

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies)	WT Docket No. 13-238
)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting)	WC Docket No. 11-59
)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers)	RM-11688 (terminated)
)	
2012 Biennial Review of Telecommunications Regulations)	WT Docket No. 13-32
)	

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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March 5, 2014

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EXECUTIVE SUMMARY

The Association of American Railroads (“AAR”) strongly supports the revision of the Federal Communications Commission’s (“FCC’s”) environmental and historic preservation review processes to reflect the growing use of smaller, minimally impactful wireless technologies that require the deployment of dozens or even hundreds of facilities in a limited area. First, building on suggestions contained in previous comments, the AAR recommends that the FCC affirm that under its current rules, replacement non-tower structures are not subject to historic preservation review, even if a wireless antenna is collocated on the new non-tower structure. This clarification will reduce the burden on the FCC and other stakeholders from processing applications for structures that do not require historic preservation review, but are submitted for such review out of an abundance of caution.

Second, the AAR urges the FCC to grant a broad exclusion from both environmental and historic preservation review for small wireless facilities deployed on transportation corridors, including railroad rights of way and rail yards. Such an exclusion is appropriate because the extensive history of soil disturbance in such corridors is similar to the underground cable trenching already excluded from environmental review and to that found in the utility corridors excluded from historic preservation review. Providing such an exclusion will encourage the concentration of deployments of small wireless facilities on such industrial rights of way, and thus provide additional protection from potential adverse effects on historic properties located in areas that could otherwise be subject to such development.

Finally, in revising its historic preservation review processes, the FCC should close existing loopholes in the deadlines provided for the resolution of Tribal consultation by limiting automatic requests for supplemental information from Tribal Nations that suspend all deadlines,

and setting a firm limit on the period in which the FCC will resolve any pending disputes between applicants and other stakeholders. The AAR also asks the FCC to propose a unified fee schedule for Tribal consultation, and to place the burden on any Tribal Nation seeking to deviate from such a schedule to establish why its consultation merits additional compensation. Finally, to ensure the safety of both consultants and railroad work crews along rail corridors, the FCC should establish that when monitoring is required as a mitigation measure, only one Tribally-approved monitor can be deployed per railroad work crew.

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REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

I. INTRODUCTION

The Association of American Railroads (“AAR”)¹ respectfully submits these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal

¹ The Association of American Railroads (“AAR”) is a voluntary non-profit membership organization whose freight railroad members operate 82 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. More information on the AAR is available at our website, <https://www.aar.org/Pages/Home.aspx>.

Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.²

As discussed in our initial comments, the AAR strongly supports the revision of the FCC’s existing environmental and historic preservation review processes to reflect the growing use of smaller, minimally impactful wireless technologies that require the deployment of dozens or even hundreds of facilities in a limited area.³ Building on the suggestions contained in our original comments, the AAR recommends that the FCC: affirm that under its current rules, replacement non-tower structures are not subject to historic preservation review; grant a broad exclusion from environmental and Section 106 review for small wireless facilities deployed on transportation corridors and in rail yards; and establish firm deadlines and a unified fee schedule for Tribal consultation, while providing limits on Tribal monitoring in rail corridors to address public safety concerns.

II. THE FCC SHOULD AFFIRM THAT REPLACEMENT NON-TOWER STRUCTURES ARE NOT SUBJECT TO HISTORIC PRESERVATION REVIEW

Under the FCC’s Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”), subject to certain narrow limitations, an antenna may be mounted on a building or other “non-tower” structure without undergoing Section 106 review.⁴ The AAR asks the FCC to affirm that the replacement of such a structure and re-collocation of an antenna on the new non-tower building does not give rise to an obligation to perform historic

² *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations*, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32, Notice of Proposed Rulemaking, 28 FCC Rcd 14238 (2013) (“*NPRM*”).

³ See Comments of the Association of American Railroads, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32 (filed Feb. 3, 2014) (“*AAR Comments*”).

⁴ See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1 Appendix B, Section V (“*Collocation Agreement*”).

preservation review. This is a common sense clarification, as the replacement building, like the original building, would not be considered a “tower” under the FCC’s rules.

