ORAL ARGUMENT NOT SCHEDULED

No. 18-1129 (consolidated with Nos. 18-1135, 18-1148, 18-1159, 18-1184)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, AND
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order
of the Federal Communications Commission

BRIEF FOR INTERVENORS IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), Intervenors hereby certify as follows:

A. Parties and Intervenors:

These cases involve the following parties:

Petitioners: 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.

Respondents: Federal Communications Commission and the United States of America.

Intervenors for Petitioners: 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 Respondents: CTIA-The Wireless Association and Sprint Corporation.

B. Rulings Under Review: Second Report and Order, *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure* Investment, 33 FCC Rcd. ___, FCC 18-30 (Mar. 30, 2018), 83 Fed. Reg. 19440 (May 3, 2018) ("*Order*").

C. Related Cases: Petitions for review are consolidated. Intervenors for the Respondents are unaware of any other related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Cir. Rule 26.1, Intervenors submit the following statements:

CTIA – The Wireless Association ("CTIA") is a Section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia that represents the wireless communications industry. Members of CTIA include wireless carriers, device manufacturers, and suppliers as well as apps and content companies, and other industry participants. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No parent or publicly held company owns 10 percent or more of CTIA's stock.

Sprint Corporation ("Sprint") is a publicly traded Delaware corporation that provides telecommunications services. Softbank Group Corp., a publicly traded Japanese corporation, owns approximately 80 percent of Sprint Corporation's outstanding stock.

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GLOSSARY

CTIA	CTIA – The Wireless Association
Sprint	Sprint Corporation
FCC	Federal Communications Commission
NRDC	Natural Resources Defense Council
ACHP	Advisory Council on Historic Preservation
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
Order	*In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure* Investment, Second Report and Order, 33 FCC Rcd. ___, FCC 18-30 (Mar. 30, 2018), 83 Fed. Reg. 19440 (May 3, 2018)
TCNS	Tower Construction Notification System
THPO	Tribal Historic Preservation Officer
5G	5th Generation Wireless Services

INTRODUCTION

For more than 40 years, the FCC has required that certain applicants submit a preliminary environmental report to the Commission before constructing communications facilities. Although this obligation originally arose under NEPA, as technology and the Commission's licensing processes have changed, the original concerns motivating this review have become less relevant. The deployment of "small cells" and a switch to geographic licensing rather than site-based approvals have eliminated the FCC's role in deciding where most wireless communications infrastructure will be placed. Nevertheless, the agency had continued to subject small cells to residual environmental review requirements arising under the FCC's Communications Act public interest authority without ever revisiting the need for these mandates or the costs they impose.

In the *Order*, the FCC took a fresh look at NEPA and NHPA requirements along with any potential public interest benefits of continued environmental review under the Communications Act. The Commission found that the costs of subjecting small cells to the FCC's environmental review regulations have become more burdensome at a time when rapid and widespread deployment of wireless infrastructure is critical to fulfilling consumer demand and winning the race to 5G. The Commission also found that the benefits of such review are minimal because they rarely identify any significant problem. The agency accordingly determined

that there no longer is any public interest justification for maintaining even residual review of small wireless facilities. Having exempted small cells from its environmental review regulations, the agency went on to find that there is no remaining argument that the siting of these facilities involves the federal government. Therefore, the Commission concluded, NEPA and NHPA are inapplicable to small cell deployment because there is no *federal* undertaking or action at issue when small cells are deployed.

The FCC's actions in the *Order* serve as a long overdue recognition that its prior environmental review regulations are out of step with the manner in which modern wireless facilities are deployed. The agency's decisions in the *Order* are thus completely reasonable, if not required. The Commission's recognition that the public interest is not served by burdensome and unnecessary application of these regulations is well within its broad statutory authority. Petitioners' arguments are meritless.

ISSUES PRESENTED

1. Whether the FCC reasonably determined that it contravenes the public interest to apply environmental review regulations adopted pursuant to the FCC's Communications Act authority to the deployment of small wireless facilities.

2. Whether the FCC reasonably determined that its involvement in the deployment of small wireless facilities is so minimal as to not constitute a "federal

or federally assisted undertaking" under NHPA or a "major federal action" under NEPA.

3. Whether the FCC was required to conduct NEPA review before issuing the *Order*.

STATUTES AND REGULATIONS

All relevant statutes and regulations are set forth in the addendum to the Brief for Respondents.

STATEMENT OF THE CASE

A. The National Historic Preservation Act and the National Environmental Policy Act

NHPA requires federal agencies to "take into account" the effects of "[f]ederal or federally assisted undertaking[s]" on historic properties. 54 U.S.C. § 306108. Under NHPA, an undertaking is "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license, or approval." 54 U.S.C. § 300320(3).

Congress intended these provisions to have "a limited reach." *Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989). NHPA is aimed solely at discouraging federal agencies "from ignoring preservation values in projects *they initiate*." *Id.* (emphasis added). It is a procedural statute that exists to ensure that when federal agencies act, they consider the effect on historic properties and do not run roughshod over local historical concerns. *See* Act of Oct. 15, 1966, Pub. L. No. 89-665, (80 Stat.), 915 (emphasizing that NHPA only reigns in actions of the "Federal Government").

Like NHPA, NEPA has a limited reach. NEPA commands Federal agencies to identify and evaluate the environmental effects of proposed "major federal actions." 42 U.S.C. § 4332(C). The statute was intended to "clarif[y] the goals, concepts, and procedures which determine and guide the programs and the activities *of Federal agencies*." S. Rep. No. 91-296, at 6 (1969) (emphasis added). As with

NHPA, NEPA is extends only to "the policies, regulations, and public laws of the United States" and the "program activities" of Federal agencies; it is not a restriction on private conduct. *Id.* at 6-7.

Courts have treated "undertakings" under NHPA and "major federal actions" under NEPA as coextensive, recognizing that determining what constitutes an "undertaking" or a "major federal action" is an objective inquiry that focuses on the degree of federal control over a particular deployment. *See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001).

B. FCC Implementation of NEPA and NHPA

The FCC's implementation of NEPA and NHPA has evolved over time to reflect changes in the FCC's licensing procedures. In 1974, the FCC adopted its initial order implementing NEPA. *See In the Matter of the National Environmental Protection Act of 1969*, Report and Order, 49 FCC.2d 1313 (1974) (the "*1974 Order*"). At the time, Section 319 of the Communications Act of 1934 required all FCC licensees, including carriers, to obtain a construction permit for a specific site or physical location before they could obtain a license to operate. *See* 47 U.S.C. § 319(a). The FCC took 500,000 actions annually that authorized construction at specified sites of this type. *1974 Order* ¶13.

