[ORAL ARGUMENT NOT YET SCHEDULED]

Case No. 18-1129 (consolidated with Nos. 18-1135, 18-1148, 18-1159)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER NATIVE AMERICAN INDIAN TRIBES AND TRIBAL ORGANIZATIONS, et al., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES of AMERICA, *Respondents*,

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS, et al., *Intervenors*.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

PETITIONERS' AND INTERVENORS' OPENING BRIEF

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA AND OTHER TRIBAL PARTICIPANTS

J. Scott Sypolt
Joel D. Bertocchi
Jeffrey J. Mayer
Eric J. Gribbin
AKERMAN LLP
71 S. Wacker Drive, 46th Floor
Chicago, IL 60606

January 25, 2019

(Additional counsel on inside cover)

CROW CREEK TRIBE OF SOUTH DAKOTA and OMAHA TRIBE OF NEBRASKA

Stephen Diaz Gavin
RIMON, P.C.
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 871-3772

SEMINOLE TRIBE OF FLORIDA

Joseph H. Webster
F. Michael Willis
Akilah J. Kinnison
HOBBS, STRAUS, DEAN & WALKER LLP
2120 L Street, NW, Suite 700
Washington, DC 20037
(202) 822-8282

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES

Elizabeth S. Merritt
Deputy General Counsel
NATIONAL TRUST FOR HISTORIC PRESERVATION
2600 Virginia Ave., NW, Suite 1100
Washington, DC 20037
(202) 588-6035

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

Andrew Jay Schwartzman
James T. Graves
INSTITUTE FOR PUBLIC REPRESENTATION GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9170

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

1. No district court proceedings occurred. Petitioners are United Keetoowah Band of Cherokee Indians in Oklahoma; Osage Nation; Shawnee Tribe of Oklahoma; Ponca Tribe of Indians of Oklahoma; Delaware Nation; Otoe-Missouria Tribe; Sac and Fox Nation; Thlopthlocco Tribal Town; Delaware Tribe of Indians; Pawnee Nation; Crow Creek Tribe of South Dakota; Omaha Tribe of Nebraska; Seminole Tribe of Florida; Blackfeet Tribe; Coushatta Tribe of Louisiana; Fort Belknap Indian Community; Rosebud Sioux Tribe; Ute Mountain Ute Tribe; United South and Eastern Tribes, Inc.; and Natural Resources Defense Council.

2. Respondents are the Federal Communications Commission and the United States of America.

3. Intervenors for the Petitioners are: National Association of Tribal Historic Preservation Officers, National Trust for Historic Preservation, Cheyenne & Arapaho Tribes, Apache Tribe of Oklahoma, Mescalero Apache Tribe, Alabama-Quassarte Tribal Town, Tonkawa Tribe, Peoria Tribe of Indians of Oklahoma, and Edward B. Myers. Intervenors for the Respondents are CTIA-The Wireless Association and Sprint Corporation.

4. No amici have appeared.

B. Ruling Under Review.

Petitioners seek review of *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Second Report and Order)*, 33 FCCRcd ___, FCC 18-30 (Mar. 30, 2018)("Order") [JA0806–0906].

C. Related Cases.

Petitions for review are consolidated. Petitioners are unaware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the District of Columbia Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Petitioners and Intervenors make the following disclosures:

United Keetoowah Band of Cherokee Indians in Oklahoma; Osage Nation; Shawnee Tribe of Oklahoma; Ponca Tribe of Indians of Oklahoma; Delaware Nation; Otoe-Missouria Tribe; Sac and Fox Nation; Thlopthlocco Tribal Town; Delaware Tribe of Indians; Pawnee Nation; Cheyenne & Arapaho Tribes, Apache Tribe of Oklahoma, Mescalero Apache Tribe, Alabama-Quassarte Tribal Town, Tonkawa Tribe, and Peoria Tribe of Indians of Oklahoma are all federally-recognized Indian Tribes that do not issue stock, and none of these Tribes has a parent corporation.

Crow Creek Sioux Tribe is a federally recognized Indian tribe in Buffalo, Hughes, and Hyde counties in the state of South Dakota. It does not issue stock and does not have a parent corporation.

Omaha Tribe of Nebraska is a federally recognized Indian tribe in Thurston County and Cuming Counties in the state of Nebraska. It does not issue stock and does not have a parent corporation.

The Seminole Tribe of Florida is a federally recognized Indian Tribe. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

The National Association of Tribal Historic Preservation Officers respectfully states that it is a nonprofit corporation with no parent companies, subsidiaries, or affiliates and has not issued shares to the public.

The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949. *See* 54 U.S.C. §312102(a). It has no parent companies, subsidiaries, or affiliates and has not issued shares to the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

GLOSSARY

Parties and Government Entities

ACHP	Advisory Council on Historic Preservation
FCC	Federal Communications Commission
NATHPO	National Association of Tribal Historic Preservation Officers
National Trust	National Trust for Historic Preservation
NRDC	Natural Resources Defense Council
Tribes	United Keetoowah Band of Cherokee Indians in Oklahoma; Osage Nation; Shawnee Tribe of Oklahoma; Ponca Tribe of Indians of Oklahoma; Delaware Nation; Otoe-Missouria Tribe; Pawnee Nation; Crow Creek Tribe of South Dakota; Omaha Tribe of Nebraska; Seminole Tribe of Florida; Blackfeet Tribe; Coushatta Tribe of Louisiana; Fort Belknap Indian Community; Rosebud Sioux Tribe; and the Ute Mountain Ute Tribe; and United South and Eastern Tribes, Inc.
UKB	United Keetoowah Band of Cherokee Indians in Oklahoma

Statutes

Act	Communications Act of 1934, as amended
NHPA	National Historic Preservation Act
NEPA	National Environmental Policy Act

Other

Order	*In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Second Report and Order)*, 32 FCC Rcd ___, FCC 18-30, released March 30, 2018, 83 Fed. Reg. 19440 (May 3, 2018)
NPA	Nationwide Programmatic Agreement
TCNS	Tower Construction Notification System
THPO	Tribal Historic Preservation Officers
5G	"Fifth Generation," the most recent technology for cellular mobile communications

INTRODUCTION

Petitioners Indian Tribes ("Tribes"), Intervenor Indian Tribes, and Intervenors National Association of Tribal Historic Preservation Officers ("NATHPO") and National Trust for Historic Preservation (collectively, "Petitioners"), request the Court vacate the FCC's Order [JA0806–0906]. The Order poses a grave threat to Tribes' ability to protect irreplaceable historic and cultural properties.

The Order expressly authorizes the unsupervised and uncontrolled build-out of wireless transmitters, even on sites of religious and cultural importance to Indian Tribes, in violation of unambiguous Congressional mandate. Under the National Historic Preservation Act ("NHPA"), agencies must consult with Tribes before proceeding with any "federal undertaking," defined unambiguously as any activity requiring a federal "license" or "approval," such as licensed wireless transmitters.

For decades, Tribes, carriers and other parties worked cooperatively to ensure that construction of cell phone infrastructure did not desecrate sacred or historic locations. In 2004, the FCC revised regulations to improve the consulting process in a nationwide programmatic agreement ("NPA").[1] Deep-pocketed carriers supported the modest cost of reimbursing Tribes for their expertise and effort

[1] *NPA Regarding the Section 106 NHPA Review Process*, 20 FCCRcd 1073 (2004) [hereinafter "NPA"].

identifying protected cultural resources and assessing potential impacts. Tribes provided their unique insights at low cost, helping to relieve the FCC of the burden of direct Tribal consultation.

Dramatically reversing course, the Order exempted tens of thousands of expected antenna facilities from the protections of NHPA and the National Environmental Policy Act ("NEPA"). The FCC excludes so-called "small cells" from environmental and historic preservation review. Tribes are no longer even notified of so-called "small cell" deployments. The FCC justified its decision to exempt "small cells" by claiming that construction is *not* a federally licensed undertaking because small cells are built under federal geographic licenses and are less environmentally intrusive than macro towers.

The FCC also discarded many protections on macro towers and other construction not falling within the new exemption. The FCC shortened the timeline for Tribal review, hindering Tribal ability to meaningfully participate in the review process. It reversed policy on Tribal fees, contrary to guidance by the Advisory Council on Historic Preservation ("ACHP"), by providing carriers need not pay upfront fees to support the cost of Tribal review. Although the FCC acknowledges Tribes have specialized knowledge regarding Tribal history, the FCC determined small cell applicants need not contract with impacted tribes to identify historic properties and assess or mitigate adverse effects, permitting carriers to instead retain

the lowest bidder for these services, regardless of qualifications. The FCC stated its intent was to eliminate "red tape" and encourage building as many transmitters as possible. Statement of Chairman Pai (denigrating Congressional protections as "unnecessary red tape") [JA0897]. The FCC's analysis is indefensible.

