BRIEF FOR RESPONDENTS

Oral Argument Scheduled For March 15, 2019

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

NOS. 18-1129, *ET AL.*

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

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. ***Parties***

All parties appearing in this Court are listed in petitioners' briefs.

2. ***Ruling Under Review***

In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd ---- (2018) (JA 806).

3. ***Related Cases***

The order on review has not previously been before this Court or any other court. We are not aware of any related case pending before this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes and Regulations

Other Authorities

GLOSSARY

ACHP	Advisory Council on Historic Preservation
NEPA	National Environmental Policy Act
NHO	Native Hawaiian Organization
NHPA	National Historic Preservation Act

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BRIEF FOR RESPONDENTS

INTRODUCTION

This case concerns the Federal Communications Commission's reasonable decision to update its historic preservation and environmental review regulations for wireless networks to account for accumulated experience, existing practice, and recent developments in wireless technology.

Under federal environmental (NEPA) and historic preservation (NHPA) laws, federal review of private construction or deployment is required only when a federal agency exercises sufficient control over a project that it is deemed a federal "undertaking" or "major federal action." With respect to the deployment of wireless facilities, the FCC (subject to exceptions not relevant here) does not license or permit such construction; rather state and local authorities do so. Accordingly, the agency has pointed to a 1990 FCC rule, known as its "limited approval authority," as the sole basis for requiring federal historic and environmental review of all wireless facilities. This Court affirmed the Commission's discretion to retain such a rule, but nowhere suggested that the Commission lacked authority to revisit it. *CTIA-The Wireless Ass'n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

When the FCC revisited and retained this rule in 2004, it was a time when "virtually every outdoor wireless facility" was a large, "macro" facility – such as the many 200-foot towers that marked the deployment of then-current third-generation ("3G") wireless services. *See, e.g.*, *Order* ¶39 (JA 819). As to those large towers that the FCC principally had in mind in 2004, the *Order* on review does not change course: it leaves the existing historic and environmental review processes in place. But the FCC launched this proceeding to reexamine its approach in light of a new trend in technology: small wireless facilities, or "small

cells," that are increasingly deployed to support fifth-generation ("5G") wireless networks.

Far from requiring 200-foot towers, small cells are primarily pizza-box sized, lower-powered antennas that can be placed on existing structures such as light poles and utility poles, and generally must be deployed in large numbers, close to the ground. The 2004 Commission did not consider these new, smaller devices, nor whether they pose the same historic and environmental concerns as macro towers. The Commission here comprehensively reexamined its prior approach. It concluded that small cells have a very different footprint than large, macro facilities. The *Order* thus placed small cells on par with other similarly-sized devices that operate on licensed and unlicensed spectrum alike, such as backyard satellite dishes and roof-mounted home television antennas, whose deployment is not subject to federal historic or environmental review.

The Commission accordingly amended its rules to remove the deployment of small cells from the scope of its "limited approval authority," to conform to the developments in wireless technology that had taken place since that authority was first adopted. Having done so, the Commission removed the basis by which it previously asserted control over the private deployment of small cells. Without its limited approval rule, the private deployment of small cells does not constitute a

federal "undertaking" – because that deployment is no longer a "project, activity or program … requiring a Federal permit, license or approval." 54 U.S.C. § 300320.

Petitioners do not challenge this basic framework. Rather, Petitioners ask this Court to endorse a new theory under which wireless facility deployment amounts to a federal undertaking – namely, that an FCC-issued geographic area service license, which authorizes a licensee to transmit on spectrum, somehow federalizes the separate and private construction of physical infrastructure, including infrastructure built by private actors that may hold no FCC licenses or authorizations. This is a legal theory that the Commission has never adopted, as this Court recognized in *CTIA*, and that it has now expressly rejected in the *Order*. And with good reason: It conflicts with decades of precedent from this Court and other circuits and threatens to federalize broad swaths of private conduct in both the telecom and non-telecom space alike.

Geographic area service licenses are indisputably "licenses." But they are licenses for emitting wireless signals, not for the private construction of physical infrastructure. Indeed, the law is clear that the scope of any undertaking covered by NHPA, or major federal action subject to NEPA, is limited by the scope of the "project" being licensed and the degree of control the federal agency exercises over it. *See, e.g.*, *Department of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004); *Big Bend Conservation Alliance v. FERC*, 896 F.3d 418, 423-25 (D.C. Cir. 2018);

Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 513 (4th Cir. 1992). Granting a license does not federalize all private activities that would not occur "but for" the license or that may become economically viable because of the license. Here, the FCC's geographic service licenses authorize licensees to transmit signals. Accordingly, the Commission conducts environmental review of those wireless transmissions (for example, by adopting radiofrequency emission limits). But the FCC licenses do not authorize, approve, or require the deployment of any particular physical infrastructure. To the contrary, anyone (non-licensees included) can build small cells either before or after the acquisition of spectrum without any notice to or control by the Commission. To be sure, the placement of such facilities is subject to approval or control by *other* permitting authorities – such as state and local zoning authorities, *see* 47 U.S.C. § 332(c)(7). But those small cells are not subject to Commission control simply because they may be used to provide services over Commission-licensed spectrum, as this Court's NEPA and NHPA law make clear. The Commission thus reasonably concluded that spectrum licenses do not transform the private deployment of small cells into a federal undertaking under NHPA or a major federal action under NEPA.