To focus its efforts only on actions likely to have a significant effect on the environment, the Commission sought to distinguish between "major" actions and "minor" ones. *Id.* The FCC recognized that "[t]he likelihood that [antenna] towers will have a significant environmental effect depends on their height and location." *Id.* ¶31. Accordingly, the Commission decided to "draw a line based on the height of the structure and to concentrate routine processing on larger structures, for which the probability of significant effect is greater." *Id.* ¶32.

In 1982, Congress amended Section 319 to eliminate the construction permit requirement for certain wireless licensees unless the FCC determined that the public interest, convenience, and necessity required a permit. *See* Act of Oct. 15, 1966, Pub. L. No. 89-665, (80 Stat.), 915; 47 U.S.C. § 319(d). Shortly thereafter, the FCC revised its rules to clarify that only facilities involving sensitive site areas, high intensity lighting, or exceeding RF exposure limits would be subject to NEPA's EA requirement. *See In the Matter of Amendment of Envtl. Rules in Response to New Regulations Issued by the Council on Envtl. Quality*, Report and Order, 60 Rad. Reg. 2d (P & F) ¶11 (FCC Mar. 26, 1986) ("*1986 Order*"); 47 C.F.R. § 1.1307. The *1986 Order* added a separate section to the FCC's rules, Section 1.1312, to address facilities for which no construction permit was required. Although construction of these facilities did not qualify as "actions which may have a significant environmental effect," and thus did not trigger NEPA, the FCC nevertheless required

the licensee or applicant to submit information similar to that required for an EA before it would issue a license. *Id.* ¶18.

Then, in 1990, the FCC amended Section 1.1312 to require pre-construction approval in limited circumstances where (i) the facilities were otherwise exempt from obtaining construction permits but (ii) the licensee or applicant determined that the proposed facility "may have a significant effect on the environment." *See In the Matter of Amendment of Envtl. Rules*, First Report and Order, 5 FCC Rcd. 2942 (1990). *Id.* ¶1.

C. The Tribal Consultation Process

NHPA and its implementing regulations distinguish between projects on tribal lands and those on non-tribal lands. For projects on tribal lands, tribes must concur that the project will have "no adverse effect" on "historical properties" before the project may proceed. *See* 54 U.S.C. § 302702. For projects on non-tribal lands, however, tribes serve as "consulting parties," and may identify concerns, advise on identification and evaluation issues, comment on potential effects, and participate in the resolution of adverse effects. *See* 36 C.F.R. § 800.2(c)(2)(ii)(A), (a)(4); *id.* § 800.16(f). Consulting parties are entitled to have their views considered, but their concurrence in the outcome is not required. *See id.* § 800.6(c).

For projects on non-tribal lands, the tribal consultation process was designed to work as follows: (1) tribes indicate the areas where they would like notification

of wireless infrastructure projects, in the Tower Construction Notification System ("TCNS"); (2) applicants enter proposed projects into the TCNS, which then notifies interested tribes; (3) tribes notify the applicant if they would like to consult on the project; (4) applicants provide consulting tribes with a Preliminary Submission Packet containing substantial information about the project; (5) tribes have an opportunity to comment; and (6) the tribes' comments are included in the final Submission Packet, and, where the record so warrants, a finding of concurrence with a proposed "no properties" or "no effect" finding. *See* CTIA/WIA Comments at 9-10 (6/15/17) [JA-306-07].

Before the *Order*, the tribal consultation process was plagued by delays, ambiguous procedures, and insufficient guidance regarding tribes' role in the process. CTIA/WIA Comments at 10 [JA-307]. Many tribes consulted on an overly broad number of facilities, designating interest in geographic areas hundreds or even thousands of miles away from their ancestral homelands, *id.*, and some tribes charged carriers exorbitant upfront fees for what they deemed "specialized evaluation" of a project. *Id.* The record includes the example of an application for collocation in a high school parking lot that drew an expression of interest from 24 tribes, resulting in extensive costs and delays, with no countervailing benefit. *See* Crown Castle Comments at 39-40 (6/15/17) [JA-283-84].

Problems with the consultation process have seriously hindered the deployment of wireless facilities. Prior to the *Order*, the average time for tribes to complete a request for consultation was 110 days, with more than 30 percent of requests taking more than 120 days to complete. CTIA/WIA Comments at 6 [JA-303]. Meanwhile, only 0.33 percent of tribal reviews (without regard for the type of project or the size of the facility involved) resulted in a finding of adverse effect. *Id.*

D. Small Cells and the Race to 5G

Wireless providers are racing to expand their networks to keep up with exponential growth in demand for wireless service. As smart devices have become ubiquitous, wireless data consumption grew 25-fold from 2010 to 2015, including a 100 percent increase in 2015 alone. CTIA Comments at 8-9 (3/8/17) [JA-289-90]. This increase in demand is illustrated by data usage on the Sprint network in and around the stadiums during the last few Super Bowls: the total data usage in 2017 was more than three times greater than 2016, which in turn was eight times greater than in 2015. Sprint Comments at 9-10 6/15/17 [JA-382-83].

To address the growing demand for speed and capacity and to enable a wide-range of additional technical enhancements, wireless providers are turning to next-generation 5G networks, which offer superior speed and latency performance. 5G networks utilize network densification, which employs small cells to reuse the same frequency bands more often and in smaller areas than traditional macro cells. *See*

Sprint Comments at 10 [JA-383]. To meet growing demand, wireless carriers will need to deploy approximately 300,000 small cells in the next few years. AccentureStrategy, *Accelerating Future Economic Value From the Wireless Industry* at 6 (2018). While there will be far more small cells, their individual impact will pale next to that of traditional wireless facilities: A typical small cell is the size of a shoe box, a pizza box, or a fire extinguisher, and can be mounted on a utility pole, streetlight, traffic signal, or building with limited additional equipment on the ground. *See* Sprint Comments at 12 [JA-385]; CTIA, *The Global Race to 5G* at 13 (April 2018). By contrast, traditional macro sites require a tall support tower with numerous antennas mounted on top, and they frequently require a fenced off ground area and one or more equipment cabinets. Sprint Comments at 11-12 [JA-384-85].

