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
	)	

COMMENTS OF THE UTILITIES TECHNOLOGY COUNCIL

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SUMMARY

UTC supports the Commission's proposals in the *NPRM* for reforming the process for Tribal consultation and categorically excluding small facilities from routine review under the National Historic Preservation Act (NHPA) and the National Environmental Protection Act (NEPA). These proposals are appropriate and necessary to accelerate the deployment of wireless communications.

Utilities have experienced significant and unnecessary delays and excessive fees in the Tribal consultation process. UTC urges the Commission to reform the process for Tribal review by requiring tribes to substantiate their claim to an area of interest, implementing efficiencies to ensure that duplicative review is not conducted by each Tribal Nation, and reducing the fees that tribes may charge individually and collectively. Specifically, the Commission could place the burden of evidence on the Tribal Nations to prove that they have a legitimate claim regarding an area of interest before including it in the TCNS. In order to create efficiencies and avoid duplicative review, applicants should be able to use ethnographic studies that have been developed by previous applicants for the same or similar site for that Tribal Nation instead of requiring each and every applicant to develop its own ethnographic study for the same area for the same Tribal Nation.

The Commission should address the issue of the fees that are charged by some of the tribes, clarify which fees are appropriate, and whether an applicant should pay them or not. Specifically, the Commission should require Tribal Nations to develop fee schedules to limit the amount that Tribal Nations may charge for such services. Similarly, in order to further reduce costs, the Commission should limit cumulative fees by establishing a presumption for limiting

fees to one tribe in one area. Likewise, the Commission should require the use of one review or one monitor to serve all tribes that claim an interest in an area to avoid duplication of efforts. In that regard, the Commission should clarify the issues of monitor qualifications, monitor reporting requirements and whether the monitor, the tribe or the FCC has the authority to determine when and under what conditions monitoring may end.

UTC also supports the establishment of a categorical exclusion under NEPA for pole replacements, antenna structures in existing rights of way, and other wireless collocations in or near historic districts, as proposed by the Commission. These types of projects are unlikely to have any impact on a historic area. In that regard, the Commission should clarify that collocations by utilities at existing utility substations and generation facilities (power plants, etc.) are excluded from review because the undertaking will not involve a substantial impact on the area (i.e. there is already a substation or a power plant at the location and there is no additional ground disturbance). Therefore, the Commission should adopt these categorical exclusions, as more fully described below.

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The Utilities Technology Council ("UTC")[1] hereby files the following comments in response to the Federal Communications Commission's *Notice of Proposed Rulemaking* in the above-referenced proceeding.[2] UTC supports the Commission's proposals in the *NPRM* for reforming the process for Tribal consultation and categorically excluding small facilities from routine review under the National Historic Preservation Act (NHPA) and the National Environmental Protection Act (NEPA). These proposals are appropriate and necessary to accelerate the deployment of wireless communications.

I. Introduction and Background

UTC is the international association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries. UTC's members include large investor-owned utilities who may serve millions of customers across multi-state service territories, as well as small rural electric cooperative utilities and municipal utilities that may serve only a few thousand customers in isolated communities and

[1] UTC was formerly the "Utilities Telecom Council". *See* www.utc.org.

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 (rel. April 21, 2017). *See also* Federal Communications Commission, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 82 Fed. Reg. 21761 (May 10, 2017), visited at https://www.gpo.gov/fdsys/pkg/FR-2017-05-10/pdf/2017-09431.pdf).

remote areas throughout the country. All of UTC's members own, manage and control extensive private internal communications networks that they use to support the safe, reliable and secure delivery of essential electric, gas and water services to the public at large and to provide wholesale services to industrial and business customers. These private internal communications networks include both wireline and wireless communications systems.

