[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' REPLY BRIEF

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GLOSSARY

PARTIES AND GOVERNMENT ENTITIES	
ACHP	Advisory Council on Historic Preservation
FCC	Federal Communications Commission
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	
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
OTHER	
Order	*In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCCRcd ___, FCC 18-30 (Mar. 30, 2018)
NPA	Nationwide Programmatic Agreement
PA	Programmatic Agreement
TCNS	Tower Construction Notification System

SUMMARY OF ARGUMENT

1. The government's argument that it had authority to definitively interpret the National Historic Preservation Act ("NHPA") is incorrect. The Federal Communications Commission ("FCC") was not entitled to unilaterally redefine the statutory definition of "undertaking" in a manner inconsistent with NHPA's plain language, this Court's rulings, and the Advisory Council on Historic Preservation's ("ACHP") interpretation. NHPA imposes obligations to assess impacts to tribal historic properties and consult with tribes *in addition* to FCC's obligations under the Communications Act. FCC cannot evade NHPA by attempting to relinquish its regulatory authority. FCC incorrectly asserts that geographic area licenses are insufficient federal involvement to trigger NHPA.

2. FCC's public interest determination purporting to relinquish its regulatory authority was arbitrary and capricious because it distinguished small cells based solely on size. FCC misconstrues the record to justify its decision. It makes unfounded claims about costs to applicants, fails to consider cumulative impacts, and unreasonably minimizes tribal comments documenting the benefits of NHPA review.

3. FCC misleadingly claims its Order merely clarified existing fee policy, when the Order arbitrarily and capriciously reversed FCC's policy, stating it would continue processing macro tower applications without tribal involvement if tribes

refused to review applications for free. Like all federal agencies, FCC has an independent obligation under NHPA to consult with tribes in assessing impacts to tribal historic properties.

4. FCC arbitrarily and capriciously failed to consult with tribes, rendering the rulemaking void because the agency violated its own policy and deprived the rulemaking process of tribal input.

ARGUMENT

I. Introduction

FCC engaged in an outcome-driven process disregarding federal environmental and historic preservation law and excluding tribes from a review process that Congress intended to protect this country's irreplaceable cultural heritage. In doing so, FCC disregarded tribal voices—among others—that urged adherence to the law and reasoned decision-making. FCC is simply not empowered with the authority it attempted to seize.

FCC's Response makes three primary arguments. First, it argues it had authority to provide definitive interpretations of NHPA, contrary to rulings of this Court and NHPA's plain language. Second, FCC relies upon representations, unsupported by the record, suggesting that the largest build-out in the history of the mobile phone network would not adversely affect historic properties. Third, FCC offers a defense of its decision that effectively defunds tribal historic preservation

offices but fails to explain how it will otherwise fulfill its statutory obligations to assess impacts to tribal historic properties and consult with tribes in doing so.

FCC violated NHPA's plain language by unilaterally reinterpreting the statutory definition of "undertaking" in direct conflict with ACHP. FCC's interpretation, therefore, merits no deference. NHPA applies to small cells because a federal license is required. Further, federal involvement is pervasive, as a federally regulated resource is involved, construction and coverage requirements make it reasonably foreseeable that infrastructure deployment would adversely impact historic properties, and substantial federal revenues are generated. Along with this federal involvement comes the obligation to comply with federal historic preservation laws.

FCC's Response also misconstrues the rulemaking record. FCC's public interest determination was arbitrary and capricious, reversing past policy by distinguishing small cells based on size alone, without considering the cumulative effect of tens of thousands of small cells, and engaging in an interest-balancing test that failed to provide independent factual support for the costs considered, or to account for the benefits of review by tribes and others. FCC also arbitrarily and capriciously sought to marginalize the role of tribes in the review of macro towers and to abandon its obligation to seek tribal consultation in assessing impacts on historic properties as required by NHPA. Petitioners urge this Court to set aside the

Order and remand the matter to FCC.