E. The FCC's Order

In April 2017, the FCC issued a notice of proposed rulemaking seeking comment on ways to remove or reduce impediments to wireless network infrastructure investment and deployment. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, Notice of Proposed Rulemaking, 32 FCC Rcd. 3330 (2017) (the "*NPRM*"). The Commission committed to take "a comprehensive fresh look at our rules and procedures implementing" NEPA and NHPA. *Id.* ¶23. The *NPRM* noted that the FCC's complicated environmental and historic review processes "increase the costs of

deployment and pose lengthy and often unnecessary delays, particularly for small facility deployments." *Id.* ¶33.

On March 30, 2018, the FCC released the *Order*, which found that there is no longer any public interest justification for subjecting deployments of small wireless facilities to the Commission's discretionary environmental review procedures under Section 1.1312 and, therefore, that there is no longer even an arguable basis for concluding that they are undertakings under NHPA or major federal actions under NEPA. The *Order* also modified certain procedures for NHPA and NEPA review of facilities that remain subject to Section 1.1312.[1]

After filing petitions for review of the *Order*, Petitioners filed two emergency motions for stay pending judicial review, which the Court denied on August 15, 2018.

SUMMARY OF ARGUMENT

1. The FCC properly determined that the deployment of small wireless facilities is neither an "undertaking" under NHPA nor a "major federal action" under NEPA. These statutes do not apply every time a federal "license," "permit," or "approval" is issued. Rather, an agency must exert control or exercise substantial discretion over a given project for the activity to qualify as an "undertaking" or a

[1] While Respondent-Intervenors support the entirety of the FCC's actions in the *Order*, this brief only addresses those actions pertaining to small cells.

"major federal action." *See Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992); *Karst*, 475 F.3d at 1295.

The FCC has never concluded that the mere issuance of a license to transmit radiofrequencies in a given geographic area is enough to trigger review under NEPA and NHPA. The agency has instead long held that its involvement only rises to the requisite level of control if a given facility either (i) is subject to the FCC's tower registration and approval process or (ii) may have a significant environmental impact and is thus required to undergo an EA under Section 1.1312(b) of the FCC's rules. *See CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 112-18 (D.C. Cir. 2006). Assessing the public interest under the Communications Act, the FCC has made a reasoned determination that the burdens of subjecting small wireless facilities to the agency's discretionary, residual environmental review outweigh the limited benefits of that review. *Order* ¶¶63-71 [JA-827-31]. For small wireless facilities that are not subject to the tower registration and approval process, the effect of excluding them from environmental review under Section 1.1312(b) is to remove the federal control or discretion over those facilities that arguably triggers NEPA and NHPA.

Petitioners' argument that the FCC's issuance of geographic spectrum licenses, standing alone, constitutes federal control or involvement over small wireless facilities would constitute a radical expansion of NEPA and NHPA. For an "undertaking" or "major federal action" to occur, the FCC must possess "actual

power" to control the project. *See Sugarloaf*, 959 F.2d at 513; *Big Bend Conservation All. v. FERC*, 896 F.3d 418, 423-25 (D.C. Cir. 2018). While the Commission has, in the past, found that site-based licensing and discretionary, residual environmental review constitute such "actual power," it has never held that the issuance of a geographic spectrum license, standing alone, meets that threshold. In fact, a geographic license falls far short; it does not determine what facilities a licensee will use to provide service using the licensed spectrum or where those facilities will be located. Indeed, parties can and do construct small wireless facilities, such as unlicensed Wi-Fi hotspots, without a spectrum license at all. The issuance of geographic licenses, therefore, is so attenuated from the actual deployment of small wireless facilities that it cannot constitute an "undertaking" or a "major federal action."

2. There is no merit to NRDC's argument that the FCC was required to conduct a NEPA review before issuing the *Order*. Procedurally, NRDC's argument is barred because it was not raised below. 47 U.S.C. § 405(a). Even if it was, under established precedent, the *Order* itself was not a major federal action, and the Commission was not required to reconsider the environmental effects of wireless

facilities. *See Cmty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1362–63 (D.C. Cir. 1985).

STANDARD OF REVIEW

This Court defers to agency decisions under the Administrative Procedure Act, 5 U.S.C. § 702(2)(A), unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1029 (D.C. Cir. 2017), *cert. denied sub nom. SNR Wireless LicenseCo v. FCC*, 138 S. Ct. 2674 (2018) (quoting 5 U.S.C. § 706(2)(A)). This review is "deferential," *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 230 (D.C. Cir. 2018) (quotations omitted), and a court cannot "substitute [its] judgment for that of the agency," *SNR Wireless*, 868 F.3d at 1029; *see also Verizon Tel. Companies v. FCC*, 292 F.3d 903, 909 (D.C. Cir. 2002) (applying "highly deferential standard" to FCC decisions "in an area of rapidly changing technological and competitive circumstances'") (quoting *Sprint Commc'ns Co. L.P. v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001)); *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004).

ARGUMENT

I. THE DEPLOYMENT OF SMALL WIRELESS FACILITIES IS NEITHER A "MAJOR FEDERAL ACTION" NOR AN "UNDERTAKING."

The FCC properly concluded in the *Order* that the deployment of small wireless facilities is neither a "major federal action" under NEPA nor an

"undertaking" under NHPA. The FCC previously determined—and this Court affirmed—that wireless facility deployments pursuant to geographic area licenses may nevertheless constitute "undertakings" in two sharply limited contexts: (1) where facilities are over 200 feet or near airports and are thus subject to the FCC's tower registration and approval process; and (2) where facilities not subject to pre-construction FCC authorization (like small wireless facilities) are nevertheless required, under Section 1.1312(b), to obtain an environmental assessment prior to deployment. *See CTIA*, 466 F.3d at 112-18; 47 C.F.R. § 1.1312(b). For small wireless facilities that are not subject to the FCC's tower registration and approval process, the only possible basis for concluding that they are "undertakings" is if they are subject to environmental review under the FCC's "limited approval authority" set forth in Section 1.1312(b). *See CTIA*, 466 F.3d at 112-18; *Order* ¶¶36-38 [JA-817-19]. Where the FCC chooses to exercise its Section 1.1312 public interest authority to require NEPA-like environmental review, the agency arguably becomes sufficiently intertwined in wireless facility deployments so as to trigger NEPA and NHPA. *See id.* ¶51 [JA-823-24]. But when it decides that environmental review is contrary to the public interest, as it has with small cells, their deployment is a private rather than federal undertaking.