The ACHP, which has primary responsibility for the interpretation of Section 106 of the NHPA,[2] expressly rejects the FCC's construction of the NHPA. The FCC is entitled to no deference. *N.Y. v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 476 (D.C.Cir. 2012); *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 115 (D.C.Cir. 2006). Additionally, the transmitters at issue are not tiny, hard-to-see structures, but a massive buildout of antennas and towers surrounded by enclosures.

The FCC also failed meaningfully to consult with Tribes in developing the Order. The FCC recites a laundry list of meetings but does not demonstrate that it actually *consulted* with a single tribe. Consultation is not a meaningless process, but a critical commitment to Tribal sovereignty and sound rulemaking.[3]

The FCC's rewrite of NHPA and NEPA is unlawful; it cannot abandon its statutory responsibilities to consider impacts to historic properties, the environment,

---

[2] *See McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287–88 (D.C.Cir. 1982).

[3] *See* 36 C.F.R. §800.16(f)("*Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process…."); *see also* 63 Fed.Reg. 20496, 20504 (1998).

and public health. And mobile operators *can* afford to build without destroying this nation's heritage.

Petitioners describe their position on the Order's impact on traditional cultural properties and other historic resources. Natural Resources Defense Council and Myers separately will address NEPA.

STANDARD OF REVIEW

The ACHP, and not the FCC, is entitled to *Chevron* deference in its interpretation of the NHPA. Absent *Chevron* deference, the FCC is entitled only to the limited deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), under which "'[t]he weight [accorded to an administrative judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Creekstone Farms Premium Beef, LLC. v. Dep't of Agric.*, 539 F.3d 492, 499 (D.C.Cir. 2008)(quoting *Skidmore*). "An agency interpretation that falls outside *Chevron* 'is "entitled to respect" only to the extent it has the "power to persuade."'" *Gonzales v. Or.*, 546 U.S. 243, 255–56 (2006)(quoting *Skidmore*).

With regard to its fact-finding and failure to consult with tribes generally, "agencies do *not* have free rein to use inaccurate data." *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56–57 (D.C.Cir. 2015)(emphasis in original). Rather, agencies

are required to "examine *the relevant data* and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (emphasis in original). "If an agency fails to examine the relevant data—which examination could reveal, *inter alia*, that the figures being used are erroneous—it has failed to comply with the APA. Moreover, an agency cannot 'fail[] to consider an important aspect of the problem' or 'offer[ ] an explanation for its decision that runs counter to the evidence' before it." *Id.*

JURISDICTION

Jurisdiction arises from 5 U.S.C. §§701–706, 28 U.S.C. §§2342, 2344, 47 U.S.C. §402(a), and Federal Rule of Appellate Procedure 15(a).

STATEMENT OF ISSUES

1. Whether the FCC's exemption of small cells from review under NEPA and NHPA is contrary to statute or, in the alternative, arbitrary and capricious.

2. Whether the FCC's change in policies governing Tribal participation in NHPA review and mitigation processes was in contravention of the NHPA or, in the alternative, was arbitrary and capricious.

3. Whether the Order should be vacated because of failure to engage in meaningful, government-to-government consultation with Tribes.

STATUTES AND REGULATIONS

Applicable statutes and regulations are included by addendum.

STATEMENT OF THE CASE

A. Petitioners

1. Petitioner Tribes

As a result of the United States government's forcible removal of Petitioners from their ancestral homelands, Petitioners have historic properties both on and off currently recognized Tribal lands. The FCC acknowledges, "[p]roperties to which Tribal Nations…attach cultural and religious significance are commonly located *outside* Tribal lands and may include Tribal burial grounds, land vistas, and other sites that Tribal Nations…regard as sacred or otherwise culturally significant." (Emphasis added) Order, ¶97 [JA0848]. Petitioners have invested substantial resources in identifying and protecting these sites over many years. *See* Declaration of Eric Gribbin, Standing Addendum, ¶20. Petitioner Tribes have unique knowledge regarding their own history, much of which is proprietary, and hold unique legal status as sovereign governments. *See, e.g.*, Comments of Seminole Tribe of Florida (March, 14 2018) [JA0744].

For example, lead Petitioner United Keetoowah Band's ("UKB") aboriginal homelands are in the Southeast. The United States forcibly relocated UKB to Oklahoma. NHPA protects UKB's right to participate in consultation regarding aboriginal sites in Georgia (non-Tribal land), as well as UKB's current homeland in Oklahoma (Tribal land). UKB's sacred sites are predominantly on non-Tribal land where UKB resided for generations before forcible relocation. Among UKB sacred

sites are Kituwah Mound and the Clingmans Dome in the Smoky Mountains. Declaration of Sheila Bird, Attachment 3 to Stay Motion, ¶7.

Seminole Tribe of Florida is also a sovereign Indian Tribe with extensive historic properties. The Tribe has reservations and other trust lands in Florida and sites of religious, cultural, and historic significance on and off such land. During four decades of warfare (1817–1858), the Tribe fought to remain in its Florida homeland, resisting a brutal federal removal campaign. The Tribe later defended its self-government from attempts by the United States to terminate the Tribe in the 1950s. Critical to the survival of the Tribe's sovereignty has been its ability to transmit culture from generation to generation.

2. NATHPO

Congress established Tribal Historic Preservation Offices, in 1992. Tribal Historic Preservation Officers are members of NATHPO. NATHPO's President serves *ex officio* on the ACHP. 54 USC §304101(a)(8). Congress provides approximately $60,000/year from the Historic Preservation Fund, partially funding NATHPO.

3. National Trust for Historic Preservation

The National Trust for Historic Preservation ("NTHP") is a private nonprofit corporation chartered by Congress to "facilitate public participation" in preserving our nation's heritage and to further federal historic preservation policy. *See* 54

U.S.C. §312102(a). Congress designated NTHP a member of ACHP, which is responsible for federal agency compliance with NHPA §106. *Id.* §§304101(a)(9), 304108(a).

B. NHPA

Congress enacted NHPA in 1966 to "foster conditions under which our modern society and our historic property can exist in productive harmony[.]" 54 U.S.C. §300101(1). Section 106, central to this Petition, requires federal agencies to "take into account" the effects of "undertakings" on historic properties. *CTIA-Wireless Ass'n*, 466 F. 3d at 106.

Section 101(d)(6) requires agencies to consult with Tribes that attach religious or cultural significance to property subject to a proposed "undertaking." Petitioner Tribes are federally recognized and entitled to consultation.[4] "Undertakings" are defined as activities requiring a "license," such as FCC geographic licenses—at issue here. ACHP administers Section 106. 54 U.S.C. §304108(a).

C. FCC and the Cellular Industry

The FCC regulates cellular construction and operation. As far back as 1990, it required tower owners to comply with NHPA before construction to "address[] environmental issues early enough in the licensing process to ensure that it fully meets its obligations under Federal environmental laws." *Amendment of Envtl.*

[4] 54 U.S.C. §306102(b)(4).

Rules, 5 FCCRcd 2942, ¶9 (1990). As the industry developed, the FCC continuously treated construction as "federal undertakings" subject to §106. *See generally, supra* p.1 n.1.

1. The 2004 Programmatic Agreement

In 2004, the FCC improved the Tower Construction Notification System ("TCNS") in collaboration with Tribes and industry.[5] Through TCNS, Tribes voluntarily identified geographic areas containing properties of religious and cultural significance and provided applicants with valuable information regarding potential effects of proposed deployments.

ACHP and the FCC entered into an NPA in 2004, which acknowledges the FCC's Tribal consultation obligation under NHPA.[6] The FCC incorporated this into its rules and regulations,[7] defined "undertakings" to which the NPA would apply, and further formalized reliance on TCNS.[8]

In implementing the NPA, the FCC considered small structure carve-outs and possible abuses. In 2001 and 2005, the FCC, working with Tribes and industry, limited the scope of Section 106 review for items such as antenna collocation on

[5] *FCC Announces Voluntary Tower Constr. Notification Sys.*, 19 FCCRcd 1998 (2004).
[6] NPA, ¶4.
[7] 47 C.F.R. §1.1320(a).
[8] 47 C.F.R. §§1.1320(a) and (b).

existing structures already compliant with Section 106, replacement towers, and tower enhancements. *See* 66 Fed.Reg. 17554 (2001); 70 Fed.Reg. 556 (2005).