II. FCC Cannot Evade NHPA by Unilaterally Redefining an Undertaking in Violation of Statutory Language and Eradicating the Method by Which it Previously Ensured NHPA Compliance.

A. FCC Lacks Authority to Redefine an Undertaking Contrary to NHPA's Plain Language and ACHP's Interpretation.

FCC is not the agency charged with administering Section 106, and its interpretations are not entitled to deference. *U.S. v. Mead Corp.*, 533 U.S. 218, 226–28 (2001). Rather, this Court should defer to the statutory constructions of ACHP, to which Congress delegated authority. 54 U.S.C. §304108(a)(ACHP regulations "govern the implementation of Section [106] in its entirety"); *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 116 (D.C.Cir. 2006)("Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the Council")[hereinafter "*CTIA*"]. ACHP disagreed with FCC's exclusion of small cells from Section 106 review. *See* ACHP Comments, as revised, pp.7, 8 (June 15, 2017)[hereinafter "ACHP 2017"] [JA0256-57].

FCC argues that ACHP's disagreement "relate[s] to the Commission's public interest analysis, not its undertaking determination." FCC Response, p.56 n.10. This is incorrect. ACHP specifically addressed the "undertaking" issue in its June 2017 and March 2018 comments. ACHP 2017, pp.7–8 [JA0256–57]; ACHP Comments, p.1 (March 15, 2018) [JA0749]. ACHP stated it "does not see a reason why the cited evolution of technology and changes in infrastructure deployment

would in any way change the FCC's interpretation of its Section 106 responsibilities…." ACHP 2017, p.7 [JA0256]. ACHP then stated that FCC's Order "revises the definition of a federal undertaking" and "remains inconsistent with the views of the ACHP as provided in its June 15, 2017 letter." ACHP Comments, p.1 (March 15, 2018) [JA0749].

FCC argues it deserves deference because the Nationwide Programmatic Agreement ("NPA"), executed under 36 C.F.R. §800.14(b), provides it with "sole authority to determine what activities...constitute Undertakings within the meaning of the NHPA." FCC Response, pp.10, 13. This, too, is contrary to ACHP's interpretation.[1] ACHP advised FCC that it did "not believe it is appropriate to reconsider the status of undertakings subject to Section 106 review per 36 CFR 800.3(a)(1)." ACHP 2017, p.7 [JA0256].[2] ACHP commented that "ACHP is given deference in interpreting Section 106 and in deciding whether an agency has complied with Section 106." *Id.*, p.9 [JA0258]. Although ACHP regularly authorizes permitting agencies to make initial determinations of whether an activity

[1] In any event, this language from the NPA applies solely to the determination of what activities are within the scope of the NPA. FCC cannot bootstrap this language into a subsequent rulemaking.

[2] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)(agency must provide detailed justification when reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy"). Moreover, ACHP advised FCC of a legal way to modify its policy, offering "to engage with FCC...along with other signatories to those agreements" to discuss possible Section 106 exclusions. ACHP 2017, p.7 [JA0256].

is an undertaking, 36 C.F.R. §800.3(a), that does not mean the permitting agency is free to contravene ACHP's interpretation of the plain language of NHPA by redefining or contradicting the statutory definition of an undertaking.

FCC is not entitled to *Skidmore* deference because FCC's interpretation directly contradicts the views of the agency charged with administering Section 106 and is unsupported by the record. *Mead*, 533 U.S. at 234–235 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Even under *Chevron*, FCC's interpretation fails. Congress directly stated that undertakings include federally licensed activities. 54 U.S.C. §300320. Had Congress not directly spoken to the issue, FCC's statutory construction would still be impermissible, as indicated by significant ACHP opposition. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

B. FCC's Duty to Comply with NHPA Does Not Solely Arise from its Limited Approval Authority but also from NHPA's Plain Language.