The FCC’s rules generally do not require historic preservation review for non-tower structures.⁵ Under the terms of the Collocation Agreement, a “tower” is “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities,” while a non-tower is any other structure.⁶ Subject to certain limitations, such as the age of the structure, its proximity to a historic district or identification as a National Historic Landmark, inclusion in the National Register of Historic Places, or the existence of pending complaints, an antenna may be mounted to a non-tower structure without undergoing any prior Section 106 review.⁷

In the NPRM, the FCC notes that its current rules exclude from Section 106 review the construction of a new communications tower that replaces an existing tower, but do not provide a parallel exclusion for the installation of a replacement for a non-tower structure.⁸ In our original comments the AAR argues in favor of the creation of such an exclusion, noting that replacement facilities pose even less of a risk to the environment or historic structures than new construction, as the ground on which they are installed has been previously disturbed, and no new visual or direct effects would arise from the installation of such a facility.⁹ In these reply comments, the AAR asks the FCC to affirm that under its existing rules, no historic preservation review is needed to construct a replacement for a building or other non-tower structure that has a collocated antenna, including if that antenna is subsequently collocated on the replacement

⁵ *See id.*

⁶ *See id.* at Section I.B.

⁷ *See id.* at Section V.

⁸ *See NPRM*, 28 FCC Rcd at 14262 ¶ 63.

⁹ *See AAR Comments* at 17-18.

building. Under the plain language of the FCC’s Collocation Agreement, a building does not become a “tower” for regulatory purposes simply by having an antenna mounted on its walls or roof, and therefore its replacement is not subject to Section 106 review. Such a clarification of the Commission’s rules will be helpful to the railroads and other entities that regularly deploy small wireless facilities on collocated sites such as on utility poles, signaling equipment, or other non-tower infrastructure, and face uncertainty when posed with the question of whether to seek historic preservation review for the replacement of such non-tower structures. Removal of this potential source of confusion will reduce the burden on the FCC and other stakeholders from having to process applications for review for replacement non-tower structures that were submitted out of an abundance of caution, and will further encourage collocation and reduce the need for the construction of new towers.¹⁰

III. THE FCC SHOULD EXCLUDE DEPLOYMENTS ON TRANSPORTATION CORRIDORS AND RAIL YARDS FROM ENVIRONMENTAL AND SECTION 106 REVIEW

In our initial comments, the AAR noted that that the location of undertakings along transportation corridors in particular has been a critical factor in the ACHP’s prior approval of categorical exclusions from Section 106 review.¹¹ The records in this docket and in the Positive Train Control (“PTC”) Program Comment proceeding¹² establish that there is strong support for

¹⁰ See Collocation Agreement at Preamble (“[T]he effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse,” while encouraging collocations will “reduc[e] potential effects on historic properties that would otherwise result from the construction of...unnecessary new towers.”).

¹¹ See, e.g., AAR Comments at 11.

¹² The FCC has recently submitted a Program Comment to the Advisory Council on Historic Preservation (“ACHP”) that would provide a targeted mechanism for historic preservation review that could be used by the railroads to streamline the processing of small wayside poles for the nationwide deployment of PTC systems. Regardless of the final content of the Program Comment, the AAR believes that any environmental and/or historic preservation review rules resulting from this proceeding should also be applicable to PTC poles that satisfy the revised criteria.

a broad exclusion from both environmental and historic preservation review of small wireless facilities in industrial corridors such as utility and communications corridors, and transportation rights of way. The AAR agrees that such an exclusion is appropriate, given the long history of soil disruption in such corridors coupled with the heavily-travelled, industrial nature of railroad tracks and rail yards, even if the tracks or rail facilities are eligible, by virtue of age only, for consideration for the National Register. The AAR continues to feel strongly that all infrastructure on the railroad rights of way or in rail yards of no more than seventy-five feet should be included in any revisions arising from this proceeding. At a minimum, the AAR asks the FCC to clarify that all infrastructure of ten feet or less located on the railroad rights of way or in rail yards should not be subject to either environmental or historic preservation review.

In its comments in this proceeding, PCIA—The Wireless Infrastructure Association (“PCIA”), argues that Note 1 to Section 1.1306 of the FCC’s rules already excludes from environmental review the underground installation of wire or cable along existing corridors, and that it would be logical to extend this exclusion to include transportation corridors which have been subject to extensive prior ground disturbance.¹³ PCIA notes that “[t]here is no record evidence showing” that deployments of small wireless infrastructure in such heavily disturbed soil will have any significant environmental effect.¹⁴ For the same reason, PCIA also argues that an exclusion from historic preservation review is appropriate for new pole deployments in utility or other corridors, while failing to grant such an exclusion will give rise to challenging delays in

¹³ See Comments of PCIA—The Wireless Infrastructure Association, WT Docket No. 13-238, WC Docket No. 11-59, RM-116988 (terminated), WT Docket No. 13-31, 18-19 (filed Feb. 3, 2014) (“PCIA Comments”); 47 C.F.R. §1.1306 Note 1 (excluding from environmental review “the underground installation of wire or cable along existing underground corridors of prior or permitted use”).