Utilities have a significant interest in the Commission's *NPRM*, because they must comply with the NHPA and NEPA when they construct wireless antenna structures for their Federal Communications Commission (FCC) licensed systems. Streamlining compliance with the NHPA and NEPA, including the Tribal consultation process, will accelerate the deployment of wireless communications systems by utilities. UTC has been an active participant in previous FCC proceedings that streamlined the process for compliance with NEPA and the NHPA.[3] It supported the Commission's proposal to categorically exclude small cells and distributed antenna systems (DAS) from NEPA and the NHPA. UTC also has raised many of the same concerns about the Tribal consultation process that the Commission is now addressing in this *NPRM*.[4] UTC's interest in the *NPRM* is primarily in reforms to the Tribal consultation process under the NHPA and the proposed categorical exclusions from NEPA for small wireless facilities. Therefore, UTC supports the proposals in the *NPRM* to remove barriers to wireless deployment by streamlining the process for compliance with NEPA and the NHPA when constructing new or modified wireless antenna structures.

[3] Comments of the Utilities Telecom Council in WT Docket No. 13-238 (filed Feb. 3, 2014); and Reply Comments of Utilities Telecom Council in WT Docket No. 13-238 (filed Mar. 5, 2014).

[4] *Id.*

II. Updating the FCC's Approach to the NHPA and NEPA

In the *NPRM*, the FCC explains that "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."[5] Specifically, the FCC focuses on the component of the Section 106 review process, and it reports that there have been widespread complaints that Tribal Nation review has caused substantial delays that significantly exceed those attributable to the review process by state historic preservation offices (SHPO). In addition, the Commission reports that Tribal compensation in connection with the review of submissions to the Tower Construction Notification System (TCNS) has become a "highly contentious subject."[6]

A. Need for Action

The FCC explains the need for action and reports that there has been an increasing number of Tribal Nations that are claiming that proposed sites will disturb areas of Tribal interest, which include Tribal burial grounds and other sites that Tribes regard as sacred off Tribal lands.[7] Moreover, the FCC reports a significant increase in the fees that Tribal authorities are routinely charging for processing applications.[8] The FCC requests comment 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. In

[5] *NPRM at* ¶33.

[6] *Id. at* ¶35

[7] *Id.*(reporting that 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.)

[8] *Id.* (reporting that the number of Tribal Nations requesting fees increased from 50 to 85 between 2015 to 2017 and that the 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.)

addition, the FCC also seeks comment and specific information on the extent of benefits attributable to Tribal participation under the Commission's Section 106 procedures, particularly in terms of preventing damage to historic and culturally significant properties.[9]

In response to the FCC's request for comment on the need for action with respect to the Tribal review process, UTC's members report similar experiences to those identified by the FCC in its *NPRM* with regard to coordinating with tribes in accordance with Section 106 review.[10] Utilities have experienced significant and unnecessary delays and excessive fees. At the outset, utilities report that Tribal Nations are often slow to respond to requests for concurrence, if they respond at all.[11] This can delay the project, despite multiple attempts by utilities to request a response from tribes. When Tribal Nations do respond, utilities have reported that the Tribal Nations appear to be claiming that a proposed antenna structure site is in an area of interest without providing any underlying proof that the proposed site would have an impact on an area of cultural or religious significance. Multiple Tribal Nations may claim that they have an interest in the area where the antenna structure is being sited.[12] Moreover, fees are charged for review of

[9] *Id*. at ¶37.

[10] *See* Comments of the Utilities Telecom Council in WT Docket No. 13-238 (filed Feb. 3, 2014)(reporting that "some tribes are routinely making claims for new deployments where there is no legitimate concern."). *And see* Reply Comments of the Utilities Telecom Council in WT Docket No. 13-238 (filed Mar. 5, 2014)(urging the FCC to address the larger issue of unnecessary delays and costs for wireless siting in general during the Tribal review process.) *See also* Letter from Brett Kilbourne, UTC to Donald Johnson, FCC regarding the Nationwide Programmatic Agreement (filed Jan. 20, 2015). *See also* Comments of UTC in WT Docket No. 15-180 (filed June 13, 2016)(supporting comments on the record and a petition complaining about unnecessary delays and fees that are associated with Tribal consultation).