Petitioners' host of Administrative Procedure Act challenges likewise fail. The Commission reasonably amended its rules to exclude small cells based on an analysis that the costs of such review would far outweigh whatever benefits it

might have, especially in light of the Commission's statutory directive to use its regulatory powers to "encourage the deployment … of advanced communications capability," like 5G. The Commission also reasonably streamlined its review of macro towers to eliminate unnecessary burdens, such as aligning "up front" Tribal fees, which had grown exponentially in recent years without any corresponding benefits, with Advisory Council guidance. And the Commission fully complied with any obligation it might have to consult meaningfully with Tribal nations and to consider and respond to record evidence. The petitions for review should be denied.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the FCC reasonably determined that the deployment of a small wireless facility by a private party is not a federal undertaking subject to review under the National Historic Preservation Act or a major federal action subject to review under the National Environmental Policy Act.

2. Whether the FCC reasonably determined that it was not in the public interest under the Communications Act to subject the deployment of small wireless facilities to historic and environmental review.

3. Whether, in order to reduce regulatory impediments to deployment of larger wireless facilities, the FCC acted reasonably in clarifying that carriers have no obligation to pay up-front fees for Tribal

historic review and in providing a 45-day timeline for Tribal organizations to express interest in a proposed deployment.

4. Whether the FCC had a judicially enforceable obligation to consult with Tribal Nations concerning issues raised by the Order, and if so whether it fulfilled that obligation.

JURISDICTION

This Court has jurisdiction to review the *Order* pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The order was released on March 30, 2018, and a summary was published in the Federal Register on May 3, 2018, 83 Fed. Reg. 19440. The petitions for review were filed within 60 days of that date, as required by 28 U.S.C. § 2344 and 47 C.F.R. § 1.4(b)(1). This Court denied a stay request on August 15, 2018.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in the Statutory Addendum.

COUNTERSTATEMENT OF THE CASE

A. STATUTORY AND REGULATORY FRAMEWORK

1. The Communications Act

The Communications Act of 1934 established the FCC for the purpose of making available a "rapid, efficient … wire and radio communication service with adequate facilities at reasonable charges," 47 U.S.C. § 151, as well as "the development and rapid deployment of new technologies, products and services for

the benefit of the public … without administrative or judicial delays," *id*. § 309(j)(3)(A), and the "efficient and intensive use of electromagnetic spectrum," *id*. § 309(j)(3)(D). In addition, Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302(a), spurs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing, in a manner consistent with the public interest, convenience and necessity … regulating methods that remove barriers to infrastructure investment."

The Commission originally issued site-specific construction permits and station licenses for the use of the electromagnetic radio spectrum. Since 1982, however, Congress has provided that "[a] permit for construction shall not be required for … stations licensed to common carriers," such as wireless telephone companies, "unless the Commission determines that the public interest, convenience, and necessity would be served" thereby. 47 U.S.C. § 319(d); *see* Pub. L. 97-259, 96 Stat. 1087, § 119 (1982).

That 1982 amendment reflects a Congressional determination that the Commission could encourage the deployment of wireless networks and advance the other goals of the Act without, as a default matter, requiring pre-construction approval of every private deployment. As a result, the Commission no longer requires a construction permit for most commercial wireless services; instead, it

authorizes such services over a particular band of spectrum within a wide geographic area – not from a specific location. *Order* ¶50 (JA 823); UKB Br. 26.

2. Historic And Environmental Review

a. *The National Historic Preservation Act (NHPA)* Section 106 of NHPA directs federal agencies to consider the effects of their "undertakings" on historic properties listed or eligible for listing in the National Register of Historic Places. 54 U.S.C. § 306108. NHPA defines an "undertaking" as "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.

Section 106 is procedural in nature; it does not "require the [federal agency] to engage in any particular preservation activities," but rather merely requires an agency to "consult" with certain parties and "consider the impacts of its undertaking." *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000) (quoting *National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908, 918 (D.D.C. 1996)).

There must be a requisite degree of federal involvement for an action to constitute a federal "undertaking" under NHPA. *See, e.g.*, *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007). In addition, not every federal approval will transform private activity into a covered "undertaking." Rather, the license or approval must be for "a project, activity, or program …

requiring" such license or approval. 36 C.F.R. § 800.16(y) (emphasis added). Thus, courts have recognized that where a federal approval does not amount to actual control over the private activity that might impact historic preservation, there is no covered "undertaking." *See Sugarloaf Citizens Ass'n*, 959 F.2d at 513.

Under rules promulgated by the Advisory Council on Historic Preservation (Advisory Council), federal agencies have the authority to determine what activities within an agency's jurisdiction constitute federal undertakings. *See* 36 C.F.R. § 800.3(a) ("The agency official shall determine whether the proposed Federal action is an undertaking."). Likewise, under the Nationwide Programmatic Agreement adopted by the Commission, the Advisory Council, and State Historic Preservation Officers in 2004 and codified in Commission rules, the Commission "has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA." 47 C.F.R. Part 1, App. C, § I.B.

b. The National Environmental Policy Act (NEPA) NEPA requires federal agencies to identify and evaluate the environmental effects of proposed "major Federal actions." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1508.18 (defining major Federal action). Similar to an "undertaking" under NHPA, a "major Federal action" under NEPA includes, among other things, "projects and programs entirely

or partly … approved by federal agencies." 40 C.F.R. § 1508.18(a). Courts consider "major Federal actions" under NEPA to be largely equivalent to "undertakings" under NHPA. *See, e.g.*, *Karst*, 475 F.3d at 1295-96. Neither encompasses all activities in which private parties might not have engaged "but for" the federal action. *Big Bend*, 896 F.3d at 425.