The FCC revisited its "limited approval authority" in the *Order*, reasonably concluding under its Communications Act public interest mandate that there is no

justification for subjecting small wireless facilities to discretionary, residual environmental review under Section 1.1312. *Order* ¶59 [JA-826]. The agency relied on a robust record detailing the harms associated with subjecting such deployments to Section 1.1312's onerous requirements. *See id.* ¶¶60-81[JA-826-38].

By amending Section 1.1312 to exclude small wireless facilities from environmental review, the FCC eliminated the sole predicate federal involvement that could arguably have met the standard for "undertakings" and "major federal actions" and, thus, there is no basis to subject such deployments to NEPA or NHPA review. *See id.* ¶¶58-59 [JA-826]. For personal wireless services, the Commission issues licenses for the use of certain bands of spectrum in defined geographic areas (sometimes spanning several states), but it does not approve specific sites or facilities. Longstanding precedent confirms that the Commission's limited role in these services (if any) fails to rise to the level of federal entanglement required to find that small cell deployments are "undertakings" or "major federal actions." *See Lee*, 877 F.2d at 1058; *Big Bend*, 896 F.3d at 423-25. Indeed, this Court has repeatedly confirmed that NEPA and NHPA must be read narrowly to avoid federalizing a broad swath of projects and saddling federal agencies with limitless review obligations. *See Lee*, 877 F.2d at 1058.

A. The FCC's Determination That Section 1.1312 Does Not Apply To The Deployment Of Small Wireless Facilities Was Both Reasonable and Amply Supported by the Record.

In the *Order*, the FCC, acting pursuant to its statutory mandate, concluded that (1) encouraging the deployment of small wireless facilities will effectuate the purposes of the Communications Act by promoting rapid deployment of 5G networks to meet the explosive demand for wireless services; and (2) the public interest does not support applying Section 1.1312 to small wireless facilities. The FCC relied on a robust record demonstrating that small wireless facilities do not cause adverse effects to tribal sites or historic properties. Myriad stakeholders submitted comments supporting the *Order's* conclusions, confirming that the FCC had ample bases on which to determine that the public interest would not be served by subjecting small wireless facilities to Section 1.1312 review.

Petitioners do not dispute that the FCC has authority to adopt, repeal, or modify rules under its public interest authority. Instead, Petitioners contest the FCC's reasons for exercising that authority, asserting that the *Order*'s exclusion of small wireless facilities from the scope of Section 1.1312 is arbitrary. *See* Keetoowah Br. at 35-36. These claims are subject to a "highly deferential" standard of review that Petitioners cannot overcome. *Sorenson*, 897 F.3d at 230; *Cellco P'ship*, 357 F.3d at 93. Petitioners attempt to shift their heavy burden to the FCC by

arguing that the *Order* amounts to a policy reversal lacking justification. *See* Keetoowah Br. at 34-35. But the Commission had never squarely addressed whether the public interest is served by applying Section 1.1312 to small wireless facilities, a fact that Petitioners do not dispute. *Order* ¶61 [JA-826]. Moreover, to the extent the *Order* constitutes a change in position, the FCC has properly acknowledged and explained its change, and such determination is entitled to highly deferential review. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

1. *The FCC Reasonably Determined That The Review Process Triggered By Section 1.1312 Is Unnecessarily Burdensome.*

In analyzing for the first time whether applying Section 1.1312 to small wireless facilities is in the public interest, the FCC reasonably concluded, based on a robust factual record, that Section 1.1312 imposes unnecessary burdens in the context of small wireless facilities. This Court must uphold the *Order* so long as the Commission made factual findings supported by substantial evidence, considered the relevant factors, and "articulate[d] a rational connection between the facts found and the choice made." *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749, 752 (D.C. Cir. 2002) (quotations omitted). There is no question that the *Order* meets this standard.

The *Order* is consistent with Congress' directive that the Commission should not impose unnecessary regulatory burdens on wireless facilities deployment. When Congress adopted Section 319(d) of the Communications Act, eliminating

Commission approval requirements for wireless communications facilities and precluding construction permit requirements, it intended to facilitate wireless infrastructure deployment by reducing the agency's involvement in the buildout of individual facilities. *Order* ¶63 [JA-827]. It was thus eminently reasonable for the FCC to conclude that, as to small wireless facilities, replacing the construction permit approval process with review under Section 1.1312 "risks replicating the harmful effects that Congress expressly sought to eliminate." *Id.*

Petitioners do not challenge the FCC's finding that small wireless facilities will be necessary to support 5G services. *Order* ¶64 [JA-827-28]. Rather, Petitioners contend that the costs of tribal consultation do not impede the deployment of small cells. *See* Keetoowah Br. at 16-17. But Petitioners offer no support for their contention aside from the mere assertions that "carriers are multi-billion dollar companies with significant revenue streams" and abusive fees are not widespread. *Id.* at 17-18.

By contrast, the FCC considered the extensive evidence in the record of the "substantial, rising, and unnecessary costs for deployment" that stem directly from subjecting small wireless facilities to Section 1.1312 review and the substantial delay that review imposes on deployment. *Order* ¶¶11-15; 68-71 [JA-809-11; 828-31]. The *Order* cites specific data in the record regarding the costs to Sprint of completing environmental assessments, *id.* ¶68 [JA-828-29], the substantial cost to Verizon as a

percentage of total project costs, *id.* ¶69 [JA-829-30], and expected increases in these costs corresponding to accelerated deployments, *id.* The *Order* also cites uncontroverted data from AT&T that the cost of complying with review requirements would fund over 1,000 additional small cell sites, and that eliminating these requirements would reduce deployment timelines by 60-90 days. *Id.* Similarly, the FCC considered evidence from Sprint that the $23 million it had already spent on historic reviews could have funded an additional 657 new sites and that, with reforms to tribal review fees, Sprint could construct 13,408 new sites for what 10,000 sites previously cost. *Id.* ¶14 [JA-811]. With such overwhelming evidence, the Commission's conclusion that the review process is unnecessarily burdensome hardly can be considered arbitrary. *See GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1986) (affirming FCC conclusion supported by ample evidence in the record).

2. *The FCC Reasonably Determined That Small Wireless Facilities Are Unobtrusive and Do Not Raise the Same Concerns As Macro Cells.*

The FCC also properly assessed the differences between small cells and macro cells, concluding that regardless of whether the public may benefit from Section 1.1312 review of larger facilities, there are no appreciable benefits from requiring such review of small wireless facilities. *Order* ¶72 [JA-831-32]. The *Order*'s approach to small wireless facilities is in lockstep with the FCC's approach to other

small facilities whose impact is inconsequential, such as consumer signal boosters, Wi-Fi routers, and unlicensed equipment, all of which operate pursuant to FCC authorizations and are excluded from Section 1.1312. *See id*. ¶43 [JA-43]. The FCC's assessment of the costs and benefits of its own regulation is entitled to highly deferential review. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 304 (D.C. Cir. 2003); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985) (recognizing narrow scope of review applicable to agency consideration of "costs and benefits of alternative policies").