[11] The FCC has issued a Public Notice that provides a process to follow when a Tribal Nation is unresponsive to initial requests. *See Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement,* Declaratory Ruling, FCC 05-176 (rel. Oct. 6, 2005). *See also* FCC Clarifies Provision of Nationwide Programmatic Agreement the Apply to Indian Tribes and Native Hawaiian Organizations, News Release, visited at http://wireless.fcc.gov/section106/tribal-declaratory-ruling.pdf. However, tribes do still fail to respond to requests, and they take at least 30 days after the ethnographic studies are submitted to review the materials after the initial request is submitted.

[12] One utility reported that there were 31 Tribal Nations that reported an interest in one tower in northern Wisconsin.

the application, ranging between $125-$600 per application.[13] In addition, tribes will typically require an ethnographic study of the proposed site, which will also impose further costs.[14] The tribe may also require the utility to hire a tribe's out of state appointed consultant and a monitor to oversee the construction of the site, even when the ethnographic study has found that there is no connection between the area and the tribe.[15] The cost of the monitor is also significant, and it is unclear what purpose the monitor serves under such circumstances.[16]

B. Process Reforms

In the *NPRM*, the Commission invites comment on possible process reforms related to Tribal fees. Specifically, the Commission asks about the circumstances when fees are requested, the amount of fees requested, the geographic areas of interest, remedies and dispute resolution and finally, negotiated alternatives for dispute resolution.[17] It asks under what circumstances an applicant may refuse to pay fees.[18] It also asks what applicants must provide to satisfy the requirement that they provide "all information reasonably necessary for the Indian tribe or NHO

[13] Note that this fee is for each tribe. The cumulative fees from multiple Tribal Nations as noted above can quickly add up. UTC also agrees with the FCC's observation that the fees are increasing. Whereas in 2013, utilities were reporting that the fees were in the range of $200-$500, now they are reporting that the fees are as high as $3,000. .

[14] In addition to ethnographic studies, tribes will typically also require topographical map showing the Area of Potential Effect (APE), as well as a description of the work to be performed.

[15] These ethnographic studies are duplicative and redundant to the extent that different applicants will be required to develop the same study for the same area. Typically, the tribes require that the ethnographic studies be subject to a non-disclosure agreement. As a practical matter, this perpetuates the need for other applicants to develop their own ethnographic study for the same area. It would make much more sense to publish the ethnographic study so that others could learn from it and use it if they decide to construct in the area.

[16] The cost of a site monitor can reportedly double or triple the already high review cost. *See* Comments of NTCH in WT Docket 16-421 at 12-13 (filed Mar. 8, 2017).

[17] *NPRM* at ¶¶42-59.

[18] *NPRM* at ¶43, *citing* 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)(explaining when fees may be charged by tribes.)

to evaluate whether Historic Properties of religious and cultural significance may be affected."[19] Moreover, the Commission asks if the amount of the fee requested by a Tribal Nation may factor into whether an applicant has satisfied its obligation 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.[20] In that regard, the Commission invites comment on whether and how it might require Tribal Nations to provide a schedule of fees for consultation services.[21]

With regard to the size of the geographic area of interest, the Commission recognizes that Tribal Nations have increased their areas of interest within the TCNS and that they are now requesting entire states instead of individual counties.[22] In that regard, it specifically invites comment on whether it 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.[23] In addition, the Commission asks 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.[24] Finally, the Commission asks whether there are mechanisms to gain efficiencies to ensure that duplicative review is not conducted by each Tribal Nation.[25]

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[19] *Id.* at ¶46, *citing* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App'x C (NPA).

[20] *Id.* at ¶¶48 and 50, *citing* NPA§§ IV.B, IV.C. *See also* 54 U.S.C. § 302706(b).

[21] *Id.* at ¶52.