3. The FCC's Historic Preservation And Environmental Rules

The FCC first adopted rules implementing NEPA in 1974. *See Implementation of the National Environmental Policy Act of 1969*, 49 F.C.C.2d 1313 (1974). *See* 47 C.F.R. §§ 1.1301-1.1319. The Commission's environmental rules also establish the agency's responsibilities regarding historic preservation under NHPA. *See*, *e.g.*, 47 C.F.R. §§ 1.1307(a)(4); 1.1308(b) Note; 1.1311(b).

When the Commission first promulgated rules implementing NEPA, all radio spectrum licenses issued by the FCC conferred authority to operate from a specific site, and the Commission was required to issue a construction permit for that site before granting the license. *See* 47 U.S.C. § 319(a) (1974) ("[n]o license shall be issued … for the operation of any station … unless a permit for its construction has been granted ….").

Therefore, the Commission amended its rules in 1990 to require for the first time that even in situations where a Commission construction permit was not required under 47 U.S.C. § 319(d), the applicant or licensee must nevertheless

determine prior to construction whether the facility may have a significant environmental effect, including an effect on historic properties. *See Amendment of Environmental Rules*, 5 FCC Rcd 2942 (1990); *see also* 47 C.F.R. § 1.1312 ("Facilities for which no preconstruction authorization is required."). This rule has come to be known as the Commission's "limited approval authority" – so named because the Commission exercises control over deployment solely to conduct federal historic and environmental review. The Commission at that time did not analyze whether this authority rendered facility deployments under it federal "undertakings." Rather, it determined that it was in the "public interest" to require environmental review prior to facility construction. 5 FCC Rcd at 2943.

Separately, pursuant to 47 U.S.C. § 303(q), Commission rules provide that radio towers meeting certain height and location criteria – generally towers more than 200 feet high or located within certain distances of an airport – require notification to the Federal Aviation Administration and must be registered with the FCC prior to construction without regard to whether a Commission construction permit is required. *See* 47 C.F.R. §§ 17.4, 17.7. The Commission concluded in 1995 that this tower registration process amounts to a federal undertaking under NHPA. *See Streamlining Antenna Structure Clearance Procedure*, 11 FCC Rcd 4272, 4289 ¶41 & n.60 (1995).

In 2004, the Commission adopted revisions to its rules to implement a programmatic agreement to streamline review of tower construction and other activities subject to NHPA. *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073 (2004). In that order, the Commission expressly declined to revisit its "existing interpretation that the construction of antennas and support facilities is a federal undertaking under NHPA." *Id.* at 1079 ¶16. That conclusion, it explained, had been based in previous orders on a determination that (1) the tower registration process it had adopted for larger towers constituted an approval process, and (2) its retention of "limited approval authority" pursuant to its rules to conduct environmental review prior to any tower construction also constituted federal approval that brought these activities within NHPA. *Id*. at 1083 ¶¶ 24-27.

The Nationwide Programmatic Agreement also explained that the Commission "has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of NHPA," determinations the Commission may "revisit[]" at any time. *Id*. at 1143. *See* 47 C.F.R. Pt. 1, App. C, §I.B.

This Court concluded that the 2004 order was "neither arbitrary nor capricious in determining that tower construction" is an undertaking, both (1) "to the extent covered by the FCC's registration process," and (2) insofar as the FCC

had "retained" approval "authority" over such construction in order to facilitate environmental review. *CTIA*, 466 F.3d at 113-15. In affirming the Commission's discretion to treat these two discrete rules as asserting sufficient control to constitute undertakings, this Court noted that the Commission had not taken the position "that the requisite federal licensing occurs when the FCC issues the initial license that allows carriers to provide wireless services." *Id*. at 113 n.3 (citation omitted).

In 2014, recognizing the "booming" demand for wireless capacity and to expedite the deployment of equipment that meets growing consumer demand but does not harm the environment or historic properties, the Commission changed its rules to update the manner in which it evaluated the impact of small wireless deployments on the environment and historic properties. *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, 12866-12869 (2014), *rev. denied*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015). Based "on the record before [it]" at that time, the Commission declined to find that small wireless facility deployments are not undertakings for purposes of Section 106 review. *See id.* at 12905 ¶ 84. But the Commission did not consider whether it should amend its rules to remove the deployment of small wireless facilities from its limited approval authority or whether the public interest would be served by such an amendment.

B. SMALL WIRELESS FACILITY DEPLOYMENT AND THE ORDER UNDER REVIEW

1. Notice Of Proposed Rulemaking

Faced with an exploding demand for 5G wireless broadband service, the Commission began a rulemaking in April 2017 to examine the "regulatory impediments to wireless network infrastructure investment and deployment" and to determine how the agency could "remove or reduce such impediments consistent with the law and the public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans." *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 3330 ¶2 (2017) (JA 64) (*NPRM*). The Commission noted that there was an "urgent need to remove any unnecessary barriers" because providers had to deploy "large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next generation technologies" in the immediate future. *Id.*; *see also id.* ¶32 (JA 77) (To achieve the anticipated demand for service, "wireless providers will need flexibility to strategically place thousands of [small wireless] facilities throughout the country within the next few years.").

The Commission identified and sought comment on regulatory burdens that could be reduced or eliminated. Among other things, the agency sought comment on a number of changes in historic and environmental review "given the ongoing evolution in wireless infrastructure deployment towards smaller antennas and

supporting structures as well as more frequent collocation on existing structures." *NPRM* ¶23 (JA 73). In particular, it sought comment on whether it should take a fresh look at the scope of its responsibility to review wireless facility construction under NHPA and NEPA, especially in light of the evolution of technology and the changes in wireless infrastructure deployment in the 27 years since the 1990 rules. *Id.* ¶76 (JA 90).