The scope of the *Order* is limited in five ways, reflecting the reasonableness of the FCC's approach. *First*, the *Order* only applies to small wireless facilities, which can be no more than three cubic feet in volume and carry associated wireless equipment no larger than 28 cubic feet. *Order* ¶¶75-76 [JA-833-35]. These facilities are analogous to those that the Commission has previously excluded from review. *See* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, Appx. B, §§ VI.A.5.a & b. *Second*, the *Order* only applies to facilities deployed on structures below a certain height threshold (50 feet or no more than 10 percent taller than other structures in the area). *Order* ¶74 [JA-832-33]. *Third*, the *Order* does not apply at all to facilities deployed on tribal lands. *Id.* ¶17 [JA-812]. *Fourth*, the *Order* does not alter any reviews conducted by states or localities. *Id.* ¶77 [JA-835-36]; 47 U.S.C. § 332(c)(7)(A). *Fifth*, the *Order* does not

apply to small wireless facilities subject to the FCC's antenna structure registration process. *Id.* ¶45 [JA-821].

The record provides ample support for the FCC's conclusion that the cost of environmental review for the narrow class of facilities covered by the *Order* far outweighs its benefits. *Id.* ¶81 [JA-838]. Numerous commenters explained that reviews of proposed deployments rarely result in a finding of significant environmental impact or adverse impact on historic properties. *See* Crown Castle Comments at 34 [JA-278] (noting that Crown Castle has never received a negative report or response from a Tribal Nation for a small cell deployment); Sprint Comments at 6 [JA-379] (describing no possible adverse effects); Verizon Comments at 44 (6/15/17) [JA-413] (only 0.3% of requests for tribal review resulted in findings of adverse effect); Texas Historical Commission 6/2/17 ex parte letter at 1 [JA-128] (stating that 0.25 percent of projects "were found to have an adverse effect on historic properties" since 2014, including at least some projects involving small wireless facility deployments); Texas Historical Commission 3/15/18 ex parte letter at 1 [JA-793] (citing one lone instance of concern associated with a small wireless facility deployment). By contrast, the FCC recognized that continuing to subject small wireless facilities to Section 1.1312 would have "detrimental effects on the roll-out of advanced wireless service." *Order* ¶79 [JA-837].

Finally, the Petitioners' characterization of the *Order* as a policy *reversal* is simply wrong. The *Order* merely clarifies the application of an existing rule to new technologies. The 2014 order cited by Petitioners did not purport to consider whether it was in the public interest to subject small wireless facilities to Section 1.1312. *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Siting Policies*, Report and Order, 29 FCC Rcd. 12865 ¶84 (2014). Rather, the 2014 order took for granted that, because small wireless facilities were subject to Section 1.1312 review at the time, their deployment constituted a federal undertaking. *Id.* Accordingly, the question before the Commission in 2014 was not whether applying Section 1.1312 to small wireless facilities was in the public interest, but, instead whether it was proper to categorically exclude small wireless facilities from environmental review. *Id.* ¶77. While the FCC concluded that the record before it—at a time when small cells were much less prevalent—was insufficient to justify a categorical exclusion, *id.* ¶86, it did not conclude that small wireless facilities must affirmatively be subject to environmental review, and thus did not adopt a policy that, Petitioners erroneously claim, the *Order* now reverses. *Cf. Chem. Mfrs. Ass'n v. EPA*, 919 F.2d 158, 170 (D.C. Cir. 1990) (finding no reversal where agency had not adopted a "settled course of behavior").

By contrast, here the FCC made a threshold determination under its organic statute that it should not extend Section 1.1312 to small wireless facilities. The effect

of that decision was to remove any credible argument that deployment of small wireless facilities is an "undertaking" or "major federal action," rendering moot the question whether a categorical exclusion for small wireless facilities is appropriate.

B. The FCC Properly Determined That, Other Than Section 1.1312 Review, The FCC Has No Involvement In The Deployment Of Small Wireless Facilities.

Carriers have long been free to choose when and where to deploy small wireless facilities, subject to lawful state and local regulations, with only the residual possibility of limited FCC oversight. By removing small wireless facilities from the scope of Section 1.1312, the FCC has reduced its already negligible involvement in the deployment of these facilities to zero. *Order* ¶59 [JA-826]; *CTIA*, 446 F.3d at 112-18. Petitioners' effort to shoehorn aspects of FCC licensing that are only tangentially related to the construction of small cells, such as geographic licensing, into the requisite federal action are unavailing: The FCC does not finance small wireless facility deployments, does not require preconstruction authorization, does not license or approve individual facilities, and now plays no role whatsoever in siting decisions. Courts have never recognized such a *de minimis* level of federal "involvement" in a project as an "undertaking" or a "major federal action," and this case should be no different.

Agencies must analyze two issues when deciding whether an activity constitutes an "undertaking" or a "major federal action": (1) does the agency exert

control or exercise substantial discretion over the project so as to be under the purview of NHPA or NEPA ("federal involvement inquiry"); and (2) if the agency *is* so involved, does the action result in effects on the environment or historic properties ("effects inquiry"). *See* 36 C.F.R. § 800.16(y); 40 C.F.R. § 1508.18; *Karst*, 475 F.3d at 1295. Unless an action qualifies under *both* the federal involvement inquiry and the effects inquiry, it is not subject to NEPA or NHPA. Petitioners cannot satisfy either standard. The FCC has no involvement in the deployment of small wireless facilities, and even assuming, *arguendo*, that it was involved, small wireless facilities by definition "pose little or no risk" of environmental or historic preservation effects. *See Order* ¶42 [JA-820]; *supra*, Section I.A.2.

1. *"Undertaking" And "Major Federal Action" Only Apply When There Is Federal Control.*

Long-standing precedent and common sense dictate that a federal agency must exercise control or otherwise show substantial involvement in all aspects of a project for the activity to qualify as an "undertaking" or a "major federal action." *See Citizens Against Rails–to–Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001); *Karst*, 475 F.3d at 1295. Congress enacted NEPA and NHPA to ensure that, *when the federal government acts*, it remains mindful of historic and environmental concerns. *See Lee*, 877 F.2d at 1058 ("It is their own nest Congress

has asked the agencies not to foul."); Act of Oct. 15, 1966, Pub. L. No. 89-665, (80 Stat.); S. Rep. No. 91-296, at 6 (1969).