FCC argues that its exercise of limited approval authority under the Communications Act was the sole source of its obligation to comply with NHPA in licensing small cells. FCC Response, pp.11–12, 46. On the contrary, NHPA imposes obligations *in addition to* the Communications Act. Amending Section 1.1312 to relinquish pre-construction approval authority merely eliminates the

mechanism by which FCC ensured that it was complying with NHPA.[3]

This Court ruled in *CTIA* that FCC possesses authority to require NHPA review prior to wireless facility construction as a condition of licensing. *CTIA*, 466 F.3d at 114. The ruling was narrow—it did not address the issue of geographic area licensing. *See id.* at 113 n.3. The decision upheld FCC's reasoning that it had authority to require NHPA review based on the agency's exercise of approval authority where either: (1) tower registration was required due to height and proximity to an airport; or (2) FCC chose to retain "limited approval authority" to ensure compliance with environmental laws including NHPA. *Id.* at 113–15. The Court did *not*, as FCC and Intervenors imply, state that these were the *only* two situations where NHPA applies. FCC Response, pp.13–14, 35; Intervenors' Response, p.15.

FCC's Response reiterates the Order's misreading of *CTIA*. FCC Response, p.19. FCC misconstrued *CTIA* as a case that set the outer boundaries of NHPA, rather than upholding FCC authority within the limited scope of the arguments presented. To evade NHPA, FCC set out to "eliminate[] the only basis under *CTIA* and Commission precedent for treating such deployments as undertakings…."

[3] FCC correctly noted Section 319 requires preconstruction review of wireless infrastructure when a public interest determination has been made. FCC Response, pp.45–46. This does not alter Petitioners' assertions that FCC arbitrarily and capriciously relinquished preconstruction review and that NHPA review is nonetheless required.

Order ¶44 [JA0820–21]. FCC sought to accomplish this by relinquishing approval authority over small cells deployed to provide service under geographic area licenses. FCC erred. NHPA applies nonetheless.

NHPA directs that federal agencies, "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. The term "historic property" means a property "included on, or eligible for inclusion on, the National Register [of Historic Places]," *id*. §300308, and includes "[p]roperty of traditional religious and cultural importance to an Indian tribe." *Id.* §302706(a). NHPA requires agencies carrying out Section 106 duties to "consult with any Indian tribe...that attaches religious and cultural importance" to property eligible for the National Register. *Id.* §302706(b). And NHPA defines undertaking to include any "project, activity, or program...requiring a Federal permit, license, or approval." *Id*. §300320.

FCC seeks to circumvent NHPA by unilaterally redefining "undertaking." NHPA is clear that undertakings are any "project, activity, or program...requiring a Federal permit, license, or approval." *Id*. Here, small cell wireless facilities may not transmit federal spectrum without a geographic area license. Without a license, transmission is unlawful and the underlying infrastructure is useless.

Respondents put forward a series of claims seeking to establish that geographic area licenses are not federal licenses triggering NHPA. FCC Response,

pp.3–5, 27, 36–45; Intervenors' Response, pp.12–13, 28-38. Respondents do not address, much less rebut, Petitioners' discussion of pervasive federal involvement in the geographic area licensing process. Petitioners' Br., pp.24–30. For instance, construction/coverage requirements make the build-out of wireless technology essentially a condition of licensing, regardless of when that construction occurs. This ties the issuance of the license directly to the deployment of infrastructure. Additionally, small cells transmit using federal spectrum—FCC essentially leases the right to transmit this federally controlled public resource by auctioning off geographic area licenses for specified, limited terms. *See* 47 U.S.C. §309(j)(1). FCC retains the right to modify these licenses at any time. *Id.* §316(a). Auctions also generate billions of dollars in federal revenue.

FCC argues there is no plausible way to assess effects at the time of geographic area licensing, as if this would excuse NHPA non-compliance. FCC Response, pp.27, 29–39. Yet, ACHP regulations specifically contemplate such circumstances: "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking," Section 106 compliance is achieved through a programmatic agreement ("PA"), 36 C.F.R. §800.14(b)(1)(ii), as FCC itself has done, beginning with the Collocation PA in 2001, 47 C.F.R. §1.1320(a)(2)(i) and Appendix B. The obligation to conduct NHPA review does not disappear merely because the license is issued prior to construction of a facility necessary to carry out

the license. *Amendment of Environmental Rules*, 5 FCCRcd 2942, ¶¶1, 5 (1990).