2. The Positive Impact of the 2004 NPA

Under ACHP's and FCC's 2005 regulations, industry applicants initiated the Section 106 process by notifying THPOs through TCNS.[9] Tribes in turn employed or contracted with personnel to review proposals, which included archaeological surveys, site documentation, maps, and NEPA review documents. Comments of Lower Brule Sioux Tribe (March 19, 2018) [JA0796].

The FCC acknowledges that Tribes relied upon up-front fees to fund these reviews and that for most Tribes, the fees relate solely to costs incurred. Order, ¶¶121, 128 n.304 [JA0859, JA0862].

Before the Order, applicants in the NHPA process consulted with THPOs "regarding undertakings occurring on or affecting historic properties on tribal lands."[10] Based upon that TCNS filing, Tribes notified applicants that they required consultation and requested a fee for review of all documents pertaining to the proposed project. Through THPOs, Tribes reviewed materials packet with their experts. In the last year alone, Tribes reviewed 10,000–15,000 applications. Numerous sites have been protected under these rules.

[9] 47 C.F.R. §Pt. 1, App. C.
[10] 36 C.F.R. §800.2(c)(2).

Tribes efficiently handled hundreds of requests each month. Comment of Seminole Nation of Oklahoma (Mar. 20, 2018)("…responded to approximately 2,000 proposed undertakings…within thirty days…") [JA0802]. Often Tribal review provides legal certainty to applicants by confirming that proposed towers raised no issues. In other instances, Tribes initiated streamlined consultation and tower sites were moved. *See* Comments of Blackfeet THPO (Apr. 13 2017)(guidance in 2015 on "re-working of an American Tower site to avoid Rock Cairn Burial locations within the right of way") [JA0028]. A small percentage of requests resulted in the need for further investigation. *See, e.g.*, Comments of Northern Cheyenne THPO (March 15, 2018) [JA0784]. Delays primarily occurred when applicants failed to provide basic information like a summary of the activity or maps of the proposed area. *See* Comments of Sault Ste. Marie Tribe of Chippewa Indians (Apr. 18, 2017) [JA0058–59]; *see also* Declaration of Matt Reed, Attachment 10 to Emergency Motion For Stay, ¶8.

D. The Rulemaking Process for the Order

1. Notice and Comment Period

In April 2017, the FCC issued a notice of proposed rulemaking with hundreds of questions regarding accelerating wireless infrastructure deployment, including issues relating to so-called "Twilight Towers" built prior to the 2005 NPA, and reexamining NHPA and NEPA application and requirements. *NPRM and NOI*, 32

FCCRcd 3330 (2017). The notice also sought comment on the costs and benefits of the Commission's NHPA and NEPA rules. *Id.*, ¶40. In December 2017, the FCC sought comment on a proposal for collocations on existing Twilight Towers. Public Notice, 32 FCCRcd 10715 (2017). Throughout the rulemaking process, multiple Tribes demanded meaningful consultation. *See, e.g.*, ex parte Comments of Navajo Nation (Mar. 15, 2018) [JA0777–78]; Comments of Seminole Tribe of Florida (June 15, 2017) [JA0359]. Many mobile operator comments focused on innocuously using existing infrastructure for 5G or other limited changes. Ex parte let of AT&T (Feb. 23, 2018) [JA0640].

The FCC provided a list of alleged consultations in the Order, ¶¶17–35, 35 n.40 [JA0812–17], many of which did not occur, were not attended by all tribes listed, or were informational sessions. *See* Comments of Ute Mountain Ute Tribe (Mar. 14, 2018) (no meaningful government-to-government consultation) [JA0747–48].

E. Factual Findings

Central to this Petition are the FCC's factual findings supporting the Order. The FCC's findings fall into four specific categories, none of which finds support in the record or in logic.

1. Finding One: The 5G Network will be a dense network of fifty foot tall towers and enclosures; the FCC believes it will be inconspicuous

The trigger for the FCC's promulgation of the Order is the expected rapid growth of cellular infrastructure. The FCC specifically relied upon a purported qualitative difference between anticipated "small cell" technology and earlier technology of so-called "macro" towers. Order, ¶41 ("The world of small wireless facility deployment is materially different than the deployment of macro cells….") [JA0820]; Statement of Chairman Pai ("[S]mall cells are inherently different from large towers.") [JA0897]. This analysis is faulty.

Infrastructure supporting over 400,000,000 cellular telephones is perhaps the United States' largest interconnected engineering structure. Existing technology uses large, widely-spaced towers. Order, ¶1 [JA0807].

Carriers envision new networks with smaller towers, perhaps fifty feet tall, placed much closer together, creating smaller area coverage for each cell than existing technology. The FCC expects mobile operators to build 55,000 new cell sites in the near term. Statement of Commissioner Carr [JA0903]. Commissioner Rosenworcel expects "as many as 800,000." [JA0905].

Yet, the FCC based its analysis on its prior "treatment of small wireless facility deployments in other contexts," Order, ¶42 [JA0820], such as "Wi-Fi routers" and "consumer signal boosters." Order, ¶43) [JA0820]. The FCC noted,

correctly, that such truly small devices were negotiated in the NPA for the Collocation of Certain Antennas. Order, ¶42, n.56 [JA0820]. Yet this Petition centers not on agreed exceptions for truly small items, but a "highly densified network" that will be built "throughout the United States." Statement of Chairman Pai [JA0897].

Transmitters may be as tall as any "other structures" in the area. Precisely what "other structures" means is undefined and could refer to a nearby 200-foot tall macro tower. The rule limits "volume" for the antenna, but this excludes "associated equipment," and "enclosure[s]." Order, ¶¶75, *id*. n.134 [JA0833]. Wireless equipment associated with the antenna "must be no larger than 28 cubic feet," but this limit excludes wired backhaul or similar equipment. Order, ¶76 n.140 [JA0834].

For placement on existing structures, the FCC abandons the volume limitation, acknowledging that such a deployment might be "larger antenna volume in the aggregate" than a "macro cell" but claims that state and local regulation would be sufficient. Order, ¶77 [JA0835–36].

Ultimately, the exemption in the Order is not related to inconspicuous, small, electronic devices, but structures and enclosures that tower over people and landscapes and are subject to ongoing maintenance and repair.

The Order contains frank admissions of analysis not done. For example, it assumes that exempt structures are "commonly" deployed on disturbed ground

(along a highway, for example), brushing off the potential for ground disturbance on sacred sites, Order, ¶92 n.201 [JA0845], without any actual analysis of what percentage is likely to be placed on disturbed ground or acknowledgment that harm can occur through additional disturbance.

Most critically, the FCC refuses to account for the cumulative effect of small cell construction on historic properties. Even if individual fifty-foot tall—or taller––towers and enclosures were verifiably different in character than "macro towers," the resulting network is not, either in impact or volume. Comments of the Arkansas State Historic Preservation Officer (Mar. 15, 2018)(FCC does not address "large scale, nationwide deployment of 5G" and "cumulative[] impact [on] cultural and natural resources") [JA0751]. Because the FCC makes no effort to determine the cumulative impact, the analysis is inherently capricious. Nor is this network independent of federal control. Each tower is part of a highly regulated, federally approved network.

2. Finding Two: The dense national network of fifty-foot tall towers poses no risk to sacred and historic sites

In irreconcilable contrast with the FCC's findings that small cells will be "throughout the United States," it separately found that such a buildout will have limited impact on historic properties. Order, ¶66 [JA0828]. The FCC makes no attempt to square its finding that new networks will be ubiquitous with its finding of "limited impact" on protected historic properties. It offers no analysis of the

footprint of such towers, what equipment will be used, what ongoing maintenance or security will be provided and how often towers will be updated or rebuilt.

3. Finding Three: The cumulative impact of modest Tribal consultation costs on carriers absent the rule change would damage the national economy

At the heart of the findings is the FCC's stated concern that carriers' consultation costs will grow exponentially in light of the greater number of facilities, as though modest Tribal review fees will crush the U.S. economy. The FCC offered two types of support for its attack on Tribal fees as the villain that would block new technologies. It asserted that fees in the aggregate were vast and growing, without providing any detail, and that in select cases Tribes behaved opportunistically. This bulk analysis of aggregate fee costs has no backup or detail of substance, either in the Order or in comments and is not sufficiently rigorous to support the FCC's conclusion. No carrier submitted a comprehensive analysis of its financial condition, nor did any provide support for their speculative claim that their ability to build new networks would be materially impaired by consulting with the Tribes. The Court can observe that the carriers are multi-billion-dollar companies with significant revenue streams.