¹⁴ PCIA Comments at 19.

the deployment of wireless technologies.¹⁵ Similarly, AT&T argues that the minimal disturbance caused by deployments of small wireless facilities in rights of way should be subject to exclusion from environmental review, and expresses its general support for an expansion of the exclusion already contained in the Nationwide Programmatic Agreement (“NPA”) from Section 106 review for poles located in or within fifty feet of rights of way that would not constitute a substantial increase in size over existing infrastructure.¹⁶ The AAR agrees with these commenters that the deployment of small wireless facilities on rights of way or in rail yards will give rise to no greater environmental concerns than the far more invasive trenching required for the installation of buried wires and cables in existing rights of way and, in fact, such cables are frequently deployed on the rights of way along railroad tracks, on the same corridor where small wireless infrastructure is deployed. An exclusion from Section 106 review is also appropriate, both because of the history of soil disruption in such corridors, and also because encouraging the concentrated deployment of small wireless facilities on such corridors will minimize the potential impact of facilities outside such industrial areas.

The Federal Railroad Administration (“FRA”) has also filed comments in the PTC Program Comment proceeding that support streamlined review of small wireless facilities on transportation corridors such as railroad rights of way.¹⁷ Specifically, the FRA recommends that the FCC adopt a general exclusion from Section 106 review for deployments in rail yards and similar rail facilities located on the railroad rights of way, based on the existing exclusion in the

¹⁵ *See id.* at 22-23.

¹⁶ Comments of AT&T, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32 at 6 (filed Feb. 3, 2014); *see also* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1 Appendix C Section III.E (“NPA”).

¹⁷ *See* Comments of the Department of Transportation and the Federal Railroad Administration, WT Docket No. 13-240 (filed Feb. 14, 2014) (“FRA Comments”).

FCC rules allowing the deployment of communications towers in industrial parks without prior historic preservation review.¹⁸ As the FRA notes, the sustained and disruptive activities that take place in industrial parks that justified the existing exclusion in the NPA are equivalent to activities occurring in rail yards and other railroad facilities, and in light of these similarities the likelihood that new wayside poles “would create any additional effects, either direct or indirect, to historic properties is minimal.”¹⁹ The AAR echoes these comments, which are equally applicable to all railroad facilities, both for Positive Train Control and non-Positive Train Control. In fact, the small wireless facilities along rail corridors and in rail yards addressed by the AAR in its original comments, with a maximum height of 75 feet, are far less likely to give rise to any adverse effects on rights of way than the large communications towers already excluded from Section 106 review by the NPA, which can reach 200 feet in height and require correspondingly deeper foundations.²⁰

Furthermore, the AAR agrees with commenters that recommend that the Commission create a general exclusion from Section 106 review for collocation on infrastructure that is forty-five years old or older, particularly for small infrastructure located on transportation corridors.²¹ Verizon specifically recommends that the FCC eliminate Tribal consultation for collocations where the only reason Section 106 review is required is the age of the structure.²² The Wireless

¹⁸ *See id.* at 2-3 (citing NPA Section III.D).

¹⁹ *Id.* at 3.

²⁰ *See* NPA Section III.D.

²¹ *See* Comments of Verizon and Verizon Wireless, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688, WT Docket No. 13-32 at 21 (filed Feb. 3, 2014) (“Verizon Comments”); Comments of the Wireless Internet Service Providers Association, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32 at 12 (filed Feb. 3, 2014) (“WISPA Comments”); Comments of Fibertech Networks, LLC, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32 at 15-17 (filed Feb. 3, 2014).

²² *See* Verizon Comments at 21-22.