[22] *Id.* at ¶53. The FCC notes that in a few instances tribes have requested 20 different states.

[23] *Id.*

[24] *Id.*at ¶54.

[25] *Id.* at ¶55.

UTC urges the Commission to reform the process for Tribal review under Section 106 of the NHPA. First, the TCNS does not appear to be narrowly tailored to areas of religious or cultural importance. Instead, it appears that a tribe may claim that any area in the country is a religious or culturally important area for the tribe, and that it is not required to substantiate that claim through an ethnographic study or any other means. This results in the TCNS being overbroad, potentially requiring concurrence from tribes that don't require consultation and/or consuming Tribal resources that could be put to better use in reviewing projects that do require concurrence.

The Commission could narrow the size of the geographic area of interest claimed by Tribal Nations in the TCNS. For example, the Commission could place the burden of evidence on the Tribal Nations to prove that they have a legitimate claim regarding an area of interest before including it in the TCNS.[26] Alternatively, the Commission could adopt a rebuttable presumption that a Tribal Nation may not claim an interest in an area that an ethnographic study has determined is not an area of cultural or religious significance to the Tribal Nation.[27] If an applicant conducts an ethnographic study and the study shows that there is no connection between the area of the project and a tribe, then the Commission must, under the ACHP "good faith" criteria, consider the ethnographic study, determine if it is satisfactory, and if so – require that the tribe respond within 30 days and provide evidence sufficient to show that the area is a religious or culturally important area for the tribe. If the tribe fails to respond within 30 days,

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[26] *See also* Petition for Declaratory Ruling, PTA-FLA, Inc., WT Docket No. 15-180, at 14-15 (filed May 3, 2016) (PTA-FLA Petition for Declaratory Ruling)(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").

[27] This presumption could be rebutted by a showing of clear and convincing evidence by the Tribal Nation that substantiates its claim concerning an area of interest.

concurrence by the tribe should be deemed granted. This proposed process is fully consistent with the NPA.

In addition to narrowing the size of the geographic area of interest, the Commission could also reduce unnecessary cost and delays in the process related to the development of ethnographic studies and the failure of a Tribal Nation to respond to requests from an applicant in a timely manner. For example, instead of requiring each and every applicant to develop its own ethnographic study for the same area for the same Tribal Nation, applicants should be able to use ethnographic studies that have been developed by previous applicants for the same or similar site for that Tribal Nation.[28] As such, UTC urges the Commission to consider these suggestions as ways to "gain efficiencies to ensure that duplicative review is not conducted by each Tribal Nation."[29] It also believes that these suggestions would help future applicants to avoid constructing in sites where Tribal Nations have identified an area of interest.[30]

Utilities have reported that they have experienced extensive delays and significant costs resulting from ethnographic studies, certified archeologists and monitors at the project sites. Some tribes require a monitor at sites, even after a completed ethnographic study, a certified archeologist and the SHPO itself concludes that the proposed project should be cleared. This can cost thousands of dollars and cause weeks of delays by itself. In addition, projects may involve multiple tribes, and some tribes will clear the project but other tribes will refuse to provide clearance – thus presenting the potential for similar costs and delays by other tribes for such

[28] Utilities report that public disclosure of ethnographic studies is typically restricted by NDAs by the Tribal Nations, thereby preventing the reuse of an ethnographic study for the same site.

[29] *Id.* at ¶55.

[30] *See Id.*at ¶54 (requesting comment on whether the 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.)

projects. As such, there is significant uncertainty about the timing and the costs associated with obtaining concurrence from a tribe, subsequent to the initial notification stage in the process.