To determine the projected impact of Tribal fees on wireless deployment, the FCC simply multiplied the number of possible towers by sample fees, without any

showing that the Tribes would, in fact, approach future fees in such fashion.[11] Having refused to consider the cumulative impact on historic properties or the environment, considering the cumulative impact of fees is a capricious analysis. To at once claim that the impact of tens of thousands of new sites on historic properties is speculative, even though common sense indicates that the impact will be catastrophic, but then calculate the fee impact by assuming that those towers will be built everywhere is illogical. In reality, Tribal fees are modest and tied to actual and reasonable costs. ACHP has recognized payment is appropriate when specific information and documentation regarding individual sites is requested because a Tribe performs a role similar to a consultant or contractor. ACHP, *Memorandum: Fees in the Section 106 Review Process*, 3 (2001) [JA0914]; ACHP *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*, 13 (2012) [JA1015]. Even Intervenor Sprint acknowledges that Tribal fees for investigation may be appropriate. Comments of Sprint (June 15, 2017) [JA0392].

Tribes provided direct and unrefuted evidence of modest fees. Comments of Blackfeet THPO (March 8, 2018)(research fee for Section 106 process is $400 for

[11] Sprint provided no actual analysis of Tribal fees' financial impact, relying upon gross generalizations. Ex parte letter from Sprint (May 16, 2017)("Sprint…could be required to pay tens of millions more [in tribal fees] in the coming years unless the Commission reforms the process as small cell deployments increase.") [JA0127].

approximately 20 hours of work) [JA0657]. The FCC did not find that the Tribes would be unwilling or unable to work cooperatively with new technology.

Second, the FCC also suggests some Tribes demanded abusive fees to participate in the §106 process. Order, ¶16 n.34 [JA0812]. The record does not document widespread abuse; the FCC concedes that abusive fee requests were rare, involving a small minority of Tribes and none of the Petitioners. *Id*. Nor did the FCC make any finding that it was unable to separately limit abusive fees without scrapping an entire regulatory scheme.

4. Finding Four: In a direct attack on the NHPA, The FCC's concludes that Section 106 consultation is without serious value.

The FCC concluded that Section 106 consultation was ineffective because it rarely resulted in a change of location for proposed construction. Order, ¶78 [JA0836]. As NATHPO explained, the lack of open conflict meant that consultation protected historic sites and allowed for economic development, while protecting culturally sensitive sites:

> Industry's claim that there are no adverse effects in 99% of tower deployments shows that the current system is working. Often, after an applicant enters a location into TCNS, a THPO or other tribal representatives will notify the applicant of an issue and the applicant will choose a new location or resolve that effect. That gets counted as having no adverse effect. The lack of adverse effect is the result of the successful TCNS process and *is being misrepresented to indicate that there are no historic properties affected by tower construction, which, if the current system were not in place, would be factually inaccurate.*

Ex parte letter from NATHPO (Mar. 12, 2018) (emphasis added) [JA0661].

Second, the FCC fails to account for the fact that the process itself serves as a check on the ability to even propose an improper site. Indeed, the assertion that consultation had limited impact on siting contradicts the complaints of industry. Intervenor CTIA cited a white paper outlining "vast" influence on siting. CCA, *Clearing the Path for America's Wireless Future* [JA0231].

F. The Impact of the Order on NHPA Review

In reliance upon these misplaced findings, the FCC unraveled the 2004 NPA. First, it exempted small cells from any consultation requirement. Order, ¶58 [JA0826]. The FCC suggested state and local review would be sufficient but has since adopted rules moved to pre-empt those laws, effectively gutting the very safeguards the Order touts as protections. *Declaratory Ruling and Order*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (Sept. 27, 2018) [JA1045–1160]. As a result, all small cell construction off Tribal lands is exempt from review.

Regarding macro towers, the FCC acted to block compensation for the necessary Tribal review on or off Tribal land. It also shortened review times and endorsed contracting with non-tribal entities. Order, ¶¶112, 125 [JA0855, JA0860].

Tribes still receive notices for macro towers, but THPOs are starved of time and resources to consult. Tribes are prohibited from charging up-front fees to review

applicants' proposals through a Catch-22 scheme.[12] Tribes nominally remain free to request up-front fees to fund THPO reviews, and mobile operators and their consultants may choose to pay such fees. If, however, a Tribe opts not to perform valuable work without compensation, and the applicant does not voluntarily pay, the mobile operator can proceed after 45 days without Tribal review.[13]

The FCC argues that if Tribes offer competitive pricing, they will be chosen for such services. This reasoning is not logical. The Section 106 process requires consideration of impacts to Tribal historic properties and consultation with Tribes; Tribes have unique knowledge regarding their own tribal historic properties. Comments of Seminole Tribe of Florida (Mar. 14, 2018) [JA0740]; Comments of Santa Clara Pueblo (Mar. 14, 2018) [JA0731]; *see also* ACHP, Meeting the 'Reasonable and Good Faith' Identification Statement in Section 106 Consultation Review, p.2 ("An identification plan…is carried out in good faith when it…[a]cknowledges the special expertise possessed by Indian tribes [] in assessing the eligibility of historic properties that may possess religious and cultural significance to them"). The FCC has an independent obligation to consult with Tribes, which may not be satisfied by non-Tribal reviews. Certainly, the FCC made no finding regarding the effectiveness of non-Tribal review.

[12] Order, ¶116 [JA8056–57].
[13] Order, ¶120 [JA0858–0859].

G. Order Issued and Implemented

The FCC wasted no time in implementing the Order. On the effective date of the Order, the FCC issued a public notice that effectively told pending applicants to dismiss their pending applications to allow for processing under the new rules of the Order.[14] Additionally, implementation has gone much further than the Order itself, prohibiting Tribes from even requesting voluntary upfront fees through TCNS. *QA-Wireless Infrastructure Second Report and Order* [JA1042].

SUMMARY OF ARGUMENT

I. Congress explicitly recognized the importance of protecting Tribal historic properties in the National Historic Preservation Act ("NHPA"). The NHPA §106 process requires agencies to "take into account" the effects of any "undertaking" on historic properties, including Tribal historic properties. 54 U.S.C. §306108. Undertakings include any federally licensed activity. *Id.* §300320(3). Agencies must also consult with Tribes in carrying out the Section 106 process. *Id.* §302706(b). These reviews are critical to protecting this nation's cultural heritage. The FCC arbitrarily and capriciously determined that small cell deployments are not "undertakings" subject to NHPA, meaning that Tribes are no longer notified of their

[14] *Changes and Updates to Tower Construction Notification and E-106 Systems*, 33 FCCRcd 6273, 77 (July 2, 2018) ("Applicants may abandon pending applications (by updating the Status of the notification to 'Abandoned') and re-submit them on or after July 2, 2018, in which case the 2018 *Infrastructure Second Report and Order* and changes discussed in this Public Notice would apply to the resubmissions.").

deployment, Tribal impacts are not assessed, and Tribes are not consulted. Small cell deployments are federally licensed undertakings because the FCC licenses their transmission of spectrum through geographic area licenses containing construction and coverage requirements.

II. The FCC lacks the authority to unilaterally rewrite the NHPA. The ACHP, not the FCC, is the agency charged with interpretation and implementation of NHPA §106. The FCC's interpretation should be accorded no deference because its interpretation has been deemed "inconsistent" with §106 by the ACHP.

III. The FCC's amendment of its regulations to exclude small cells from preconstruction review based on size is arbitrary and capricious. It is a direct reversal of previous agency policy, lacks a reasoned justification, and is unsupported by the record. The massive deployment of tens of thousands of small cells across the country is inherently likely to impact historic and cultural properties, and the FCC has not provided sufficient basis for a small cell exclusion.

IV. FCC's reversal of policies regarding macro towers are arbitrary and capricious. The FCC reverses course on supporting applicants paying Tribes fees for the work Tribes perform in reviewing tower siting applications, contrary to ACHP guidance regarding the appropriateness of Tribal fees and without a reasoned justification based on the rulemaking record. While depriving Tribes of funding for NHPA reviews, it also unnecessarily shortens review timelines for already

underfunded and overstretched Tribal staff to review applications. Further, the FCC arbitrarily and capriciously eliminated the requirement to contract with Tribes to perform review, assessment, and mitigation functions, guiding industry toward contracting with the lowest bidder for services only Tribes are qualified to perform based on their unique, often sacred, knowledge.