The Commission also sought comments on fees paid to Tribal Nations by applicants in the Section 106 historic review process, noting complaints by applicants that such fees had become "exorbitant." *NPRM* ¶38; *see id.* ¶¶35-59 (JA 79, 77-85). In the course of its examination of these issues, the Commission directed its staff to conduct government-to-government consultation with Tribal Nations consistent with the agency's established policy. *Id.* ¶24 (JA 73). *See Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078 (2000) ("*Tribal Policy Statement*").

2. The Order

After engaging in "extensive consultations" and "outreach efforts" with Tribal Nations, *see Order* ¶¶17, 18-35 (JA 812-817), and reviewing a voluminous administrative record, the Commission adopted the order under review. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* FCC 18-30 (*Order*) (JA 806). The *Order* amended and clarified the

Commission's rules to enable the rapid and efficient deployment of next-generation wireless networks by reducing "regulatory impediments" to the deployment of small wireless facilities. *Id.*¶ 4 (JA 807). At the same time, it left in place the FCC's approach to large, macro facilities.

The Commission explained that "next-generation wireless networks, in many areas, will increasingly need to rely on … spectrum [that] is reused more frequently through the deployment of far more numerous, smaller, lower-powered base stations or nodes that are much more densely spaced." *Order* ¶1 (JA 806). In the *Order*, the agency sought to address "the extent to which [its] regulatory requirements are unnecessarily impeding deployment of wireless broadband networks and how best to remove or reduce such impediments consistent with law and the public interest." *Id*. ¶3 (JA 807). The Commission observed that a failure to act "to speed deployment and pave the way for enhanced 4G and 5G networks could cost the United States leadership in advanced wireless broadband services," lead to "negative effects on job and economic growth," and "risk leaving many behind in today's technology revolution, particularly those in unserved and underserved areas of rural America." *Id*.

a. Small Wireless Deployments And NHPA/NEPA Review The Commission first clarified the types of wireless deployments that are subject to review under NHPA and NEPA. *Order* ¶¶36-95 (JA 817-846). Noting that the Commission had

not previously paid extensive attention to this issue, it concluded that "the deployment of small wireless facilities by non-federal entities does not constitute either a 'federal undertaking" within the meaning of NHPA or a "major federal action" under NEPA." *Id*. ¶4 (JA 807). In doing so, the Commission adopted a definition of small wireless facility that "includes size limits on antennas, associated equipment and pole heights" that "exclude from review those facilities that are least likely to implicate federal environmental and historic interests." *Id*.[1]

The Commission explained that in the past it had focused primarily on macrocells and large tower deployments, and "it could not have anticipated that many small-cell antennas today would fit inside a space the size of a pizza box." *Order* ¶66 (JA 828). It pointed to comments describing small cell antenna sizes that "are much smaller – three cubic feet or less per antenna – and are mounted predominantly on existing (or replacement) structures at a height of 60 feet or less," and therefore "bear little resemblance to the macro facilities that represented

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[1] To qualify as a small wireless facility, the antenna associated with the deployment, excluding the associated equipment, "must be no more than three cubic feet in volume." *Id*. ¶75 (JA 833). The wireless equipment associated with the antenna "must be no larger than 28 cubic feet." *Id*. ¶76 (JA 834). And small wireless facilities can be deployed on new structures "that are either no taller than the greater of 50 feet (including their antennas) or no more than 10 percent taller than other structures in the area." *Id*. ¶74 (JA 832). A small wireless facility may also be "affixed to an existing structure" if "as a result of the deployment that structure is not extended to a height of more than 50 feet or by more than 10 percent, whichever is greater." *Id*.

most wireless siting in 2004," and "are much less likely to affect historic properties." *Id.* n.132, quoting Verizon 2/26/18 ex parte letter (JA 654). *See also* AT&T 2/23/18 ex parte letter Attach. (JA 640-651) (displaying photographs of typical small cell installations).

The Commission explained, citing this Court's decision in *CTIA*, that to the extent that it had addressed in the past the status of the deployment of wireless facilities that do not require site-by-site licensing or construction permits, it had identified only two bases for finding a sufficient degree of federal involvement for such deployments to be considered federal undertakings or major federal actions – (1) the requirement of the Commission's rules for antenna tower registration based on Section 303(q) of the Act, 47 U.S.C. § 303(q), and (2) the "limited approval authority" that the Commission had implemented in Section 1.1312 of its rules, 47 C.F.R. § 1.1312. *Order* ¶¶50-53, 58 (JA 823-824, 826).

The Commission explained that small wireless facility deployments, as defined in the *Order*, include only those facilities that are not subject to the tower registration requirement. *Id.* ¶ 58 (JA 826). By amending the limited approval authority contained in Section 1.1312 to remove small wireless facilities from its coverage, the Commission eliminated the only other basis on which the Commission had relied for federal historic preservation and environmental review of small wireless facility deployments. *Order* ¶¶59-72 (JA 826-831).

The Commission rejected arguments made by some commenters that the issuance of a geographic area service license constitutes sufficient federal involvement to bring the later deployment of small wireless facilities within the scope of undertakings or major federal action requiring historic or environmental review. As the Commission explained, it had "never taken the position that every form of license or authorization demonstrates a sufficient federal nexus to convert the separate deployment of facilities into a federal undertaking or major federal action." *Order* ¶84 (JA 839). The "key consideration," the Commission stated, is "the degree of federal involvement." *Id.* ¶85 (JA 839). In the case of geographic area licenses, the Commission pointed out, it has no involvement in and cannot foresee the specific location of subsequent wireless facility deployment. *Id.*

The Commission therefore concluded that issuance of a geographic area license that authorizes provision of wireless service in a geographic area "does not create sufficient Commission involvement in the deployment of particular wireless facilities in connection with that license for the deployment to constitute an undertaking for purposes of the NHPA." *Id.* For similar reasons, it concluded that the issuance of geographic area service licenses did not render small wireless facility deployments "major federal actions" under NEPA. *Id.* ¶¶86-87 (JA 841-842).