Because NEPA and NHPA are "look before you leap" directions aimed exclusively at the federal government, neither extends to private action. Federal control is the hallmark of an "undertaking," with courts evaluating the agency's degree of discretion, whether federal aid has been given, and whether the overall level of federal involvement is sufficient to convert private action into federal activity. *Ringsred v. City of Duluth*, 828 F.2d 1305, 1308 (8th Cir. 1987). At a minimum, a federal agency must possess "actual power" to control the project for an "undertaking" or "major federal action" to occur. *See Sugarloaf*, 959 F.2d at 513; *see also Big Bend*, 896 F.3d at 423-25 (declining to require NEPA review where "the bulk of" a pipeline project was "not subject to federal jurisdiction"); *Defs. of Wildlife v. Andrus*, 627 F.2d 1238, 1244 (D.C. Cir. 1980) (mere federal "approval" of a private act does not create a "major federal action" unless "the federal government undertakes some 'overt act' in furtherance of" the project).

Petitioners fail to grapple with this well-established precedent. Instead, they assert, without authority, that "undertaking" and "major federal action" should be read broadly, to encompass private, small wireless facility deployments over which the FCC exercises no control. *See* Blackfeet Br. at 19-20. This Court has never taken such an expansive view.

Instead, this Court has long confirmed that "undertaking" and "major federal action" must be read narrowly, to encapsulate "only . . . projects or programs [federal agencies] *initiate or control* through funding or approvals." *Lee*, 877 F.2d at 1058 (emphasis added). In *Lee*, for example, this Court clarified that NHPA's reach is narrow, holding the statute did not apply to a proposed D.C. correctional facility "because the planning and construction of the facility was neither funded nor dependent on approval by a federal agency." *Id.* at 1058. Likewise, in *Sheridan Kalorama Historical Association v. Christopher*, this Court cautioned against adopting overly capacious interpretations of NHPA's terms that would "read all limitations out of the Act." 49 F.3d 750, 756 (D.C. Cir. 1995) (concluding that the failure to disapprove a building proposal "did not render the project" an "undertaking").[2]

Other Circuit Courts agree with this approach. *See, e.g.*, *Ringsred*, 828 F.2d at 1308 (8th Cir.); *Sugarloaf*, 959 F.2d at 515 (4th Cir.); *Norton*, 240 F.3d at 1262-63 (10th Cir.). In *Ringsred*, for example, the Eighth Circuit held that the Secretary of Interior's approval of contracts related to a private parking ramp "were so incidental" to the project that neither NHPA nor NEPA applied. *Ringsred*, 828 F.2d

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[2] Petitioners wrongly claim that *Sheridan* interprets "undertaking" "broadly," Keetoowah Br. at 25, but *Sheridan* explicitly rejects a broad theory of "undertaking," cautioning against "extending the reach of § 106 beyond the grasps of its terms." 49 F.3d at 756.

at 1308. Although the Secretary's approval of the contracts "did give him 'a factual veto power'" over the project, the court concluded that the Secretary's control over the ramp was "not significant enough to establish a major federal action." *Id.*; *see also Save the Bay, Inc. v. U.S. Corps of Eng'rs*, 610 F.2d 322, 327 (5th Cir. 1980) ("a private project does not become a 'major Federal action' merely because of some incidental federal involvement").

The FCC has no involvement in small wireless facility deployment, let alone "control" of these private actions. As in *Ringsred*, "[n]o federal action is a legal condition precedent" to the deployment of small wireless facilities. *Id.* at 1308. Where Section 1.1312 review is not required, carriers may deploy small wireless facilities without any FCC approval at all. The deployment of such facilities cannot be considered an "undertaking" or a "major federal action" under any reading.

2. *Petitioners Cannot Recast Spectrum Licenses As Infrastructure Permits.*

Without Section 1.1312, Petitioners are left to spin an alternate narrative of FCC involvement: That the FCC's issuance of broad geographic area spectrum licenses is enough to federalize the deployment of small wireless facilities. *See* Keetoowah Br. at 24; NRDC Br. at 12-13. But this radical reimagining of NEPA and NHPA's scope relies on a misapprehension of the authority conveyed by geographic area spectrum licenses. It also ignores long-standing precedent

confirming that government involvement of the type involved in spectrum licensing is of no moment.

Spectrum licenses grant the right to *use spectrum*, not the right to deploy or build infrastructure. *See Order* ¶85 [JA-839-40]. A geographic area spectrum license does no more than authorize wireless operations on specific frequencies in a given geographic area,[3] and gives the FCC no role in individual deployment decisions. *See id.* Instead, the choice of where and when to deploy any particular wireless facility, including a small wireless facility, lies with the licensee and does not require an FCC license, permit, or any other form of FCC approval any more than a person's decision of where to place a WiFi router in her home. *See id.*; *see also* 47 U.S.C. § 319(d) (precluding construction permits for wireless communications facilities); 47 C.F.R. § 24.11 (declaring that applications for individual wireless sites "are not required and will not be accepted" in conjunction with geographic area licenses); *1986 Order* ¶12 (recognizing the role of local, state, regional, or local land use authorities).

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[3] The *Order* distinguishes between geographic area licenses, which grant licensees blanket authority to transmit on specific frequencies in a given geographic area, and site-by-site licenses, which grant licensees authority to transmit on specific frequencies at specific sites. *See Order* ¶36 [JA-817-18]. Small wireless facilities subject to the site-by-site licensing regime must continue to comply with environmental and historic preservation review. *Id.* References to "spectrum licenses" and the FCC's "spectrum licensing authority" herein thus relate only to geographic area licenses.

Courts have repeatedly rejected claims that this kind of peripheral federal involvement can transform the project into an "undertaking" or a "major federal action." *See, e.g.*, *Lee*, 877 F.2d at 1058 (construction of D.C. correctional facility not an "undertaking" where project not subject to federal control or approval); *Sugarloaf*, 959 F.2d at 513-15 (certification of incinerator too "ministerial" to be an "undertaking"); *Norton*, 240 F.3d at 1263 (acquisition of land not a "major federal action" where agency exercised "no discretion" over project); *Am. Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 803-04 (5th Cir. 2000) (decision allowing increased flights not a "major federal action" because agency lacked "significant discretion"); *Ringsred*, 828 F.2d at 1308. Absent substantial federal involvement in all aspects of a project, agency action is merely "marginal" and does not trigger review. *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988); *see also Bus. & Residents All. of East Harlem v. Jackson*, 430 F.3d 584, 592 (2d Cir. 2005) (a federal agency must have power to "approve or otherwise control" a project for it to fall within NHPA's scope).