V. The FCC arbitrarily and capriciously failed to engage in meaningful consultation with Tribes, contrary to the agency's own policy and in complete disregard of Tribal sovereignty and the unique government-to-government relationship between Tribes and the federal government. This failure to comply with its own policy violated Tribes' justified expectations and had a direct adverse impact on the rulemaking process, as the FCC in bad faith failed to consider Tribal input in its rush to exempt review of wireless deployment.

STANDING

The standing of the Petitioners and Intervenors is apparent from the administrative record because all participated in this rulemaking proceeding on review and have members who are harmed by the Order. To err on the side of caution, we have included the declarations contained in the addendum hereto.

ARGUMENT

I. WIRELESS INFRASTRUCTURE DEPLOYMENT IS A FEDERAL UNDERTAKING AND MAJOR FEDERAL ACTION BECAUSE THE FCC LICENSES TRANSMISSION OF FEDERAL SPECTRUM

The FCC's core ruling, that building a national dense network of licensed regulated towers is not a federal undertaking is indefensible. NHPA is clearly implicated in FCC licensing decisions. *CTIA-Wireless Ass'n*, 466 F.3d at 106.

"Congress enacted [NHPA] in 1966 to 'foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony.'" *Id.* Section 106 provides that a federal agency "having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking…prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property." 54 U.S.C. §306108. Federal undertakings include "a project, activity or program" that is "carried out by or on behalf of the Federal agency," "carried out with Federal financial assistance," or that requires "a Federal permit, license, or approval." *Id.* §§300320(1)–(3); 36 C.F.R. §800.16(y).[15] The Court has read this definition broadly, stating "Congress intended to expand the definition of an 'undertaking'–formerly limited to federally funded or licensed projects–to

[15] Similarly, NEPA requires agencies to assess environmental impacts of any major federal action. 42 U.S.C. §4332(C). Environmental effects to be considered include ecological, aesthetic, historic, cultural, economic, social or health impacts whether direct, indirect, or cumulative. 40 C.F.R. §1508.8.

include projects requiring a federal 'permit' or merely federal 'approval.'" *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 757 (D.C.Cir. 1995). ACHP has primary statutory responsibility for interpretation and enforcement of NHPA. *McMillan Park Committee*, 968 F.2d at 1287–88.

Deployment of wireless infrastructure, even small wireless infrastructure, is subject to federal licensing. No one can operate a radio station except as authorized by the FCC "and with a license in that behalf granted under the provisions" of the Communications Act. 47 U.S.C. §301.[16] The FCC is deeply involved in the authorization, deployment, and operation of wireless infrastructure.

The Communications Act established the FCC, giving it broad regulatory powers over spectrum use.[17] The FCC licensed the first commercial wireless "cellular" services in 1982.[18] Review of the original applications, filed for licenses to serve Metropolitan Statistical Areas, included evaluation of site information specific for each market.[19] Since 1993, spectrum licensees have been selected by

---

[16] "Before a party may use the spectrum to provide broadband PCS, it must get a license from the Commission. See 47 U.S.C. 301." *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 602 (D.C.Cir. 2002). *See also* 47 C.F.R. §1.903 ("Stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service as set forth in this title and with a valid authorization granted by the Commission under the provisions of this part.")

[17] 47 U.S.C. §§151, 301.

[18] *See Cellular Communications Systems*, 86 FCC.2d 469 (1981), *modified*, 89 F.C.C.2d 58, *further modified*, 90 FCC.2d 571 (1982), *review dismissed sub nom. U.S. v. FCC*, No. 82-1526 (D.C.Cir. Mar. 3, 1983).

[19] *See generally Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987).

auction.[20] More recent spectrum auctions have provided for far wider geographic area licenses and have generated billions. For example, in the 2008 Auction 73, the FCC awarded 12 Regional Economic Area Groupings licenses to serve the entire U.S. and even allowed one national frequency block.[21] In these auctions, rather than granting a license that included specific transmitter sites, the FCC granted licenses for a wide geographic area.[22]

For example, Verizon won the C-block geographic area license for the New England states area in Auction 73, receiving license WQJQ689. There were no specific transmitter locations in that license. Instead, the license specifies that Verizon reach specific population penetrations by 2013 and 2019. Verizon must deploy infrastructure to cover essentially 40% of the population in each geographic license area by the first deadline and 75% by the end of the license term.[23] It has filed a series of applications to construct new and modify existing sites, although some minor modifications to existing sites can be made without prior authorization. Thus, not only is a federal license required to use spectrum, but the FCC actually requires deployment of wireless infrastructure, i.e., construction of antennas mounted on towers and structures, as a license condition. Given the federal

[20] 47 U.S.C. §309(j).
[21] *Auction of 700 MHz Band Licenses Closes*, 23 FCCRcd. 4572 (FCC, 2008).
[22] *Id.*, Attachment A.
[23] 47 C.F.R. §27.14(h).

government's regulatory jurisdiction over and revenue from licensing wireless facilities, deployment of small cells is a federally licensed undertaking.

The Order, however, reaches the opposite conclusion.[24] The FCC argues that an additional construction permit is not legally required before wireless deployment, though admitting that licenses most often *are obtained* prior to deployment.[25] This distorts the facts and the law based on a fiction: (a) that companies can construct infrastructure technically capable of providing commercial service without turning on the transmitter and antenna, and (b) the FCC has no role in the process. In reality, no carrier would construct facilities before obtaining a geographic license because **no one can *operate*** a commercial mobile system without a license.[26]

That the FCC initially grants a geographic license without considering the impact of specific infrastructure does not mean that deployment of that infrastructure is immune from NHPA. Rather, as this Court has recognized, the FCC adopted a NPA to establish a process to ensure evaluation would occur, relying on §106 regulations calling for the use of programmatic agreements "for undertakings whose effects are 'similar or repetitive' or 'cannot be fully determined prior to approval' of the undertaking." *CTIA-Wireless Ass'n*, 466 F.3d at 107 (quoting 36 C.F.R. §800.14(b)(1)). As the licensee builds out its system to meet construction deadlines,

[24] Order, ¶58 [JA0826.
[25] Order, ¶¶85–89 [JA0839–43].
[26] 47 U.S.C. §301; *see also High Plains Wireless*, *supra* p.25 n.16.

the FCC can require changes and even modify a license when it believes such changes are in the public interest, even if this causes minor disruption to a licensee's operations.[27]

The fact that facilities could be deployed prior to FCC review in the licensing process is precisely why the FCC amended its rules in 1990 to require NHPA review before construction. Once licensing occurs, the agency becomes responsible for assessing potential impacts. Thus, the FCC sought to ensure that environmental and historic preservation issues were addressed "early enough in the licensing process to ensure that [the FCC] fully meets its obligations under Federal…laws."[28] The FCC acknowledged its responsibility "to consider potential harm…before it occurs, not simply to await…damage and then attempt to rectify it."[29] ACHP supported the FCC's 1990 amendments, stating that they would "help resolve a major problem in the Commission's compliance with Section 106."[30] ACHP's support, assistance, and agreement ultimately led to the FCC's adoption of the NPA, which ensures the FCC "take[s] into account the effect" of the many undertakings it regulates, in order to comply with NHPA. NPA ¶¶1, 13.

---

[27] 47 U.S.C. §316(a). *See also California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 46 (D.C.Cir. 2004).
[28] *Amendment of Envtl. Rules*, 5 FCCRcd at 2943, ¶9.
[29] *Id*., ¶10.
[30] *Id*., ¶5 (quoting ACHP).

Without a federal license, an entity can build a structure, subject to local licensing, that is technically capable of transmitting a signal. However, until a federal license is granted, that structure is the equivalent of expensive scrap metal—it serves no purpose, cannot transmit and receive calls, and will generate no income. This is precisely why industry generally waits until after licensing to build infrastructure. Federal licensing and the ability to operate service is the sole motivation for construction, and licenses contain construction and coverage requirements: any new tower joins an existing highly regulated infrastructure, all of which is subject to licensing and a variety of additional regulation.

In addition to arguing that licensing occurs too late to trigger a federal undertaking, the Order inconsistently argues that licensing occurs too early.[31] It states that, although NHPA requires agencies to evaluate the effects of undertakings before they occur, providers deploy wireless facilities well after the FCC has issued licenses.[32] Again, the time between licensing and construction is not determinative. The fact of a federal "license" is determinative, as NHPA explicitly provides. 54 U.S.C. §306108. Even when there is a delay between licensing and deployment, the FCC must ensure NHPA compliance. The agency has previously done so through the 2004 NPA, but now unilaterally declares a major exemption to that agreement.