FCC also claims effects are not "reasonably foreseeable" at the time of licensing. FCC Response, p.39. ACHP disagreed, stating that evolution in technology did not change the reasonable foreseeability that infrastructure would be deployed "to enable the FCC licensed use of spectrum." ACHP 2017, p.7 [JA0256]. Although some specific effects may not be readily predictable, "the construction of such [infrastructure] is reasonably foreseeable, and therefore needs to be considered by the FCC for Section 106 purposes." *Id.*, p.9 [JA0258]. In any event, FCC's own programmatic agreements already provide an approach for addressing this issue. 47 C.F.R. §1.1320.

Respondents claim that Petitioners attempt to make every possible "but for" consequence of a federal license subject to NHPA. FCC Response, pp.39–45; Intervenors' Response, pp.37–38. Yet, Petitioners merely assert that where a federal license authorizes the use of federal spectrum for wireless telecommunications, with construction or coverage requirements that necessitate certain infrastructure, FCC remains responsible to ensure the deployment of that infrastructure complies with federal law. Petitioners' point arises directly from the narrow and necessary statutory interpretation.

FCC primarily relies upon a series of NEPA cases to argue there is insufficient federal control. Those cases are inapposite for two reasons. First, they

are not analogous to this case. *See, e.g., Big Bend Conservation Alliance v. FERC*, 896 F.3d 418, 422–423 (D.C.Cir. 2018)(FERC, by statute, lacked jurisdiction over intrastate pipeline); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992)(FERC certification was purely ministerial, and not required); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004)(agency lacked power to act on information obtained in environmental review); *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 396–97 (9th Cir. 1989)(environmental review *was conducted* and court upheld agency limitations on scope); *NRDC v. EPA*, 822 F.2d 104, 127–28 (D.C.Cir. 1987)(striking down ban on construction application prior to private owner applying for EPA permit). Unlike the cases cited, FCC has clear jurisdiction to license the infrastructure at issue, under a comprehensive licensing scheme for construction and operation of the mobile telephone system. *See* 47 U.S.C. §§301 *et seq*.

Second, although ACHP specifically cautioned FCC not to conflate NEPA and NHPA because of differences in the plain language of the statutes, ACHP 2017, p.8 [JA0257], FCC nonetheless invokes NEPA cases to argue the federal involvement here is insufficient to trigger NHPA.[4] ACHP warned that despite

[4] Intervenors similarly conflate NEPA and NHPA. Intervenors' Response, p.26. FCC also cites *Karst Envtl. Educ. & Protection, Inc. v. EPA*, which included NHPA claim, but focused on final agency action. 475 F.3d 1291, 1296 (D.C.Cir. 2007).

significant similarities, the triggering thresholds and scopes are clearly distinct. *Id.* ACHP explained that under NEPA:

> [The] degree of Federal involvement...turns an otherwise private action into a "Federal" action. In contrast, the undertakings (projects, activities or programs) whose effects must be considered under Section 106 include those that are simply under the "indirect jurisdiction" of a Federal agency, such as those "requiring a Federal permit, license, or approval."

ACHP 2017, p.8 (quoting NHPA) [JA0257]. ACHP also noted that NEPA requires "major" federal action "significantly" affecting the environment, while NHPA applies to *any* project involving a Federal permit, license, or approval, and need not have "significant" effects to be considered an undertaking. *Id*. Thus, under the plain language of NHPA, an undertaking exists even if the federal agency only has indirect jurisdiction (rather than actual control) so long as a license issues. Although NEPA and NHPA are closely analogous, they are not the same.[5]

FCC and Intervenors also invoke *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), in which the court reviewed NHPA claims based upon NEPA's "degree of federal involvement" test because "the parties treat NHPA's 'undertaking' requirement as essentially coterminous with NEPA's 'major Federal actions' requirement." 828 F.2d at 1309; FCC Response, p.42 n.6; Intervenors' Response,

[5]*See Indiana Coal Council, Inc. v. Lujan,* 774 F. Supp. 1385, 1402 n.13 (D.D.C. 1991), *vacated in part on other grounds,* No.91-5397, 1993 WL 184022 (D.C.Cir. 1993).

pp.26, 27–28, 30. *Ringsred*, however, involved approval of a construction contract that parties could have carried out without approval. Lack of federal contract approval would not render performance illegal. In contrast, bringing small cell infrastructure into operation without a federal license is unlawful.