UTC recommends that the Commission should clarify the issues of monitor qualifications, monitor reporting requirements and whether the monitor, the tribe or the FCC has the authority to determine when and under what conditions monitoring may end. Questionable claims, unnecessary ethnographic studies and ambiguous monitor requirements impose significant delays and additional costs. The Commission should adopt rules that define when the earth disturbing phase is over, with consideration for site variables like fill, bore depths and previous disturbance. The Commission should also adopt rules that specify who has the authority to determine when monitoring will cease. The monitor requirements must not be open-ended. Finally, the Commission should adopt rules that specify the content and recipients of the monitor's report. In that regard, UTC suggests that the report objectively state whether cultural resources at the site (not the APE) are or are not affected, and UTC suggests that the tribe, the Commission, the tower owner, the SHPO and any environmental consultant hired by the tower owner receive a copy.

UTC also urges the Commission to find ways to limit the amount of fees that are charged for Tribal consultation. These fees reportedly range from $125 to $600 per site – with some tribes charging $3,000. These fees add up when there a multiple sites involved in a project and can be significant. The ACHS is aware of this practice, and it has stated that "[t]here has been a growing concern about the practice of certain parties charging fees from Federal agencies or their applicants for their participation in the Section 106 process. In particular, the issue has emerged in the context of Indian tribes and their participation in the process."[31] In addition, ACHS has

[31] *Fees in the Section 106 Review Process*, Advisory Council on Historic Preservation, visited at http://www.achp.gov/regs-fees.html.

stated that "[n]either Section 106 nor ACHP's regulations impose a duty on an applicant for Federal assistance or approval to develop information and analyses for Section 106 compliance or to engage contractors to so do. If a Federal agency has the authority to impose the development of such information and analyses on the applicant and chooses to do so, the legal basis for that obligation on the applicant lies in the Federal agency's authorities and does not derive from ACHP's regulations."[32] UTC recommends that the Commission should address the issue of the fees that are charged by some of the tribes, clarify which fees are appropriate, and whether an applicant should pay them or not.

UTC agrees with the ACHP's guidance that applicants may refuse to pay fees to the extent that they are not based upon costs of providing consulting services.[33] Moreover, UTC agrees that the amount of the fee should factor into a determination of whether an applicant has met its obligation to make a good faith and reasonable effort to identify Tribal Nations and NHOs that may attach religious and cultural significance to historic properties affected by an undertaking.[34] If the fee is excessive, the applicant has the right to refuse to pay it, and the applicant is free to move to the next step in the Section 106 process.[35]

UTC understands that Tribal Nations should be paid for services they provide to applicants as consultants, and it supports the concept of requiring the development of fee schedules to limit the amount that Tribal Nations may charge for such services.[36] UTC believes

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[32] *Id.*

[33] *Id.* at ¶43, *citing* ACHP, Fees in the Section 106 Review Process (2001), http://www.achp.gov/regs-fees.html (ACHP 2001 Fee Guidance).

[34] *Id.*

[35] *Id.*

[36] *See Id.* at ¶¶51-52.

that the fees specified in such a schedule should serve as the presumptive maximum an applicant would be expected to pay.[37] As such, UTC believes that substantial weight should be placed by the Commission on the fee schedule so that fees that are less than the schedule are presumptively reasonable.[38] With regard to the Commission's suggestion to limit cumulative fees, UTC would support establishing a presumption for limiting fees to one tribe in one area, unless it could be shown by clear and convincing evidence that other tribes have a substantial interest in the area. We also support the use of one review or one monitor to serve all tribes that claim an interest in an area to avoid duplication of efforts. UTC objects to the ability of a tribe to charge a fee when it does not expend time or resources other than to state that it has no interest in a particular project. Similarly, UTC objects to the ability of a tribe to charge excessively more than the actual cost of time and resources needed to ensure cultural sites are preserved. Finally, UTC objects to the ability for a tribe to require a Native American monitor to be on-site for the earth disturbance phase of the project when the required ethnographic study shows that the area is not an area of interest for a tribe.