[31] Order, ¶¶49, 88 [JA0823, JA0842–43].
[32] *Id.* ¶85 [JA0839–40].

II. FCC IS NOT ENTITLED TO DEFERENCE

The FCC is not entitled to deference when it interprets NHPA. Under *Chevron v. Natural Resource Defense Council*, 467 U.S. 837 (1984), an agency with primary responsibility for implementing a statute is accorded substantial deference in judicial review of its interpretation of the statute. In *Chevron*, the Supreme Court justified the deference as an "implicit" delegation to an agency to interpret a "statute which it administers." 467 U.S. at 844.

Importantly, this is not a typical case involving the FCC interpreting the Communications Act,[33] which it has primary duty to administer.[34] In such a case, the FCC has substantially broad regulatory power[35] and is granted considerable deference.[36]

In the Order, by contrast, the FCC has unilaterally taken upon itself to interpret NHPA,[37] even though Congress has assigned to ACHP the sole responsibility to administer NHPA. 54 U.S.C. §304108(a). Just this past term, the Supreme Court underscored that an agency is not entitled to deference for its interpretation of a statute that it is not charged to administer. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612

---

[33] 47 U.S.C. §§151 *et seq.*
[34] *Id.* §151.
[35] *U.S. v. Sw. Cable Co.*, 392 U.S. 157 (1968).
[36] *See generally National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).
[37] 54 U.S.C. §300101, *et seq.*

(2018) (NLRB not entitled to deference in interpreting Federal Arbitration Act). Significantly, in this matter, ACHP rejected the FCC's unilateral abandonment of its NHPA obligations ("we do not believe it is appropriate to reconsider the status of undertakings subject to Section 106 review per 36 CFR 800.3(a)(1)").[38] ACHP explicitly stated that the FCC's proposal to amend §1.1312 of its regulations is "inconsistent with the views of the ACHP."[39]

Ironically, the FCC cites this Court's holding in *CTIA* in its claim it has discretion to "clarify that the deployment of small wireless facilities does not qualify as a federal undertaking or major federal action."[40] In invoking *CTIA*, the FCC ignores this Court's specific reference to *McMillan* and its holding there that ACHP's interpretations of its regulations command substantial deference.[41]

The FCC's unilateral elimination of historic preservation obligations exceeds its statutory authority under NHPA.[42]

---

[38] Comments of ACHP (June 15, 2017) [JA0256].
[39] Comments of ACHP (Mar. 15, 2018) [JA0749].
[40] Order, ¶58 [JA0826].
[41] *CTIA-Wireless Ass'n*, *supra* p.1 n.1; *see also McMillan Park Committee*, 968 F.2d at 1288 (no basis for extending ACHP's §106 regulations any less deference than traditionally afforded NEPA regulations of the Council on Environmental Quality); *see also Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755 (D.C.Cir. 1995).
[42] *Epic v. Lewis*, *supra* p.30–31; *see also DuBois v. USDA*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996) (interpreting NEPA, "We note that the two-step process articulated in *Chevron*…does not apply here, because we are not reviewing an agency's interpretation of the statute that it was directed to enforce"); *see generally Gonzales v. Or.*, *supra* p.4 ("Congress intended to invest interpretive power in the

III. EXCLUDING SMALL WIRELESS FACILITIES FROM REVIEW VIOLATES THE APA

The FCC attempts to evade NHPA review by amending its rules so it can argue there is no federal control over small cell deployments. In addition to contradicting the statute, the amendment to 47 C.F.R. §1.1312 is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a policy reversal lacking justification.[43]

47 U.S.C. §319 requires a construction permit as a condition of FCC licensing but also allows the FCC to waive the requirement if "public interest, convenience and necessity would be served."[44] The FCC waived the pre-construction permit requirement for geographic area licenses for common carrier mobile providers, while retaining approval authority over wireless facilities to the extent necessary to ensure compliance with federal environmental law and NHPA.[45] Prior to the Order, regulations at 47 C.F.R. §1.1312 codified this retention of limited approval authority.

---

administrative actor in the best position to develop [policymaking expertise])(quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1990)).

[43] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (The FCC must "provide a more detailed justification … when its prior policy has engendered serious reliance interests that must be taken into account.")(internal citations omitted).

[44] 47 U.S.C. §319(d).

[45] *See NPA*, ¶¶25, 26.

The agency now modifies these regulations to argue it has relinquished all approval authority over small cells, thus they are not a federal undertaking.

The Order erroneously argues that this Court in *CTIA* affirmed that geographic area licenses for wireless deployments constitute undertakings or major federal actions only

> in two limited contexts: (1) where facilities are subject to the FCC's tower registration and approval process pursuant to Section 303(q) of the Act because they are over 200 feet or are near airports, and (2) where facilities not otherwise subject to pre-construction Commission authorization are subject to Section 1.1312(b) of the Commission's rules and thus must obtain FCC approval of an environmental assessment prior to construction.[46]

First, this is an incorrect reading of *CTIA*, in which this Court explicitly stated it was ***not*** addressing CTIA's argument that the NHPA obligations were unjustified "on the ground that the requisite federal licensing occurs when the FCC issues the initial license that allows carriers to provide wireless services."[47] The Court noted that the FCC had not relied on this justification in the *NPA Order*.[48]

Second, the FCC's determination that small cells do not fall within the scope of Section 1.1312(b) violates the APA. The Order is arbitrary and capricious and does not express a reasoned departure from prior precedent. If an agency changes policy, it must explicitly recognize that it is disregarding its own precedent, "show

[46] Order, ¶37 [JA0818].
[47] 466 F.3d at 113, n.3.
[48] *Id*.

that there are good reasons for the new policy," and account for "serious reliance interests." *Encino Motorcars, LLC v. Navarro,* 136 S.Ct. 2117, 2126 (2016). In the Order, the FCC has done anything but that.

The FCC states that, apart from its determination that small cells are not undertakings, removing them from the purview of §1.1312 is reasonable in light of the Communications Act and congressional requirements that the FCC consider the public interest in imposing regulatory burdens on new deployments.[49] Although it admits that it has already made a public interest determination that wireless facility deployment requires review, the FCC now argues it never determined review was required of all wireless facilities, now removing small cells from review based on size.[50]

Distinguishing small cells solely on size is not a reasoned policy reversal. The FCC states small cells are "inherently unlikely to trigger environmental and historic preservation concerns."[51] However, only four years ago, the FCC declined to adopt a categorical exclusion for small cells based on size.[52] The FCC stated, "*we find no*

[49] Order, ¶39 [JA0819].
[50] *Id*.
[51] Order, ¶92 [JA0844–45].
[52] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCCRcd 12865, ¶84 (2014).

basis to hold categorically that small wireless facilities such as DAS and small cells are not Commission undertakings."[53]

The FCC at that time rejected arguments that infrastructure size provided "any characteristic of such deployments that logically removes them from the analysis applicable to other facilities" or that "deployments cease to be undertakings simply because of their size."[54] Rather, the FCC stated "the ACHP's rules clearly contemplate that the determination of whether a proposed Federal action is an undertaking is separate from the determination of whether that action is the type that could have effects on historic properties. Thus, the extent of any potential effects is not relevant…."[55] And the rule change itself does not involve solely small minimally intrusive antennas, but large towers surrounded by enclosures. To make the decision even *more* arbitrary, the FCC declined to seriously consider the cumulative effect of multiple towers, even as its Chairman declared that the purpose of the rule change was to permit a massive rollout.

The FCC does not provide sufficient basis for determining that small cells will not adversely impact historic properties, a position it previously expressly rejected and that is unsupported by its findings. The Order admits commenters stated that small cells have been found to adversely affect historic properties, but dismisses this

[53] *Id.* ¶28 (emphasis added).
[54] *Id.* ¶84.
[55] *Id.*

as merely "generalized claims of effects… that have been addressed in isolated cases."[56] Yet, Tribes cannot identify in advance which sites will be impacted.