The Commission noted that NHPA and NEPA "require agencies to evaluate the effects of their undertakings or major Federal actions in advance of those

undertakings or actions," but "there is no plausible way for the Commission to meaningfully assess environmental and historic preservation effects associated with the deployment of small wireless facilities at the time geographic service licenses issue …." *Order* ¶89 (JA 843). As a result, the Commission concluded, "there are no reasonably foreseeable effects" that it could consider prior to issuing such licenses. *Id.* The Commission added that "[u]nder the geographic area service license, it is generally state and local zoning authorities that exercise their lawful authority regarding the placement of wireless facilities by private parties" and that "nothing we do in this order precludes any review conducted by other authorities such as state and local authorities." *Order* ¶¶77, 85 (JA 835, 839).

The Commission independently concluded that "the public interest would not be served by continuing to subject small wireless facility deployment to Section 1.1312's review requirements" except on Tribal lands because of the burdens of that review on deployment of small wireless facilities and the "minimal anticipated benefits of NHPA and NEPA review" in the context of small facilities. *Order* ¶61 (JA 826). The Commission found clear evidence that "there are substantial, rising, and unnecessary costs for deployment [of small wireless facilities] that stem from compliance with NEPA and the NHPA." *Id.* ¶68 (JA 828). Sprint, for example, informed the Commission that NEPA and NHPA review had required it to spend tens of millions of dollars while providing virtually no

environmental or historical benefits, because none of its assessments had found any significant impact on historic properties or the environment. *Id.* citing Sprint Comm. at 35 (JA 393); *see also Order* ¶¶69-70 (JA 829-830) (citing additional similar record evidence). In addition to the financial costs to applicants of these reviews, the Commission noted substantial record evidence of the delays to deployment of wireless service attendant to historic and environmental reviews. *See id.* ¶71 (JA 831).

The Commission also found that the record did "not support sufficiently appreciable countervailing environmental and historic preservation benefits associated with subjecting small wireless facility deployments off of Tribal lands to historic preservation and environmental reviews." *Order* ¶72 (JA 831). And the Commission noted that "state and local review procedures, adopted and implemented by regulators with more intimate knowledge of local geography and history, reduces the likelihood that small wireless facilities will be deployed in ways that will have adverse environmental and historic preservation effects." *Id.* ¶77 (JA 835).[2]

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[2] The Commission decided to continue to exercise its limited approval authority for deployment of small wireless facilities on Tribal lands based on evidence that "wireless providers have not experienced the same challenges arising from the historic preservation review process on Tribal lands." *Id.* ¶72 (JA 831).

b. The Section 106 Tribal Consultation Process The *Order* also revised the historic preservation review consultation process that continues to apply to the deployment of larger wireless facilities located off Tribal lands but at locations that may hold cultural and religious significance for Tribal Nations.[3] The revised rules require wireless applicants to provide all potentially affected Tribal Nations with more detailed information "about proposed facilities, including their proposed location(s), the dimensions, scale, and description[s] of proposed projects; and information about the potential direct effects and visual effects of the project" (including "photographs and maps of the proposed site"). *See Order* ¶104 (JA 851). In addition, the Commission clarified the timeframe for Tribal responses to applicant notifications and adopted new procedures to address circumstances where a Tribal Nation fails to respond to the applicant notifications. *See id.* ¶¶109-111 (JA 853-855). Under the revised timeframes, a Tribal Nation or Native Hawaiian Organization (NHO) generally has 30 days from the receipt of the required information to provide a response indicating whether it "has concerns about a historic property of traditional religious and cultural significance that may be affected by the proposed construction." *Id*. ¶109 (JA 853). If the Tribal Nation

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[3] The consultation process for undertakings on Tribal lands is covered by separate provisions of the Advisory Council's rules. *See* 36 C.F.R. § 800.3(d). That process was not addressed in the *Order* and "nothing in th[e] *Order* disturbs existing Commission practices for Section 106 review on Tribal lands." *Order* ¶97 (JA 848).

or NHO does not respond within that time, the applicant can refer the matter to the Commission for follow-up. *Id*. ¶111 (JA 855). If there is no response within 15 days of follow-up, "the applicant's pre-construction [consultation] obligations are discharged with respect to that Tribal Nation or NHO." *Id*. The Commission found that these new procedures would provide improved notice and information to Tribes, address applicants' concern about delays in the process and, by involving the Commission in the consultation process, facilitate the resolution of consultation when issues arise. *Id*. ¶113 (JA 856).

c. Tribal Fees Finally, the Commission clarified, after reviewing evidence that there had been dramatic and troubling increases in Tribal fees, that "consistent with ACHP guidance … applicants are not required to pay Tribal Nations or NHOs up-front fees simply for initiating the Section 106 consultative process." *Order* ¶116 (JA 856).