FCC's assertion that there is little federal involvement in small cell deployment is inaccurate and disingenuous. For example, FCC itself issued a new Order less than four months ago, imposing significant restrictions on the ability of state and local governments to regulate small cell infrastructure, in an effort to preserve federal regulatory uniformity. *Declaratory Ruling and Third Report and Order in WT Docket No. 17-79*, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-133 (September 17, 2018). The national cell phone network is among the country's largest engineering endeavors, with virtually every aspect licensed by FCC. Along with FCC's federal involvement comes the obligation to ensure that federal environmental and historic preservation laws are enforced. As ACHP pointed out, "[w]hether the entity owning or managing communications sites is or isn't an FCC licensee does not change the fact that...the construction of such sites...needs to be considered by the FCC for Section 106 purposes." ACHP 2017, p.9 [JA0258]. Upholding NHPA is also part of the United States' trust responsibility toward tribes and particularly important given the history of dispossession and warfare that created a situation in which tribes

struggle to protect off-reservation historic and sacred sites. *See North Slope Borough v. Andrus*, 642 F.2d 589 (D.C.Cir. 1980)(finding the Secretary fulfilled trust obligations through compliance with applicable statutes).

Notably, Intervenors (but not Respondents) state that "FCC does not finance small cell wireless facility deployments." Intervenors' Response, p. 24. That is an incomplete characterization of the facts. NHPA provides that "undertaking" means a project, activity, or program including "those carried out with Federal financial assistance[.]" 54 U.S.C. §300320(2). As Commissioner Rosenworcel pointed out in dissent, "it is highly likely that small cells are going to be deployed using federal financial assistance." Order (Rosenworcel Dissent, 10)(referring to $4.53 billion Mobility Fund budget) [JA0906]. Although FCC's Universal Service Fund programs (also including Lifeline and Connect America programs) do not distribute *appropriated* funds, it is FCC, using staff resources, that administers their operation and determines how monies are distributed. *See, e.g.*, *Connect America Fund; Universal Service Reform–Mobility Fund II*, 32 FCCRcd 2152 (2017).

III. FCC Misconstrues the Record as Justification for Removing Small Cell Facilities from Review.

FCC asserts the "record bears out" its concerns regarding regulatory burdens, costs, and delays. FCC Response, pp.49–50. Yet, FCC misconstrues the record. For instance, it argues without any legal authority that "limitations on the

permissible size of a small wireless facility removed from review serve to ensure that the impact on historic preservation and environmental interests is likely to be limited." *Id.*, p.67. FCC ignores now, as it did in the rulemaking, tribal input stating that even small infrastructure, if placed on sensitive sites, can cause adverse effect. *See e.g.*, Santa Clara Comments, p.2 (March 14, 2018) [JA0730]; Seminole Tribe of Florida Comments, pp.5–6 (June 15, 2017) [JA0362–63]. Additionally, FCC's definition of "small" cell infrastructure includes towers up to 50 feet, Order ¶74 [JA0832–33], which could certainly impose adverse impacts on a wide variety of historic properties.

In its zeal to eliminate NHPA review, FCC made irrational distinctions between small cells and other infrastructure and came to unsupported conclusions. In previous rulemakings, FCC found "no basis" to determine small cells were not FCC-licensed undertakings, rejecting arguments that infrastructure size justified removing small cells from the analysis applied to macro towers. *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCCRcd 12865, ¶84 (2014); *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)(requiring detailed justification when agency adopts policy that "rests upon factual findings that contradict those which underlay its prior policy").