Internet Service Providers Association (“WISPA”) agrees, and notes that eliminating the forty-five year age threshold for non-tower structures such as utility poles and water tanks will not lead to greater adverse impacts on historic properties, as applicants would still be required to ensure that the underlying structure was not eligible for listing in the National Register or was not itself a historic landmark.²³ In addition, several State Historic Preservation Officers (“SHPOs”) note that they have no objection to such a clarification of the FCC’s rules, as they have no interest in consultation on potential adverse effects of small wireless deployments on utility poles and other industrial infrastructure simply because of the age of such infrastructure.²⁴

There is ample precedent for crafting an exclusion from historic preservation review for the effects of antenna deployments on railroad tracks and rail facilities located on the railroad rights of way. In addition to the existing exclusion for industrial corridors already part of the FCC’s rules, as discussed above, the ACHP has previously granted several exemptions that remove the effects of undertakings on broad elements of industrial corridors from Section 106 review. For example, in 2005 the ACHP adopted an exemption that released all Federal agencies from the Section 106 requirement of having to take into account the effects of their undertakings on the interstate highway system, except for a limited number of individual highway elements that were found to have particular national significance.²⁵ In granting this exemption, the ACHP noted the need for continuing improvements to the highway system, which requires regular construction, alterations and additions that have a minimal or non-adverse effect, when viewing

²³ See WISPA Comments at 12.

²⁴ See Comments of the Office of Historic Preservation, Department of Parks and Recreation, State of California, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32 at 2 (filed Feb. 3, 2014); Comments of the Arkansas Historic Preservation Program, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32 at 1 (filed Feb. 3, 2014).

²⁵ See Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System, 70 Fed. Reg. 11928, 11928 (Mar. 10, 2005).

the highway system as a whole.²⁶ More recently, the ACHP adopted a program comment that exempted from Section 106 review undertakings potentially affecting thirteen distinct categories of post-1945 concrete and steel highway bridges, based on their shared characteristics and their limited value for historic preservation.²⁷ By excluding undertakings with the potential for effects on industrial infrastructure located on railroad rights of way and in rail yards from Section 106 review, the FCC would be following this long-standing precedent and encouraging the deployment of small wireless facilities in areas that are already subject to extensive development and soil disruption.

IV. THE FCC SHOULD SET FIRM DEADLINES AND ESTABLISH A UNIFIED FEE SCHEDULE FOR TRIBAL CONSULTATION, AND LIMIT MONITORING

To streamline the process of deploying small wireless facilities, and in particular those facilities located on railroad rights of way and in rail yards, the FCC should set firm deadlines and establish a unified fee schedule to govern Tribal consultation undertaken as part of the Section 106 review process. The AAR similarly recommends that, to ensure the public safety, the FCC should place reasonable limits on the use of monitoring in rail corridors as a form of mitigation.

Several commenters have written to express their concern about the delays that can arise under the current Section 106 Tribal review process. As Verizon notes in its previous comments, “[i]f even one tribe does not respond to a [Section 106] notification or fails to render a

²⁶ *See id.* at 11929.

²⁷ *See* Program Comment Issued for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges, 77 Fed. Reg. 68790, 68791 (Nov. 16, 2012). In adopting the NPA, the ACHP also carved out numerous exemptions for tower enhancements, replacement towers, temporary facilities, industrial and commercial properties, towers on or near communications and utility rights of way, and areas specifically exempted by a SHPO. *See* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Review Process, *Report and Order*, 20 FCC Rcd 1073, 1086-1099 ¶¶ 33-68 (2004).

determination about the effects of a project, the entire project will be delayed by a minimum of 60 days, but many times...the time is far longer.”²⁸ Verizon describes a recent internal study it conducted of various Distributed Antenna System (“DAS”) projects for which it was required to seek historic preservation review, which found that the average time to complete a review was 84 days, with poles requiring approval from multiple Tribal Nations often taking much longer.²⁹ For example, Verizon reports that a DAS installation on the roof-top of a building in Pennsylvania with no historic effects required consultations with nine Tribal Nations, with the last response received 126 days after the Tribal review process was initiated; while the installation of a similar small antenna in Cleveland, Ohio was approved by the SHPO in 37 days, but took 150 days to receive approval from all Tribal Nations contacted through the Tower Construction Notification System (“TCNS”).³⁰ The Utilities Telecom Council (“UTC”) similarly expresses concern at delays in the resolution of Section 106 review arising from the Tribal review process, and posits that some Tribal Nations “are routinely making claims for new deployments where there is no legitimate concern.”³¹

The AAR shares Verizon and UTC’s concerns regarding delays that can arise under the current Tribal consultation process, and notes that there are steps the FCC could take in this rulemaking that would address these concerns. The FCC has the authority to impose deadlines on Tribal Nations for the completion of Section 106 review. The ACHP’s rules provide that an agency “shall ensure that consultation in the section 106 process provides the [Tribal Nation] a *reasonable opportunity* to identify its concerns about historic properties, advise on the

²⁸ See Verizon Comments at 20.