Finally, UTC urges the Commission to address the problem of unnecessary delays in the initial notification process. When an applicant uses the TCNS or other means to notify the tribes about a proposed project, the ACHP rules and the NPA provide that a THPO must respond within 30 days of a request for review of a finding or determination, or risk having the agency/applicant proceed forward to the next step in the process based on the finding or determination. However, "the refusal of a participant to consult or provide their views within a

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[37] *Id.* (asking whether the fees specified in such a schedule should serve as the presumptive maximum an applicant would be expected to pay, and under what circumstances might an upward departure from the fee schedule be appropriate.)

[38] *Id.* at ¶52.

time frame specified in the regulations or a reasonable time frame does not stop the process," and "the federal agency may elect to extend the review period or may decide to proceed in the Section 106 process." In addition, the NPA provides that if a tribe requests additional time to respond, the applicant must afford additional time as reasonable under the circumstances. The NPA only allows the applicant to proceed forward without providing additional time if "the Indian tribe or NHO has stated that it is not interested in reviewing proposed construction of certain types or in certain locations. Finally, applicants should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating, but should make a reasonable effort to follow up. The Commission has advised applicants to contact the Commission or the tribes, if the tribes are unresponsive. For all of these reasons, there is very little certainty in terms of timing, notwithstanding the 30-day timeframe for the initial notification process.

UTC recommends that the Commission address this issue and provide greater certainty about the time in which tribes must respond to an initial notice through TCNS or other means. In that regard, UTC supports allowing a one-time-only 30-day period, after which the project can proceed without a response from the tribe. UTC has been informed that tribes will restart the time period by responding late at various different stages in the process, which drags out the tower siting. By limiting the period to 30 days, it would prevent this practice.[39]

[39] The FCC also invites comment on whether it should simply end the current framework of one-off negotiations, and instead negotiate with the tribes to enter into agreements regarding best practices. *See NPRM* at ¶59. This would also be a proposal that UTC would support, but it could be a lengthy process getting through it. As such, the FCC should work on this initiative in parallel with other reforms.

III. NHPA Exclusions for Small Facilities

In the *NPRM,* the Commission asks whether it should expand the categories of undertakings that are excluded from Section 106 review.[40] Specifically, the FCC is considering whether to exclude from routine review certain types of pole replacements, as well as sites in existing transportation rights of way. The FCC is also asking whether additional measures to further streamline review of collocations are appropriate. In that regard, it is asking whether some or all collocations located between 50 and 250 feet from historic districts should be excluded from Section 106 review.[41] Similarly, the FCC is asking to what extent tribes and NHOs should participate in the review of collocations on historic properties or in or near historic districts. In that regard, it is asking if it should 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.[42]

UTC supports the Commission's proposal to exclude pole replacements from Tribal review, regardless of whether they were already being used as an antenna structure and regardless of whether they were in a historical district. However, UTC disagrees with the Commission that this exclusion should be conditioned upon whether the replacement pole is not substantially larger (as defined under the NPA (e.g. not more that 10 percent taller than the

[40] *Id.* at ¶66.

[41] *Id.* at ¶73.

[42] *Id.* at ¶74. Specifically, the FCC is considering excluding collocations that are non-substantial or don't disturb the ground or non-substantial collocations in urban rights of way or indoors. Similarly, the FCC is considering excluding 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. Finally, the FCC is considering excluding 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.

previous pole). In this regard, UTC observes that the NPA permits pole top extensions without any restriction on height; and as such, it would make no sense for the Commission to adopt a restriction on height for purposes of a pole replacement. A pole replacement is just an alternative approach to a pole top extension. There shouldn't be two different rules for effectively the same type of structure, especially when it makes no difference visually whether the pole is a replacement pole or one that has a pole top extension. That said, UTC agrees with the Commission that this exclusion should apply to pole replacements within rights of way, regardless of whether such replacements are in historic districts.[43]

UTC supports the Commission's proposal to exclude from Section 106 review any construction or collocation of communications infrastructure in transportation rights of way. In that regard, UTC submits that Tribal and NHO participation should not continue to be required if the Commission does adopt an exclusion for facilities constructed in utility or communications rights of way on historic properties. UTC believes that Tribal and NHO participation should not be required under these circumstances to the extent that there is an exclusion for undertakings in existing ROW or on historic properties.[44]

UTC also recommends that the Commission limit participation of tribes and NHOs for 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.[45] UTC believes this would be appropriate because wireless collocation only has a limited impact on areas of interest,

[43] *Id.*at ¶¶67-68.