The Commission noted that the Advisory Council's guidance "repeatedly makes clear that the proponent of an undertaking is not required to accede to unilateral requests for payment." *Order* ¶115 (JA 856), citing *Fees in the Section 106 Review Process* at 1 (ACHP 2001) (JA 912) ; *see also Order* ¶118 (JA 857) (citing *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* at 13 (ACHP 2012) (JA 1015)). The Commission therefore clarified that "nothing in the applicable law … *requires* applicants (or the Commission for that

matter) to pay up-front fees as part of the Section 106 process." *Id.* ¶120 (JA 858). The Commission added that Tribal Nations "remain free to request upfront fees and applicants may, if they choose, voluntarily pay such fees" but that if a Tribal Nation declines "to provide its views without an up-front payment, and the applicant does not voluntarily agree to provide the payment, consistent with the ACHP's guidance, our obligations have been satisfied and we may allow the applicant to proceed with its project" pursuant to the procedures it had outlined where a Tribal Nation does not respond to a notification. *Id.*

The Commission added that an applicant may engage a Tribal Nation or NHO as a "paid consultant at any point in the Section 106 process, but it is under no obligation to do so." *Id.* ¶127 (JA 861). As the Commission explained, "so long as the underlying obligation to make reasonable and good faith efforts to identify historic properties is satisfied, the applicant is not bound to any particular method of gathering information." *Id.* ¶125 (JA 860).

The Commission explained that the record fully supported this legal conclusion. Extensive record evidence indicated that Tribal Nations' assessment of "up-front" fees had increased significantly in recent years, without any corresponding benefits. *See Order* ¶117 (JA 857).

With respect to costs, the Commission found increases in recent years in the number of tribes charging fees (up 200% from 35 to 104), the average amount

charged per tribe per review (up 43% from $375 to $532), and the average number of tribes expressing interest in a single site (doubling from 8 to 15). *Order* ¶¶12-13 (JA 810). For review of collocations (added antennas to existing sites, which bear resemblance to small cells), average fees had tripled over the same period ($200 to $562). *Id.* n.21 (JA 810).

Cost of review per site has increased accordingly, with one consultant estimating that average fees in its area have gone from $2,000 per site to $11,500 per site. *Order* ¶13 (JA 810). This is a dramatic increase from carrier association estimates that fees averaged between $50 to $200 per site when data was first collected in 2004. *Id.* ¶15 (JA 811). In total, the record reflects that providers paid $36 million in fees in 2017 and that this number was expected to reach $241 million in 2018 in the absence of Commission action. *Id.* ¶69 (JA 829).

Despite this dramatic increase in costs, the Commission concluded that the record did not reflect any significant corresponding benefits. Sprint, for example, said that despite spending $23 million on these reviews, every single review resulted in a Finding of No Significant Impact. *Order* ¶68 (JA 829). Verizon stated that only 0.3% of its requests for tribal review led to findings of adverse impact, while another commenter reported that 99.6% of reviews identify no issues. *Id.* ¶79 (JA 837).

SUMMARY OF ARGUMENT

1. The Commission reasonably concluded that the private deployment of small cells is neither a federal undertaking within the meaning of the NHPA nor a major federal action within the meaning of NEPA. The FCC does not issue licenses, construction permits, authorizations, or otherwise control the deployment of small cells. Rather, the FCC licenses a separate project – wireless transmissions – under a "geographic area service license" that does not specify where and how any particular facilities are to be deployed. Such deployments are a result of marketplace decisions by private companies subject to any applicable regulations, such as state or local zoning requirements.

Consistent with the views of this Court and other courts to confront similar issues, the Commission explained that not every form of federal license or authorization has a sufficient connection to the separate deployment of facilities to convert the deployment into a federal undertaking or federal license. The key consideration, rather, is the degree of federal involvement. Here, the FCC does not license, approve, or otherwise oversee the physical deployment of small wireless facilities, nor can it predict where providers subsequently will build their network facilities at the time the Commission issues a geographic area license. Thus, the Commission cannot reasonably foresee, and assess, the historic preservation or environmental effects at the time of licensing.

Contrary to Petitioners' arguments, the geographic service licenses at issue here involve far less federal control over small cell deployments than in other cases in which courts have rejected calls for environmental review in the face of a physical, economic, or "but for" connection between a federal permit and follow-on private deployment. *See, e.g.*, *Big Bend*, 896 F.3d at 423-25 (federally-approved export facility and privately-built pipeline to it); *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400-401 (9th Cir. 1989) (golf course with federal wetlands permit and rest of privately-built resort). Petitioners' arguments, if accepted, would run contrary to this established line of cases and would have significant adverse effects in practice, resulting in the federalization of many private activities that the Commission and other agencies have long considered outside of federal control, such as the placement of WiFi routers and backyard satellite dishes.

2. The Commission's decision not to require historic preservation and environmental review for small wireless facility deployments was also eminently reasonable as a policy matter. Congress has charged the FCC with responsibility to ensure the establishment of "rapid and efficient … wire and radio communications service," 47 U.S.C. § 301, to spur the "development of new technologies, products and services … without administrative or judicial delays," *id.* at § 309(j)(3)(D), and to "encourage the deployment on a reasonable and timely basis of advanced

telecommunications capability to all Americans … by utilizing, in a manner consistent with the public interest … regulating methods that remove barriers to infrastructure investment." *Id.* § 1302(a). The Commission's decision not to apply Section 1.1312 to small wireless facility deployments directly advances these Communications Act goals.

Noting the dramatic changes in wireless technology since the Commission adopted the limited approval authority rule, the Commission reasonably concluded that the regulatory burdens imposed by continuing to subject small wireless deployments to NHPA and NEPA review would be "impractical, extremely costly, and contrary to the purposes of the Communications Act." *Order* ¶65 (JA 828). The record did not support, the Commission reasonably found, "sufficiently appreciable countervailing environmental and historic preservation benefits associated with subjecting small wireless facility deployments off of Tribal lands to historic preservation and environmental reviews." *Order* ¶72 (JA 831).