The FCC cannot rewrite its obligations under these facts. *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014)("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

IV. THE FCC'S CHANGES TO POLICIES REGARDING MACRO CELL TOWERS AND REVIEW ON TRIBAL LAND VIOLATES THE APA

The FCC also made sweeping changes to its policies regarding macro cell tower review and small cell review on Tribal land, and these changes also lack a reasoned justification.[57] Macro "facilities," as described in the Order, generally consist of large arrays of panel antennas mounted on towers, roof tops, or other structures 100–200 feet or more above ground level.[58] Rule changes include: (1) guidance stating Tribal upfront fees for §106 reviews need not be paid; (2) guidance stating industry applicants need not contract with Tribes for work only Tribes are qualified to perform; and (3) unnecessarily shortening Tribal review timelines.[59]

NHPA imposes two distinct duties on the FCC. First, it must take into account the effect of an undertaking on any historic property. This remains an obligation

---

[56] Order, ¶78 [JA0836–37] (This language was changed from the draft R&O, where the FCC dismissed these claims "anecdotal evidence.").
[57] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126-27 (2016) (policy reversal affecting longstanding reliance requires more explanation).
[58] Order, ¶39 [JA0819].
[59] Order, ¶¶112, 120, 128[JA0855, JA0858–59, JA0862].

that the agency, not industry contractors, is responsible for fulfilling. The FCC agrees this obligation applies to macro towers anywhere and to small wireless facilities on Tribal land.[60] Separately, NHPA provides the FCC "*shall* consult with any Indian Tribe … that attaches religious and cultural significance" to Tribal historic properties that might be affected by a Federal undertaking.[61] This consultation obligation is independent of the duty to evaluate impacts on Tribal historic properties, and it may not be delegated to industry applicants.

TCNS was the result of collaboration between the FCC, industry, and Tribes to facilitate review of proposed deployments. This avoided the need for Tribes to invoke direct consultation with the FCC on each cell tower. Tribal participation in TCNS, is voluntary, and Tribes chose to provide industry with valuable information regarding potential impacts rather than invoking full consultation with the FCC. Tribes charged reasonable fees, which industry applicants voluntarily paid.

Now the FCC seeks to upend the balance that has been struck. The Order provides that applicants need not pay upfront fees, and application processing will proceed without Tribal input if Tribes insist on upfront fees.[62] This encourages applicants, which have until this point voluntarily paid fees, to refuse paying Tribes for services in reviewing TCNS notices. FCC implementation goes far beyond the

[60] Order, ¶36 [JA0817–18].
[61] 54 U.S.C. §302706(b).
[62] Order, ¶120 [JA0858].

terms of the Order by refusing to even allow Tribes to request voluntary fees through TCNS.[63] Yet, the FCC does not now agree to assume its statutory consultation obligations.

Continuing to process and approve applications without assessing Tribal impacts and consulting with Tribes violates NHPA and is contrary to ACHP guidance.[64] Additionally, reversing policy on the appropriateness of Tribal upfront fees lacks justification. ACHP acknowledges Tribal fees are entirely appropriate when a Tribe is performing "a role similar to that of a consultant or contractor," stating the Tribe "would be justified in requesting payment for its services, just as is appropriate for any other contractor."[65] The FCC cites extreme examples of when potentially exorbitant fees have been charged.[66] Yet, the FCC acknowledges that Tribes rely upon these up-front fees to fund their §106 activities and that, for most Tribes, the fees relate solely to the costs incurred.[67]

For example, in accordance with ACHP guidance, Seminole Tribe of Florida charges reasonable fees for its THPO's work.[68] The Tribe charges nothing to assess

---

[63] *QA-Wireless Infrastructure Second Report and Order* ("[R]equests that applicants pay upfront fees voluntarily are not permitted and will be removed . . . .") [JA1042].
[64] *See* ACHP, *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act* (2012).
[65] ACHP, *Consultation Handbook*, 13 [JA1015].
[66] Order, ¶¶13–15 [JA0810–11].
[67] Order, ¶121 [JA0859].
[68] Comments of Seminole Tribe of Florida (Mar. 14, 2018) [JA0742–43].

towers directly related to public health and safety or for emergency purposes.[69] For macro towers, the Tribe charges $500 for review and $200 for reassessment needed due to changes in the original submission.[70] For small cell facilities, the Tribe charges $300.[71] These fees are directly related to the THPO's significant level of effort and time in evaluating each project and effectively managing review requests. The Tribe does not intend to fund its entire THPO through fees, but it does reasonably expect fees to cover the costs of reviews.[72]

Although noting applicants are free to contract with the Tribes for review services,[73] the Order also states applicants need not contract with Tribes when services are required to identify historic properties and assess or mitigate adverse effects,[74] essentially guiding industry toward contracting with the lowest bidder, even though the FCC has a statutory consultation obligation. Tribes hold unique, and often sacred, knowledge regarding where their historic properties are located and what is needed to protect them. Non-tribal consultants are not qualified to assess impacts to Tribal historic properties, nor are they qualified to design mitigation measures or monitor construction to ensure Tribal historic properties are protected.

---

[69] *Id*. [JA0743].
[70] *Id.*
[71] *Id.*
[72] *See* Declaration of Paul Backhouse, Attachment to Seminole Stay Motion, ¶¶16–19.
[73] Order, ¶120 [JA0858–59].
[74] Order, ¶124 [JA0860].

The FCC's mash of policies—permitting contracts with Tribes but allowing applicants to refuse to pay fees; permitting applicants to avoid contracts with Tribes and thus encouraging lower cost but outsourcing NHPA review to less qualified contractors—underscores the arbitrary and capricious nature of the Order.

Finally, the Order unnecessarily shortens the overall time for tribal response to TCNS notifications from 60 to 45 days.[75] The Order eliminates the requirement that applicants make a second attempt to contact a Tribe and allows only 15 days, rather than 20, to respond after the FCC has followed up to contact a Tribe.[76] By and large, Tribes promptly respond to TCNS notices and are not interested in creating additional or unnecessary delay. However, THPOs operate with limited staff and budget, making the shortening of Tribal review time unreasonable.

The FCC's charges arbitrarily and capriciously hinder Tribal participation in the TCNS process while incentivizing industry applicants to forego Tribal fees and hence critical input required for the FCC to fulfill its obligations under NHPA.

V. THE FCC DID NOT MEANINGFULLY CONSULT WITH THE TRIBES

The Order should also be invalidated because the FCC capriciously failed to comply with tribal consultation obligations. This failure violated the agency's own policy by refusing to consider necessary Tribal input in its decision-making process.

[75] Order, ¶¶110–111 [JA0854–55].
[76] *Id.*

The FCC's defiance of its own policy renders the rulemaking void. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (finding an agency's failure to comply with own policy of prior consultation violates general administrative decision-making rules, justified expectations, and "the distinctive obligation of trust incumbent upon the Government.")(citing *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)).

The FCC's obligation to consult with Tribes is rooted in the sovereign status of Tribes and the unique government-to-government relationship explicitly recognized in Article I, Section 8 of the United States Constitution.

This mandate is echoed repeatedly in various U.S. statutes/regulations, Executive Orders, and in federal agency policy handbooks. The importance of tribal consultation is reflected in Executive Order ("EO") 13175,[77] issued to "strengthen the United States government-to-government relationship with Indian Tribes," which requires agencies to consult with Tribal officials regarding any regulation that has Tribal implications. Policies with Tribal implications are defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the [government and tribes]." *Id.*;

[77] *Consultation with Indian Tribal Governments*, 65 Fed.Reg. 67249 (2000).

see also EO 12875[78] (requiring meaningful consultation with Tribal governments on federal matters that significantly affect their communities); EO 13007[79] (directing agencies to establish policies and procedures for dealing with Tribal governments on a "government-to-government basis").

FCC policy acknowledges "the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions."[80] In that policy, the FCC noted Executive Order 13084, *Consultation and Coordination with Indian Tribal Governments*, which encourages independent executive agencies to comply with its terms.[81] The FCC also stated it "recognizes its own general trust relationship with, and responsibility to, federally-recognized Indian tribes," and committed itself to "endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance."[82] Thus, the FCC's policy provides that the FCC "in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or

[78] 58 Fed. Reg. 58093 (1993).
[79] *Indian Sacred Sites*, 61 Fed.Reg. 26771 (1996).
[80] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCCRcd 4078, 4080 (2000).
[81] *Id.*
[82] *Id.*

policy that will significantly or uniquely affect Tribal governments, their land and resources."[83]

The importance of the obligation to consult on rulemaking is echoed by the Section 106 consultation requirement. This Court recently analyzed the harm resulting from failure to consult in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520(D.C.Cir. July 20, 2018), ruling, in the context of a license issued by the Nuclear Regulatory Commission ("NRC"), that the NRC's failure to engage in consultation with the Oglala Sioux cannot, by itself, be harmless error. *Id*. at . at 533–34. This Court acknowledged the Catch-22 created by an agency's failure to consult: "How, after all, can the Tribe show that [the] project will irreparably damage its cultural artifacts if there has not been a survey adequate to determine where those artifacts are located?" *Id*., at 535. This Court's recognition of the central importance of consultation in *Oglala Sioux* cannot be reconciled with the FCC's stated purpose in promulgating the Order: to eliminate consultation.