[44] *Id.* at ¶¶69-71.

[45] *Id.* at ¶74.

including historic properties or historic districts. UTC also supports excluding collocations that don't involve a ground disturbance or are otherwise non-substantial (*e.g.* in urban rights of way or are indoors).[46] In that regard, UTC urges the Commission to clarify that collocations by utilities at existing utility substations and generation facilities (power plants, etc.) are excluded from review because the undertaking will not involve a substantial impact on the area (*i.e.* there is already a substation or a power plant at the location and there is no additional ground disturbance). Under the same reasoning UTC supports excluding 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.[47] Finally, UTC supports excluding collocations of facilities on new structures in industrial zones (including industrial areas that are unzoned) or facilities on new structures in or within 50 feet of existing utility rights of way.[48] UTC submits that all of these collocations should be excluded because they are all collocations that are non-substantial and won't have an impact on potential areas of interest.

IV. Scope of Undertaking and Action

In the *NPRM*, the FCC requests comment on whether and under what conditions a project should be considered a federal undertaking for purposes of environmental and historical review.[49] UTC continues to believe that the Commission may categorically exclude from environmental and historical review certain projects such as small cells and DAS deployments, based upon the premise that they do not typically impact an area of interest. UTC commented in support of this issue when the Commission conducted its *2014 Wireless Infrastructure NPRM,*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at ¶¶76-77.

but the Commission declined to distinguish projects based on the size of the facilities and find that they were not federal undertakings.[50] Now, that the Commission is revisiting this issue, UTC reiterates its position that the Commission should not consider a project a federal undertaking, if it finds that the type of project would not typically impact an area of interest. In that regard, UTC believes that the Commission should clarify that projects on existing structures, such as substations or near existing utility rights of way, should not be considered a federal undertaking because there would be no additional impact on the area of interest and no ground disturbance.[51] In this context, UTC supports the petition by PTA-FLA which requests clarification that certain unlicensed and licensed sites should not be considered federal undertakings. UTC urges the Commission to extend the relief requested by PTA-FLA to apply to site-by-site licenses, as well as licenses that are issued on a geographic area basis. UTC believes this is consistent with Commission policies towards excluding collocations on existing sites, as well as with PTA-FLA's petition seeking clarification more broadly that they should not be considered federal undertakings.

V. CONCLUSION

In conclusion, UTC appreciates the opportunity to provide these comments in response to the Commission's *NPRM* and supports the Commission's efforts to reform the process for Tribal

[50] *See* Comments of the Utilities Telecom Council in WT Docket No. 13-283 (filed Feb. 3, 2014). *See also* In the Matter of 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; 2012 Biennial Review of Telecommunications Regulations, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32, *Notice of Proposed Rulemaking*, FCC 13-122 (rel. Sept. 26, 2013) (*2014 Wireless Infrastructure NPRM*). *See also 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).

[51] *See also* Chapter NR150, Environmental Analysis and Review Procedures, Wisconsin Department of Natural Resources, visited at https://docs.legis.wisconsin.gov/code/admin_code/nr/100/150.pdf. The Wisconsin Administrative code (Natural Resources 150) provides streamlined processing for a variety of minor actions, which could serve as a model for the Federal Communications Commission as it considers streamlining the environmental and historical review process under the NEPA and the NHPA.

review under Section 106 and to provide categorical exclusions from environmental and historical review of certain pole replacements; any construction or collocation of communications infrastructure in transportation rights of way; and some or all collocations located between 50 and 250 feet from historic districts should be excluded from Section 106 review.

Respectfully submitted,

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