3. The actions the Commission took regarding Tribal fees and procedures related to deployment of larger wireless facilities were also reasonable.

a. With respect to up-front fees sought by Tribes to participate in the Section 106 review process, the Commission simply clarified, in the face of sharply rising Tribal fees, longstanding guidance from the Advisory Council that applicants are not required to pay a Tribal Nation or NHO for providing its views

to initiate the Section 106 process. On the other hand, the Commission made clear, Tribes "remain free to request up-front fees and applicants may, if they choose, voluntarily pay such fees." *Order* ¶120 (JA 858).

b. The limited modifications that the Commission adopted to its procedural timelines were also reasonable. The Commission required an applicant to provide Tribes more detailed information regarding its proposed construction and it concomitantly reduced the time for a Tribe to indicate whether it was interested in the proposed construction from 60 days to 45 days. The record discloses no reason why 45 days should not allow sufficient time for a Tribe to provide an expression of interest in proposed construction after a complete description of that proposal has been made available to it. This minor modification in the agency's procedures was supported by evidence of delays in the Section 106 process and was well within the agency's broad discretion.

4. The Commission fulfilled its commitment to consult with Tribal Nations that it had set out in a 2000 policy statement. The *Order* described in detail the numerous meetings in which FCC Commissioners and other agency officials engaged with Tribal Nations both before and after it issued the *NPRM* in this proceeding, and during which agency officials explained and received feedback on the proposals. *See Order* ¶¶ 18-35 (JA 812-817). Petitioners contend that these were not "meaningful consultations," but they do not dispute the fact of the

extensive meetings as summarized in the *Order* nor do they explain why the consultations were not "meaningful." In any event, the *Policy Statement* by its express terms does not give rise to any judicially enforceable rights. Similarly, the Executive Orders cited by Petitioners are not applicable to independent agencies such as the FCC.

STANDARD OF REVIEW

Section 706 of the Administrative Procedure Act provides that a court must uphold an agency's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this 'highly deferential' standard of review, the court presumes the validity of agency action … and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

With respect to the Commission's interpretation of provisions of the Communications Act, judicial review is governed by the two-step framework set forth in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Unless the statute "unambiguously forecloses the agency's interpretation," a reviewing court must

"defer to that interpretation so long as it is reasonable." *National Cable & Tel. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009).

Petitioners contend that the Commission is "not entitled to deference' when it interprets NHPA or NEPA (UKB Br. 30; NRDC Br. 9). But that argument is certainly academic as to NHPA. Petitioners acknowledge that the Advisory Council *is* entitled to deference in interpreting NHPA, UKB Br. 22, and the Advisory Council's rules and the Nationwide Programmatic Agreement recognize that the *Commission* is entitled to determine whether there is a sufficient federal nexus to trigger the requirements of NHPA or NEPA. *See, e.g.*, *Protection of Historic Properties*, 65 Fed.Reg. 77698, 77712 (ACHP 2000) ("The Agency Official is responsible, in accordance with [36 C.F.R.] § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking.").[4]

[4] Petitioner Blackfeet Tribe argues that the Advisory Council's regulations only provide the Commission with discretion to identify undertakings in specific cases, not categories of actions. Br. 14-15. No party raised that argument before the agency, and it is therefore waived. 47 U.S.C. § 405(a); *In re Core Communications, Inc.*, 455 F.3d 267, 276–77 (D.C. Cir. 2006). But in any event, the argument fails on the merits. Blackfeet Tribe provides no textual basis for that limitation. The limitation also makes no sense, as a Commission action such as granting a geographic license would involve the same amount of federal control (or lack thereof) in each case; it would be redundant to require the Commission to make an undertaking determination with respect to each licensee.

Apart from whether the Commission has properly identified a federal undertaking, the public policy rationales offered for any amendment to Commission rules are governed by standard arbitrary and capricious review. *See, e.g.*, *CTIA*, 466 F.3d at 114.

ARGUMENT

I. THE FCC REASONABLY CONCLUDED THAT DEPLOYMENT OF SMALL WIRELESS FACILITIES IS NOT A FEDERAL ACTION SUBJECT TO NHPA OR NEPA.

Petitioners appear to conflate the question whether the Commission properly concluded that small cell deployment is not a federal "undertaking" or "major federal action" under NHPA and NEPA with the question whether the Commission's decision was rational under ordinary arbitrary or capricious review. UKB Br. 32-33. The *Order* withstands scrutiny on both counts. To start, the Commission appropriately concluded, consistent with this Court's decision in *CTIA*, Advisory Committee rules, and the Nationwide Programmatic Agreement, that the private deployment of small wireless facilities is not a federal undertaking or major federal action.

A. The Commission Repealed Its "Limited Approval Authority" Over Small Wireless Facilities, And Therefore, Does Not Exercise Federal Control Over Them.

The Commission amended the scope of its "limited approval authority" to make clear that it no longer made sense to apply that authority to small wireless facilities, whose proliferation the Commission could not reasonably have foreseen

when it first adopted that approval authority in 1990. In making that decision, the Commission removed the only federal control it had previously exercised over small facilities. Absent such control, there is no federal undertaking or major federal action.

