in a 4G and 5G world. Indeed, the localities considering siting applications vary immensely from geographic and demographic differences, to financial considerations, to differences in local law. They are on the front lines addressing the challenges of cost, complexity, and time faced by siting applicants, while answering and addressing the never ending questions, concerns and needs, of their communities.

We cannot afford to deal with any of these elements in a vacuum. Local officials and industry must work together to identify challenges, engage in coordinated efforts to update outdated regulations, and brainstorm deployment plans that are minimally disruptive to communities, and they must do so in an efficient and timely way. A collaborative local process and open dialogue between the public and private sector will minimize conflict, introduce predictability, and create incentives for information sharing and transparency.

I have met with industry representatives, as well as those from local governments, and I understand each of their grievances. Some localities charge fees that applicants view as excessive for permit applications, access to rights-of-way, and public structures, while others find themselves economically underwater after the negotiations are complete. And while it is important that municipalities are properly compensated for use of their rights-of-way and public structures, a balanced and equitable system would ensure that those fees paid by the companies are both fair and reasonable.

Siting applicants have themselves been criticized for submitting incomplete applications, which some localities point to as a source of delay in processing permits. That must be appropriately addressed. Some applications lack field engineering expertise, propose locations that are clearly not viable, or are submitted by entities that lack clear legal authority to do so. That cannot be ignored. Review of incomplete or inadequate applications, adds to the costs, burdens, and time imposed on local governments, and impacts the ability of localities to timely review properly completed applications. This cannot be denied. Applicants could help speed the review process by ensuring that their submissions are complete and reflect all necessary underlying work and municipalities must recognize that infrastructure builds enable, empower and improve their communities.

I think it is important to acknowledge that there are actions that can be taken on both sides of the aisle, and I thank my colleagues for agreeing to my requests to seek comment on actions applicants can take to help streamline the process, as well as to seek comment on the "deemed granted" approach, rather than proposing it outright.

The *NPRM* also proposes to take a "fresh" look at our rules implementing the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA), and while I am not opposed to reviewing our rules, we must be careful not subvert statutory intent, as we update our rules to reflect the evolving wireless landscape.

I encourage all parties to fully participate in this proceeding, and propose creative solutions that will allow us all to work together towards our common goal. In the end, it is the American consumer who will benefit from our efforts. They are ever most in mind when I make decisions, as they should be in yours.

Many thanks to the hard-working staff of the Wireless Telecommunications Bureau for your work on this item.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

I am pleased to support today's notice of proposed rulemaking and notice of inquiry seeking comment on potential ways to overcome some of the barriers being put in front of wireless infrastructure siting. Since I joined the Commission, I have engaged on this topic with many interested parties and discussed the importance of facilitating network deployments in many fora. The Commission can continue to release spectrum into the marketplace, but wireless services only become a reality if the infrastructure is in place to deliver them to the American consumer. While today's notice is narrower in scope than I would have liked, I recognize that stakeholders commented on several issues in response to last December's Wireless Telecommunications Bureau public notice.[1] Hopefully, the Commission will also consider those ideas expeditiously.

I have heard some argue that there should be more outreach to stakeholders before taking today's step, but I must respectfully disagree. While conversations can be productive, the Commission, in an open and transparent fashion, should obtain all the facts and ask the difficult questions to holistically consider any barriers placed before wireless infrastructure siting. The Commission cannot continuously hear accounts of deployment hurdles and sit idly by. If this generates the need for preemption, I have no hesitation to use authority provided by Congress to get new wireless services deployed.

Take, for instance, the tortured history of twilight towers, the resolution of which I have been urging since I came to the Commission and which has been outstanding since 2005. Twelve years later, there has been a lot of talk, but no action. It makes no sense to have towers upon which no collocations can occur. Facilities are needed as industry participants build out newly available bands and densify their systems. This issue must be resolved once and for all, and immediately.

I have also met with many people about the delays and expense of seeking the necessary local permitting and tribal approvals. This has been especially problematic for small cell systems, which should not require the same review and fees as a macro tower. Many localities and tribes are, undoubtedly, acting in good faith, and I thank them for their cooperation in approving the deployments necessary to provide Americans with the wireless services they demand, but bad actors are ruining it for everyone. Infrastructure siting is not a means to increase revenues; and delaying application reviews, imposing de facto moratoria, preventing densification and upgrades of networks, among other tactics, is not acceptable.

As we go forward, I am interested in hearing the suggestions of all interested parties and, as always, I will consider all views before making a final decision. I will review with particular interest submissions regarding our statutory authority to impose a deemed granted remedy under section 332. While I like the idea, the wording of the statute may complicate our ability to bypass the judicial system. Further, I have concerns about one petitioner's suggestion that the Commission set a fee schedule or resolve disputes with tribes. I generally do not believe this is the Commission's role.

I appreciate that the Chairman incorporated my requested edits, such as providing additional information about alternative twilight tower solutions, adding a statement that twilight towers should not

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[1] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

be subject to any type of enforcement action or penalties, discussing potential improvements that we can make to the Commission's Tower Construction Notification System and our internal processes, seeking comment on whether the current Commission forms are sufficient to provide all the required upfront information for tribal review, and exploring whether specific types of collocations, such as those on existing structures with no ground disturbance or indoors, should be exempt from historic preservation and environmental reviews, amongst others.

Finally, I thank the staff for their efforts on this item and for all the work to come on what is one of the most important proceedings before the Commission.