The failure to meaningfully consult also had direct adverse impact on the rulemaking process analogous to the failure addressed in *Oglala Sioux* for a single project. In 2004, all stakeholders were able to resolve issues regarding truly small equipment or other unique situations. Here, the FCC's cited concerns regarding new truly small technology, or abusive fees, for example, could have been resolved well

[83] *Id.*

short of the whole sale scrapping of the existing regulatory scheme. Not a single tribe, for example, advocated for a right for abusive or opportunistic fees.

The Order mischaracterizes the nature and extent of the FCC's efforts to fulfill its duty to consult with Tribes: it depicts listening sessions, briefings, conference calls, and delivery of remarks by a Commissioner at a conference as "consultations." Order, ¶¶17–35 [JA0812–17]. Numerous examples demonstrate these contacts, however characterized by the FCC, did *not* constitute meaningful consultation:

- The Order fails to acknowledge that every single Tribe present at the FCC's listening sessions stated on the record their belief that the sessions were *not* consultations within the meaning of the FCC's consultative duty and that the record of the January 24, 2018 conference call reflects the same dissent. *See, e.g.*, Comments of Pechanga Band of Luiseño Indians (Mar. 15, 2018) [JA0757]; Ex parte letter from Thlopthlocco Tribal Town (Mar. 13, 2018) ("Thlopthlocco Filing") [JA0675].
- A regional meeting with no agenda or format in Broken Arrow, Oklahoma on July 24, 2017, Order, ¶24) [JA0814], at which FCC staff did not take minutes, record proceedings, or make comments part of the record. *See* ex parte letter from Muscogee (Creek) Nation (Mar. 19, 2018) [JA0799]; Affidavit of Deborah Dotson, Attachment 8 to July

17, 2018 Emergency Motion for Stay, ¶8 (attendee describing meeting as disorganized, unfocused, and not a proper government-to-government consultation).

- Commissioner Carr's attendance at USET SPF's Impact Week 2018, Order, ¶30 [JA0815–16], was a listening session, not a formal consultation, as it "did not include any substantive dialogue between the Commissioner and the tribal leaders." Comments of the NCAI, *et al.* ("NCAI Comments") (Mar. 14, 2018) [JA0726–27].
- The FCC admitted that the August 10–11 and February 21, 2018 meetings were not consultations but were informational only. *See* Thlopthlocco Filing [JA0682]; Declaration of Carol Butler, Attachment 4 to Stay Motion, ¶8. Yet, the FCC lists these meetings as proper examples of tribal consultation. *See* Order, ¶¶25, 34 [JA0814, JA0816–17]; Declaration of Elsie Whitehorn, Attachment 11 to Stay Motion, ¶7 ("There have been a few meetings with the FCC where it was stated it was not a consultation but later it was recorded as consultation meetings.").

- Repeated Tribal requests to meet with both industry and the FCC at the same time to address concerns on all sides were ignored.[84]
- In one egregious instance, FCC staff at the Broken Arrow, Oklahoma event refused to engage in dialogue with Tribal representatives, stating they were only the "ears" of Chairman Pai. Affidavit of Kimberly Penrod, Attachment 9 to Stay Motion, ¶7.

Characterizing this as meaningful consultation is simply disingenuous and disregards repeated Tribal objections to the agency's bad faith, check-the-box approach to consultation.

The FCC's reliance upon the "sheer number of these events"[85] does not excuse the procedural insufficiency of the events. *See, e.g.*, ex parte letter of Cherokee Nation (Mar. 14, 2018)("The Nation maintains that these meetings do not constitute government-to-government consultation.") [JA0711]; NCAI Comments ("The January 24, 2018 and February 5, 2018 conference calls are clearly not tribal consultation. A conference call with one to two weeks prior notice is not a consultation; it is simply a conference call. Characterizing these calls as tribal

[84] Two instances of this request being made by Tribes occurred at the October 4, 2017 meeting in Washington, DC, and the February 21, 2018 meeting in New Mexico. *See* Thlopthlocco Filing [JA0678].
[85] Order, ¶35 n.40 [JA0817].

consultation is inaccurate and should be removed from the list of consultations for the record.") [JA0727].

Careful review of the Order itself demonstrates that the failure to meaningfully consult impacted the Commission's decision-making. The FCC's alleged support for its decision derives solely from the carriers' input. The Commission cites industry data for its claim of huge burden. *See, e.g.*, Order, ¶32 [JA0816]. The rulemaking process should account for the voices of *all* interested parties. Yet, references to Tribal point of view are minimal and generalized. *See, e.g.*, Order at ¶¶84–86 [JA0839–42]. The FCC complains, for example, that the Tribes only provided generalized information about future harm. Rather than complaining, it should have stopped and consulted. In 2000, the FCC adopted its Tribal Policy Statement, wherein the Commission committed to prior tribal consultation.[86] Having established tribal consultations as its own procedure, the Commission had a duty under the APA to follow the requirements here. *See e.g.*, *Morton v. Ruiz*, 415 U.S. at236 (an agency must "follow [its] own procedures" regardless whether they are "more rigorous than otherwise would be required"). *See also Reuters, Ltd. v. FCC*, 781 F.2d 946 (D.C.Cir. 1986)(FCC not at liberty to depart from its rules). On this basis alone, the Order fails.

[86] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCCRcd. 4078 (2000).

Accordingly, the Order cannot stand, and proper consultation must take place so that the very real potential for adverse environmental, historical, and spiritual effects can be acknowledged and considered.

CONCLUSION

WHEREFORE, Petitioners and Intervenors request that the Court grant their petition for review and vacate the challenged FCC Order and remand the matter to the Commission to comply with its statutory duties.

Dated: January 25, 2019 Respectfully submitted,

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA AND OTHER TRIBAL PARTICIPANTS

/s/ Joel D. Bertocchi
J. Scott Sypolt
Joel D. Bertocchi
Jeffrey J. Mayer
Eric J. Gribbin
AKERMAN LLP
71 S. Wacker Drive, 46th Floor
Chicago, IL 60606
(312) 634-5700

CROW CREEK TRIBE OF SOUTH DAKOTA and OMAHA TRIBE OF NEBRASKA

/s/Stephen Diaz Gavin
Stephen Diaz Gavin
RIMON, P.C.
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 871-3772

SEMINOLE TRIBE OF FLORIDA

/s/Joseph H. Webster
Joseph H. Webster
F. Michael Willis
Akilah J. Kinnison
HOBBS, STRAUS, DEAN & WALKER LLP
2120 L Street, NW, Suite 700
Washington, DC 20037
(202) 822-8282

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES

/s/Elizabeth S. Merritt
Elizabeth S. Merritt
Deputy General Counsel
NATIONAL TRUST FOR HISTORIC PRESERVATION
2600 Virginia Ave., NW, Suite 1100
Washington, DC 20037
(202) 588-6035

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

/s/Andrew Jay Schwartzman
Andrew Jay Schwartzman
James T. Graves
INSTITUTE FOR PUBLIC REPRESENTATION GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9170

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(a) because, excluding the parts of the document exempted by Fed. R. App. P. 27(d)(2)(B):

☒ this document contains 10,369 words, *or*

☐ this document uses a monospaced typeface and contains ____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because:

☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman, *or*

☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

January 25, 2019

Respectfully Submitted,

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA AND OTHER TRIBAL PARTICIPANTS

/s/ Joel D. Bertocchi
J. Scott Sypolt
Joel D. Bertocchi
Jeffrey J. Mayer
Eric J. Gribbin
AKERMAN LLP
71 S. Wacker Drive, 46th Floor
Chicago, IL 60606
(312) 634-5700

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-fifth day of January 2019, I electronically filed the foregoing **PETITIONERS' AND INTERVENORS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on each of the participants in the case via the Court's CM/ECF system, with exception of the following, which was accomplished by first class mail:

Mr. Troy Andrew Eid
Greenberg Traurig, LLP
1200 17th Street, Ste. 2400
Denver, CO 80202

January 25, 2019

Respectfully submitted,

/s/ F. Michael Willis
F. Michael Willis

Hobbs, Straus, Dean & Walker, LLP
2120 L Street, NW, Suite 700
Washington, DC 20037