The FCC likewise has never viewed geographic area spectrum licensing as providing the federal nexus required to convert the deployment of facilities into "undertakings" and "major federal actions." *Order* ¶84 [JA-839]. Similar technologies, like signal boosters, also operate on FCC licensed spectrum but have never been subject to NEPA or NHPA. Deployed in homes and businesses across

the country, signal boosters use antenna technology to amplify cell signals between mobile devices and wireless networks. Like small cells, they operate pursuant to geographic area spectrum licenses. *See Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage Through the Use of Signal Boosters*, Report and Order, 28 FCC Rcd. 1663 (2013). Yet the FCC has never considered the authorized use of signal boosters pursuant to a spectrum license as sufficient to transform the deployment of those facilities into "undertakings" or "major federal actions." *Order* ¶84, n.170 [JA-839]. Nor could it; as here, the FCC's tangential involvement in authorizing spectrum use is not enough to federalize the deployment of signal boosters.[4] By contrast, the FCC has historically treated its site-specific licensing decisions as sufficient to trigger NEPA and NHPA. *See Order* ¶36 [JA-817-18].

Geographic area spectrum licenses are not, as Petitioners suggest, a legal prerequisite to deploying wireless infrastructure. *See* Keetoowah Br. at 24-30. Instead, geographic area spectrum licenses are only necessary to provide wireless service using specified frequencies. *Order* ¶85 [JA-839-41]. But while a spectrum license may be required to *operate* a small wireless facility, neither a geographic

[4] The same is true of microwave news gathering trucks, with masts up to around 50 feet tall, and certain licensed satellite dishes. These facilities would not be deployed but for FCC authorizations permitting operations on licensed spectrum, yet their implementation has never been subject to NEPA or NHPA.

area spectrum license nor any other form of FCC approval is required to *build* a particular small wireless site. *See id.*; *see also* 47 C.F.R. § 24.11.

It is well established that "where federal approvals are not legal predicates to private actions," the approvals are neither "major federal actions" nor "undertakings." *State of N.J., Dept. of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 417 (3d Cir. 1994); *see also Sugarloaf*, 959 F.2d at 512-13. Private projects, like small wireless facility deployments, are federalized for review purposes only if the project "cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome." *Sugarloaf*, 959 F.2d at 512 (internal quotations and citations omitted). *Sugarloaf* thus held that FERC's certification of an incinerator as a small power facility did not amount to a "major federal action" because the facility legally could have been built without the agency's certification. *Id.* at 513-14.

So too here. Wireless service providers or infrastructure owners are not legally required to obtain a geographic area spectrum license—or any other form of FCC approval—before constructing small wireless facilities. *See Order* ¶86 [JA-841-42]. The issuance of geographic service licenses is typically "remote in both time and regulatory reach" from the deployment of small wireless facilities. *Id.* ¶88 [JA-842-43]. In fact, many small wireless facilities are deployed by private entities that do not hold FCC spectrum licenses at all. *See* Crown Castle Comments at 3

[JA-274]. Private actors make marketplace decisions about deployment plans in light of applicable state and local zoning requirements. *Id.* FCC action is not a "legal requirement" for these deployments, and the agency retains no "discretion" over them. *Long Island Power Auth.*, 30 F.3d at 417.

Nor could the agency "take environmental [or historical] considerations into account before acting" to issue spectrum licenses. *Id.* The physical deployment of particular infrastructure occurs in a manner and at locations that the Commission cannot foresee, let alone direct, at the time of spectrum licensing. *Order* ¶85 [JA-839-41]. While it is safe to assume that *some* wireless facilities will be built following spectrum licensing, the Commission cannot know when, where, or what kind of facilities will be deployed. There is thus "no plausible way" for the FCC to meaningfully assess the environmental and historic effects of particular small cell deployments. *Order* ¶89 [JA-843]; *see Sierra Club v. FERC*, 827 F.3d 36, 46-47 (D.C. Cir. 2016) (agency need only assess effects that are "sufficiently likely to occur that a person of ordinary prudence would take it into account").

That principle is amply demonstrated by the development of technology that has led to the need for small cell deployment. When geographic wireless licenses were first issued, technology at that time required construction of macro sites. To meet growing demand, providers now need to deploy more wireless facilities, but evolving technology allows these deployments to utilize smaller equipment. These

facilities are still being deployed under the aegis of the carrier's existing FCC geographic area license, without the need to return to the agency for modification or revision of that license. For example, Sprint's recent small cell deployments utilize its existing 2.5 GHz licenses. *See* Sprint Reaches Nationwide LTE Advanced Milestone, https://newsroom.sprint.com/quarterly-network-update.htm; *see also* AT&T Comments at 5-6 (6/15/17) [JA-260-61] (noting plans to install small cells around the country); What is Small Cell Technology, https://www.verizon.com/about/our-company/5g/what-small-cell-technology (documenting Verizon's countless recent small cell deployments). The fact that the Commission has no control over whether and how carriers roll out these new technologies under their existing licenses underscores that geographic spectrum licenses do not provide the level of federal authority necessary to constitute a federal undertaking or major federal action. *See State of S.D. v. Andrus*, 614 F.2d 1190, 1194 (8th Cir. 1980) (issuing a mineral patent is not a "major federal action" under NEPA because it is "not a precondition which enables a party to begin mining operations").

Nor do the performance and construction requirements associated with spectrum licenses provide control over small wireless facility deployment. *See* Keetoowah Br. at 26-27. The FCC's construction requirements ensure that licensed spectrum is put to beneficial use by imposing coverage benchmarks upon licensees,

but they do not require the construction of particular facilities in any specific place. For example, Upper 700 MHz C Block licensees must provide coverage to at least 75 percent of the population in its licensed geographic area by the end of its license term. *See* 47 C.F.R. § 27.14(h). But the FCC's rules say nothing about how or where the licensee may choose to deploy wireless infrastructure.[5] As far as the FCC is concerned, licensees are free to deploy any mix of communications infrastructure they like so long as the minimum construction and coverage requirements are met. Licensees can satisfy construction obligations without deploying any small wireless facilities, as they have done for over 20 years. Indeed, licensees could theoretically meet those obligations without deploying *any* permanent physical facilities.[6] The mere fact that the FCC requires licensees to operate on their licensed spectrum does not reflect any federal control—or even involvement—in wireless siting decisions, particularly as they relate to small cells.