FCC now asserts that size alone makes small cells materially different from other infrastructure. However, size alone is not the determining factor for whether a

deployment will damage historic properties of tribal religious and cultural significance, nor is it directly correlated with severity of harm. A smaller structure placed in the middle of a tribal burial site causes grievous harm; a gigantic tower adjacent to a shopping mall might not.

FCC minimizes the benefits of review, ignoring that Congress directed such review by statute. Citing carriers' self-serving presentations, such as Verizon's claim of adverse tribal effects in 0.3% of reviews, FCC Response, pp. 26, 54,[6] FCC does not even mention that tribes considered the same statistic to be of significant benefit because, by Verizon's count, this protected 29 sites. *See* Navajo Nation Comments, p.5 (June 15, 2017) [JA0344]. Further, tribes provided numerous examples of reviews resulting in protection of sites. *See, e.g.*, Choctaw Nation Comments, pp.1–2 (Feb. 28, 2017)(describing how consultation averted impact to National Register site) [JA0025–26]; Seminole Tribe of Florida Comments, p.13 (June 15, 2017)(providing six examples) [JA0370]; Chippewa Cree Tribe Comments, p.8 (July 17, 2017)(proposed tower relocated) [JA0625]. Yet, FCC's Response reiterates the Order's unfounded claim that "the record does not support sufficiently

[6] Intervenors state "only 0.33 percent of tribal reviews...resulted in a finding of adverse impact." Intervenors' Response, p.9. Given the estimated deployment of hundreds of thousands of small cells, 0.33 percent is significant. At that rate, for each 100,000 small cells, potentially 330 adverse impacts would be caused—without any procedures in place to avoid, minimize, or mitigate harm, as required by NHPA.

appreciable countervailing environmental and historical preservation benefits…." FCC Response, p.52.

FCC and Intervenors misleadingly assert that exempting small cells from NHPA review is equivalent to exempting Wi-Fi routers or other small devices. FCC Response, pp.48–49; Intervenors' Response, pp.20–21, 29. Wi-Fi routers, unlike small cells, use *unlicensed* spectrum. *See* 47 C.F.R. §§2, 15. FCC rules merely require certification so that unlicensed transmitters do not interfere with use of licensed spectrum. *See* FCC, Office of Engineering & Technology, Understanding the FCC Regulations for Low-Power, Non-Licensed Transmitters, OET Bull. No. 63.[7]

Respondents' and Intervenors' citation of signal boosters is similarly inapposite. Like Wi-Fi routers and garage door openers, signal boosters are used by consumers to improve mobile wireless service within a limited area, such as a home, car, or boat. *Amendment of the Commission's Rules to Improve Wireless Coverage Through the Use of Signal Boosters*, 28 FCCRcd 1663, ¶4 (2013). Users are not FCC-licensed. Larger industrial boosters are similarly not themselves licensed, *id.* ¶5, and although providing greater signal strength than consumer boosters, their use is still intended for areas such as stadiums, airports, and educational campuses, *id.*,

[7] Available at https://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet63/oet63rev.pdf.

to overcome terrain and other signal problems rather than to authorize extension of coverage, which would have to be accomplished by wireless carriers. Accordingly, boosters are not a federally licensed activity under NHPA, in contrast to licensing of mobile carriers.

FCC reiterates the Order's findings regarding a massive increase in small cell deployment. FCC Response, pp.50–51 (citing carriers' estimate to "deploy hundreds of thousands of wireless facilities"; Sprint's plans "to build at least 40,000 new small sites over the next few years"; and Verizon's expectation that networks will require 10 to 100 times more antenna locations). Even one isolated small cell can adversely affect tribal historic properties, and the likelihood of harm greatly increases when the deployment encompasses an entire network of densely packed infrastructure comprised of thousands of structures (each of which can be up to 50 feet tall).