²⁹ See *id.* at 9.

³⁰ See *id.*

³¹ See Comments of the Utilities Telecom Council, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32 at 9 (filed Feb. 3, 2014) (“UTC Comments”).

identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.”³² As long as an agency abides by the reasonable parameters for Tribal consultation it establishes, courts have found that the agency has satisfied its requirements for Tribal consultation.³³ Similarly, an Executive Order released in 2000 provides that agencies should have a process “to ensure meaningful and timely input by tribal officials,” suggesting that the burden for prompt responses lies not just with the Federal government, but also the Tribal respondent.³⁴

Promulgating rules that provide firm deadlines for the resolution of Tribal consultation would be in keeping with actions taken by other agencies. Other Federal agencies have imposed explicit, firm deadlines on Tribal Nations in their regulations.³⁵ For example, the rules of the Department of the Interior provide that prior to issuing a permit for the excavation or removal of archeological resources from public lands, the Federal land manager charged with issuing the permit must give any Tribe which may consider the site as having religious or cultural importance thirty days' notice.³⁶ During this thirty day period, the Federal agent may meet with Tribal officials to discuss ways to avoid or mitigate potential harm, at the end of which time, the permit for archeological excavation may be granted.³⁷ In addition, the regulations of the Bureau

³² 36 C.F.R. § 800.2(c)(2)(ii)(A) (emphasis added).

³³ See *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp 395, 400 (D.S.D. 1995) (finding that Tribal consultation could be satisfied with even “perfunctory” consultation, as long as such consultation accorded with the agency’s policies).

³⁴ See EO 13175, 65 Fed. Reg. 67249, 67250 (2000); see also 25 C.F.R. § 170.100(a) (providing that consultation on the Indian Reservation Roads Program should be conducted through “government-to-government communication in a timely manner by all parties,” including state and Tribal governments).

³⁵ See, e.g., 25 C.F.R. §§ 262.3(b)(1); 262.8(c).

³⁶ See 43 C.F.R. § 7.7(a).

³⁷ See *id.*

of Indian Affairs allow Federal officials to act after providing Tribal Nations finite comment periods.³⁸ Courts have upheld the ability of Federal agencies to impose strict deadlines on Tribal Nations, noting that agencies have the freedom to “fashion [their] own rules of procedure and to pursue methods of inquiry capable of permitting [them] to discharge [their] multitudinous duties.”³⁹

Under both the FCC’s current rules, and the procedure proposed in the Program Comment, a request by a Tribal Nation for additional information effectively stops the clock on consultative review.⁴⁰ While the NPA provides clear deadlines in cases where a Tribal Nation expressly disavows any interest in consultation, the FCC has taken the position that the Section 106 review process also allows a Tribal Nation to make automated requests for information to supplement the submission packet, and that each such request essentially “stops the clock” on Tribal review. The submission of an application packet often triggers an automatic request for additional information from Tribal Nations, putting these applications in an administrative limbo with no clear path to resolution. In many cases more than one Tribal Nation expresses interest in consultation on a potential deployment site, giving rise to multiple opportunities for delay, but information requests on the part of only one Tribal Nation can significantly extend the duration of the approval process. Similarly, neither the current NPA process nor the draft Program

³⁸ See 25 C.F.R. §§ 262.3(b)(1); 262.8(b)(3)(c).

³⁹ *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management*, 455 F.Supp. 2d 1207, 1220 (D.Nev. 2006), citing *FCC v. Pottsville*, 309 U.S. 134, 143 (1940) (“Agencies...[may] set deadlines as needed in order to ensure the timely and proper disposition of matters before it.”).

⁴⁰ See, e.g., NPA Section VII.A; *Comment Sought on Draft Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act*, WT Docket No. 13-240, Public Notice, DA 14-97 (rel. Jan. 29, 2014), Attachment A (“Draft Program Comment”).

Comment sets a firm deadline by which the FCC will resolve disputes between parties regarding the Section 106 process.⁴¹

As a vehicle to impose firm deadlines, the FCC should limit the ability of consulting Tribal Nations to generate automated requests for supplemental information after an applicant submits a packet for review into TCNS, and commit to resolving all disputes within a set period of time, such as thirty days. By clarifying its rules to close these loopholes in the Tribal consultative process going forward, the FCC will greatly increase the predictability of small wireless facility deployment, without sacrificing any element of the important Tribal consultative process.