NRDC cites *New York v. Nuclear Regulation Comm'n*, 681 F.3d 471 (D.C. Cir. 2012), to support its claim that the *Order* "unlawfully separat[es] the wireless services provided by a facility from the facility necessary to provide these services."

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[5] The FCC has no way to know how many small wireless facilities a licensee has deployed, let alone where they are located, making NEPA and NHPA review implausible.

[6] A carrier could, for example, use mobile cells on wheels to provide service throughout their licensed area, or in the future could use aerial platforms to provide wireless service in rural areas.

NRDC Br. at 12. NRDC misses the point. *New York* held that a Waste Confidence Decision ("WCD") that would be used by the NRC as "a predicate to *every decision* to license or relicense a nuclear power plant" constituted a major federal action. *New York*, 681 F.3d at 476 (emphasis added). This Court reasoned that the WCD was inextricably intertwined with the NRC's nuclear power plant licensing authority and thus qualified as a major federal action. *See id.* But the FCC's geographic area licenses authorize carriers to use spectrum only and exert *no* licensing authority over small wireless facility deployments. The analogous circumstance would be if the NRC licensed entities on a state- or region-wide basis and then exercised no control over where, when, or how many nuclear facilities those entities went on to build—clearly a very different regulatory regime than this Court considered in *New York*. Thus, NRDC's "asserted linkage" between small cell deployments and spectrum licensing is far "too attenuated" to provide the requisite level of federal involvement for an "undertaking" or a "major federal action." *Sierra Club*, 827 F.3d at 47 (requiring a "reasonably close causal relationship" akin to "proximate cause" between federal action and its effects).

Moreover, NRDC's argument adds nothing to Petitioners' claim that the FCC unreasonably determined that small cell siting does not raise significant environmental concerns. In *New York*, it was undisputed that nuclear reactor siting is a major federal action raising environmental concerns, and this Court concluded

that the prior WCD was a predicate to those decisions. 681 F.3d at 476. But here, where the FCC reasonably concluded that small cell siting does not raise significant environmental issues, there is no reason why NEPA should be triggered by a prior geographic licensing decision. *See supra*, Section I.A.

NRDC mischaracterizes the FCC's actions here as unlawful "splintering tactics," NRDC Br. at 12. It is true that agencies cannot evade NEPA and NHPA by artificially dividing a major federal action into "smaller, less significant actions." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987). But "[t]he rule against segmentation . . . is not required to be applied in every situation." *Id.* Where, as here, Petitioners can identify no "overarching federal project," and federal permission is required only for the "discrete" and tangential ability to utilize spectrum, segmentation claims are misplaced. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F.Supp.3d 50, 70 (D.D.C. 2018); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F.Supp.2d 9, 37 (D.D.C. 2013) (noting "general reluctance to conclude that federal action with respect to a small portion of a pipeline" is sufficient to "federalize the entire project"). Applied as NRDC suggests, the anti-segmentation rule would expand NEPA and NHPA beyond recognition and federalize the entire wireless network ecosystem. Under this expansive view, the construction of carrier stores would arguably require NEPA and NHPA review: But for the FCC's spectrum licenses authorizing a carrier to provide wireless service, the

stores would not be built. Although neither courts nor the FCC have ever understood the construction of carrier retail stores to be "undertakings" or a "major federal actions," the "but for" test urged by Petitioners here could well lead to this absurd result. *See Big Bend*, 896 F.3d at 423-25 (rejecting a "but for" approach that would "improperly" extend NEPA's reach).

II. THE FCC WAS NOT REQUIRED TO CONDUCT ANY NEPA REVIEW BEFORE ISSUING THE ORDER.

NRDC raises additional claims that are incorrect and not properly before this Court. NRDC asserts that the *Order* itself is a "major federal action significantly affecting the quality of the human environment" and contends that the FCC failed to prepare an EIS as required by NEPA. *See* NRDC Br. at 10-11. Because this argument was not raised below, it is outside the scope of this appeal. *See* 47 U.S.C. § 405(a) ("The filing of a petition for reconsideration shall not be a condition precedent to judicial review . . . except where the party seeking such review . . . relies on questions of fact or law upon which the Commission… has been afforded no opportunity to pass"); *Free Access & Broad. Telemedia, LLC v. FCC*, 865 F.3d 615, 619 (D.C. Cir. 2017) (no jurisdiction to review agency analysis if not raised in petition for reconsideration); *FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 696 (D.C. Cir. 2015) (same); *Environmentel, LLC v. FCC*, 661 F.3d 80, 83 (D.C. Cir. 2011).

In any event, NRDC is mistaken. The FCC's issuance of the *Order* itself is not a "major federal action," nor will it "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C). *First*, NRDC fails to cite a single case suggesting that the *Order* could itself constitute a "major federal action" requiring environmental review. *See* NRDC Br. at 10. Courts have made clear that where an agency acts to exclude categories of projects from NEPA review, the exclusion is "by definition not a major federal action," but instead an "agency procedure . . . for which an EA or EIS has been deemed unnecessary." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1025 (9th Cir. 2007); *see also Heartwood v. U.S. Forest Serv.*, 230 F.3d 947, 954 (7th Cir. 2000) (creating categorical exclusions under NEPA was not itself a "major federal action").

Second, NEPA review is not required because the *Order* will not "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C). The FCC properly concluded that "small wireless facilities pose little or no risk of adverse environmental . . . effects," either individually or cumulatively. *Order* ¶42 [JA-820]. It is axiomatic that the *Order* will not significantly affect the environment and thus, NEPA is not triggered.

NRDC also complains that the FCC failed to reconsider the environmental health effects of wireless facilities in adopting the *Order*. NRDC Br. at 11. But the FCC properly addressed the environmental effects of radiofrequency exposure in

another proceeding, *Reassessment of FCC Radiofrequency Exposure Limits & Policies*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 28 FCC Rcd. 3498 (2013), and is not required to reconsider that issue here. *See Cmty. Nutrition Inst.*, 773 F.2d at 1362–63 (citations omitted) (agency not required to address issues it "has already considered and rejected" in a prior proceeding).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Commission's brief, the Petition for Review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,037 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

/s/ Joshua Turner

January 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, I caused copies of the Respondent-Intervenors' Brief to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ Joshua Turner

January 25, 2019