FCC's failure to consider the direct, indirect, and cumulative impact of small cells is itself arbitrary and capricious. FCC has not demonstrated that infrastructure less than 50 feet tall is inherently less likely to trigger harmful environmental and historic preservation consequences, as the Order claims. Rather, the record suggests the risks to historic preservation are greater now that numerous small cells will be deployed more densely than fewer, more distributed macro towers. FCC's Response offers no explanation for the Order's failure to meaningfully discuss alternatives to exempting small cells such as batching small cell applications to reduce cost and

increase efficiency or exercising its authority to deal with rising costs or exorbitant fees. *See, e.g.*, ACHP 2017, p.4 [JA0253]. Another ACHP-suggested alternative would be amending the NPA to add a defined category of small cell applications to the list of undertakings not subject to Section 106 review. *Id.*, p.7 [JA0256].

Ultimately, FCC engages in a cost-benefit analysis with its thumb on the scale. FCC decries the supposed cost of conducting reviews and purported delays, but it made no effort to modify the review process to manage and reduce costs, and it fails to provide reliable information about costs specific to small cells. Nor does FCC provide any evidence that costs significantly impede the ability or willingness of companies to deploy small cell technology. Nowhere does FCC consider the public interest in preservation nor discuss sites that have been protected through review. Adverse effects on other sites are reasonably foreseeable if there will be no notice or opportunity to review small cell infrastructure whatsoever.

IV. FCC's Claim that it is Merely Clarifying Existing Fee Policy is Incorrect, and FCC Arbitrarily and Capriciously Ignores its Responsibility to Conduct NHPA Reviews.

FCC ignores the key flaw in its treatment of tribal fees—FCC has the statutory obligation to consult with tribes, and it reasonably implemented that obligation through the NPA, allowing applicants and tribes to work together efficiently through the Tower Construction Notification System ("TCNS"). What is arbitrary and capricious is not FCC's clarification that fees are voluntary, it is the

Order's determination that FCC will process applications without tribal input if tribes insist on charging applicants for their reviews. If FCC wishes to undermine the NPA by excluding tribes from the process, it cannot continue to rely on TCNS. FCC still must comply with Section 106 prior to approving any application.

FCC's Response claims FCC merely clarified rules regarding tribal fees, consistent with ACHP guidance. FCC Response, p.62. FCC argues that tribes are still free to request voluntary fees (by means other than TCNS, which no longer allows such requests), but "[w]hat the Tribes cannot do is insist on up-front fees before providing their views." *Id.*, p.63. Payment of fees has always been voluntary—as has been the provision of tribal information to applicants. Tribes are perfectly free to refuse to provide information to applicants if they are not compensated for their efforts, or for any other reason. FCC, however, is not free to continue approving applications without fulfilling its independent duty under NHPA to: (1) assess impacts to properties eligible for the National Register; and (2) consult with tribes regarding properties of tribal religious and cultural importance. Thus, the Order violates the APA in providing that FCC will consider a tribe non-responsive and approve applications without consultation if tribes insist on payment for their services in reviewing applicants' requests. Order ¶119 [JA0858].

FCC must fulfill its affirmative obligation to consult with tribes in assessing impacts. The NPA specifically provides that applicants' contacts with tribes "do[]

not substitute for government-to-government consultation unless the Indian tribe... affirmatively disclaims further interest or...has otherwise agreed such contact is sufficient." 47 C.F.R. Pt.1, App'x. C. FCC previously recognized "the Commission is not delegating a governmental function or any decision-making authority, but simply seeking assistance from our licensees and applicants in beginning a process over which the Commission ultimately retains control." Nationwide Programmatic Agreement Regarding the Section 106 Nat'l Historic Pres. Act Review Process, 20 FCCRcd 1073, ¶99 (2004). Further, ACHP regulations provide that an agency may authorize applicants to initiate consultation, but the agency "remains legally responsible for all findings and determinations" and for "government-to-government relationships with Indian tribes." 36 C.F.R. §800.2(c)(4).