In addition to clarifying and tightening deadlines for Tribal review, the FCC should also develop a unified fee schedule for Tribal consultation. Specifically, the FCC should work with Tribal Nations to arrive at a transparent, predictable fee schedule that could serve as the default for all consultative review, with the burden on Tribal Nations to explain why a deviation from such a schedule would be justified. The lack of transparency regarding potential consultative fees results in a difficult budgeting process for applicants for historic preservation review. The FCC should strongly recommend that the Tribal authority adopt a comprehensive, transparent and aggregated fee schedule. One possible template for a fee schedule could be the Model Explanation Cost Recovery Schedule, which was adopted by the United South and Eastern Tribes (“USET”), a consortium of Tribal authorities, in 2004 to provide a guideline for Tribal Nations and applicants for various consultation-related activities.⁴² The USET agreement establishes a possible precedent for other Tribal Nations to consider.

⁴¹ See, e.g., NPA at Section VII.D.4; Draft Program Comment at 11.

⁴² See USET, Model Explanation Cost Recovery Schedule, *available at* http://www.usetinc.org/media/2005009._633824699407685000.pdf (last accessed Oct. 16, 2013).

Any fee schedule should be provided to the applicants prior to the initiation of consultation. Such an approach offers obvious benefits for the deployment of small wireless facilities by establishing clear and predictable costs for Section 106 review. A fee schedule would also provide transparency and uniformity to Tribal authorities, allowing each Tribe to be certain that its consultative requests are consistent with those made by other Tribal Nations.

Finally, the AAR feels strongly that in the limited instances where the presence of monitors along rail corridors has been found to be an appropriate mitigation measure, for safety reasons the Program Comment should clarify that a maximum of one monitor will be allowed per railroad work crew for deployment on rights of way and in rail yards.⁴³ The railroad rights of way and rail yards, like all industrial corridors, are frequently traveled by heavy machinery, and any monitor working in such a location must be well-trained to ensure both their safety and the safety of the work crews around them. The AAR believes that the most comprehensive approach to monitoring would be the formation of a pool of professionals who satisfy the Secretary of the Interior's Professional Qualification Standards.⁴⁴ Both the applicants and Tribal Nations should be able to contribute monitors to this pool. The applicants would then draw from this group of approved monitors to accompany work crews installing any small wireless infrastructure which has been found to have a potential adverse effect on a historic property, including a property of cultural and religious significance for a Tribal Nation. Any disputes regarding the selection of a monitor for areas of interest for more than one Tribal Nation should be submitted to the FCC,

⁴³ The AAR also urges the FCC to consider adopting criteria to govern the coordination of monitors and work crews. Such criteria are critical to ensure that the deployment of small wireless facilities can go forward as scheduled even if, for example, an appointed monitor fails to appear at a work site on a scheduled deployment date. Standard criteria are also necessary to ensure the safety of work crews and monitors on the job site. The FCC should finalize a list of required working criteria that would ensure that monitoring does not slow the deployment of small wireless facilities, or endanger the safety of such deployment.

⁴⁴ See 36 C.F.R. Part 61.

and resolved within a set period of time, such as fifteen days. The AAR recognizes that the historic preservation interests of Tribal Nations vary, but will be well-represented by a Secretary-qualified monitor, and providing for a single monitor will avoid inevitable scheduling delays and safety concerns that will arise if each interested Tribe is entitled to deploy a monitor to each site of small wireless facility deployment.⁴⁵

V. CONCLUSION

To ensure that small wireless facilities can be expeditiously deployed while satisfying the requirements of historic preservation review, the FCC should affirm that its current rules do not require Section 106 review of replacement non-tower structures. In addition, as part of the current rulemaking, the Commission should grant a broad exclusion from both environmental and historic preservation review of small wireless facilities deployed on transportation corridors

⁴⁵ In its comments, UTC asked the FCC to provide clear guidance regarding who—the monitor, the Tribes or the FCC—has the authority to determine when and under what conditions monitoring can be considered completed. *See* UTC Comments at 9. The AAR supports this request for clarification.

such as railroad rights of way and in rail yards, and require firm deadlines and a unified fee schedule for Tribal consultation, while limiting Tribal monitoring to minimize public safety concerns.

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