FCC and Intervenors paint a picture of a widespread, abusive fee-collecting scheme even though the Order made no such finding. Tribes maintained that fees are generally reasonable.[8] However, FCC disregards tribal comments, claiming "fees have increased significantly over the years," citing the highly unusual example

[8] Whether a tribe indicates it does not object or it identifies potential harm, information obtained and transmitted incurs costs. Costs include hiring qualified staff, time to evaluate proposals and gather information from community members, and potential site visits and research. Upfront fees compensate tribes for time and resources involved in providing applicants with the certainty they seek in an efficient and cost-effective manner, including by avoiding the transaction costs of negotiating fees for each review. Hualapai Tribe Comments, p.2 (June 15, 2017) [JA0338].

of the Super Bowl—a situation it had complete authority to address individually. FCC Response, p.53. Intervenors meanwhile cite "overwhelming evidence" of the financial benefits of fee reform, pointing to "exorbitant" fees. Intervenors' Response, pp.8, 20. Yet, ACHP notes that "few if any" fee disputes had been referred to ACHP in the TCNS's 12 years. ACHP 2017, p.1 [JA0250]. ACHP, therefore, recommended FCC "take a more deliberate approach to monitoring how and when" fees are appropriate and "urge[d] FCC and Industry to work with Indian tribes to gather pertinent facts about how such fees are assessed... before it determines appropriate solutions." *Id.* Instead, FCC developed significant policy changes based upon outlier examples of potentially abusive fees. *See* Order ¶121 [JA0859]. FCC could have dealt with bad actors individually, through appropriately tailored processes, rather than using a few extreme examples to justify eviscerating the tribal role in TCNS.

FCC's shortening of timeframes for tribal responses and its green light to applicants to contract with non-tribal entities is further evidence of FCC's efforts to undermine tribal participation. Like the Order, FCC's Response essentially argues that this is up to agency discretion, FCC Response, p.68, without considering tribal input as to the barriers or risks these changes pose. FCC's regulatory changes are arbitrary and capricious, unreasonably burdening tribal participation.

V. FCC's Failure to Engage in Meaningful Consultation Renders the Rule Arbitrary and Capricious Under the APA.

Lack of meaningful consultation arbitrarily and capriciously violated FCC's own policy, voiding the rulemaking. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979)(failure to comply with consultation policy violates general administrative decision-making rules, justified expectations, and "the distinctive obligation of trust incumbent upon the Government")(quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)). *See also Reuters, Ltd. v. F.C.C.*, 781 F.2d 946, 947 (D.C.Cir. 1986)("A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations.") Further, FCC deprived the decision-making process of tribal input regarding laws and processes designed, in part, to protect tribal interests. FCC's argument that the consultation obligation is not independently actionable does not undermine APA's requirement that rulemaking be in accordance with agency policy and based on reasoned decision-making.

FCC further argues that no standard for meaningful consultation is articulated, misconstruing Petitioners' invocation of executive orders and agency policy. FCC Response, pp.71–72. Agency policy and executive orders provide context for understanding meaningful consultation, emphasizing the government-to-government nature of consultation, and with E.O. 13084 urging consensual mechanisms for developing regulations affecting tribal rights. 63 Fed.Reg. 27655 (May 19, 1998).

Tribes repeatedly alerted FCC that meetings fell short of the dialogue needed, and although FCC was not bound to obey tribes, it failed to meaningfully consider tribal input.[9] Had FCC meaningfully consulted on the concerns that purportedly justify its NHPA evasion, it could have addressed those matters without running afoul of FCC's legal obligations.

CONCLUSION

The FCC comes before this Court and argues that the federally regulated expansion of the federally regulated national mobile network is not a federal undertaking. The FCC is wrong. Petitioners respectfully request the Court grant the petition, vacate the challenged Order and remand the matter to the Commission.

Dated: January 25, 2019

Respectfully submitted,

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[9] *See* Order (Rosenworcel Dissent, 9) [JA0905].

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CERTIFICATE OF SERVICE

I hereby certify that on this twenty-fifth day of January 2019, I electronically filed the foregoing **PETITIONERS' AND INTERVENORS' REPLY 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:

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