Section 106 of NHPA requires federal agencies to "take into account the effect of" any "undertaking" on historic properties. 54 U.S.C. § 306108. NEPA requires environmental review of any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

An agency thus "need not satisfy the [Section] 106 process at all … unless it is engaged in an undertaking." *McMillan Park Comm. v. National Cap. Planning Comm'n*, 968 F.2d 1283, 1289 (D.C. Cir. 1992). Likewise, "the threshold legal question [is] whether an action falls within NEPA in the first place." *Citizens Against Rails-to-Trails*, 267 F.3d 1144, 1150 n.5 (D.C. Cir. 2001). If there is no "major Federal action," that is the end of the NEPA inquiry. *See id.*; *see also Karst*, 475 F.3d at 1296 ("[J]ust as the 'final agency action' in a NEPA claim must be a 'major federal action,' the 'final agency action' in an NHPA claim must be a 'federal undertaking.'").

There is no NHPA undertaking or NEPA major federal action with respect to the deployment of small wireless facilities. Under Advisory Committee rules and its Nationwide Programmatic Agreement with the Commission, the agency is

entitled to determine what activities involve sufficient federal control to constitute a covered undertaking. 36 C.F.R. § 800.3(a); 47 C.F.R. Pt. 1, App. C, § I.B. The agency's discretion in this regard must be guided by congressional directives, which provide that no pre-construction approvals shall be required for wireless deployments unless the public interest requires it. 47 U.S.C. § 319(d). (Petitioners misread the statute, erroneously claiming that construction permits *must* be issued unless the Commission "waives" the requirement. UKB Br. 33.)

As this Court noted in *CTIA*, the Commission has identified "undertakings" in the case of geographically licensed facilities in only two limited contexts – as part of its antenna structure registration process under Section 303(q) of the Act and under its limited approval authority for facilities that do not otherwise require pre-construction approvals, 47 C.F.R. § 1.1312. In the *Order*, the Commission explained that Section 303(q) did not apply to small wireless facilities (because the Commission defined them as those not subject to antenna registration, *see Order* ¶58 (JA 826)). And the Commission amended Section 1.1312 to remove such facilities from the scope of its limited approval authority unless they are on Tribal lands, *id* ¶59 (JA 826). The Commission reasonably determined that, once it no longer retained limited approval authority for the deployment of a small wireless facility not on Tribal lands (and not subject to its antenna registration rules), such a

deployment was neither an undertaking subject to NHPA review, *see Order* ¶85 (JA 839), nor a major federal action subject to NEPA review, *see id*. ¶ 86 (JA 840).

B. There Is No Merit To Petitioners' Novel Theory That The Commission's Authority To License Spectrum Turns Private Deployment Of Facilities Into A Federal Undertaking Or Major Federal Action.

Petitioners do not contest that the Commission's decision to repeal its limited approval authority removes that authority as a predicate for the application of NHPA or NEPA. Rather, Petitioners contend that the Commission's licensing of spectrum on a broad, geographic basis renders the deployment of small wireless facilities subject to NHPA and NEPA review.

That suggestion fails for multiple reasons. As noted above, the Commission has never deemed geographic licenses to possess the requisite degree of federal control over private deployment. And in the *Order*, the Commission expressly rejected that contention, and with good reason: The Commission does not license, approve, or otherwise oversee where small cells are placed.

NHPA defines "undertaking" to include "a project, activity or program … requiring a Federal … license …." 54 U.S.C. § 300320(3). Petitioners repeatedly mischaracterize the "project[s]" or "activity" that the Commission licenses – claiming that the Commission "expressly authorizes the unsupervised and uncontrolled build-out of wireless transmitters." Keetoowah Br. at 1; *see also* Blackfeet Br. at 18 ("the deployment of small wireless facilities requires FCC licensing").

That is wrong. The Commission does not license or approve the deployment of small cells. Rather, the Commission licenses the use of spectrum (which is a separate and distinct "project" from the deployment of physical facilities). Meanwhile, other governmental bodies – such as states and localities – oversee and issue permits for deployment. Indeed, petitioners concede that "an entity can build a structure, subject to local licensing … [w]ithout a federal license." UKB Br. 29.

As the *Order* explains, the deployment of wireless facilities requires no construction permit from the Commission. Instead, wireless service is authorized under a "broad geographic area service license" that does not specify where and how such facilities are to be deployed. *Order* ¶85 (JA 839). Thus, as the Commission explained, "[t]he deployment of small wireless facilities today is a function of marketplace decisions by private actors in light of applicable regulatory regimes, such as any state or local zoning requirements." *Id*. ¶88 (JA 842). "For the same basic reasons," the Commission concluded, a "geographic area service license is insufficient to render deployment of wireless facilities in connection with that license a 'major Federal action' under NEPA." *Id*. ¶ 86 (JA 841).

Petitioner Keetoowah contends that "[i]n reality, no carrier would construct facilities before obtaining a geographic license because no one can *operate* a commercial mobile system without a license." UKB Br. 27 (emphasis removed in part). Even if true, this is a theory of federalization that has been soundly rejected

by this and other courts. *See, e.g.*, *Big Bend*, 896 F.3d at 425; *see also Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 49-52 (D.C. Cir. 2015) (rejecting request to federalize a nearly-600-mile oil pipeline even though federal authorizations were required to complete construction). Moreover, the fact remains that the geographic area service license does not authorize any particular wireless facility deployment. "[A]lthough geographic area service licenses are a legal prerequisite to the provision of licensed wireless service, and can affect entities' economic incentives to deploy small wireless facilities – insofar as the facilities can be used to offer the licensed service – neither the geographic area service license nor any other Commission approval is a legal prerequisite to the deployment of those particular facilities." *Order* ¶85 (JA 840).[5] Indeed, there are companies that are in the business of constructing small wireless facilities even though they never seek or receive any licenses. *See, e.g.,* Crown Castle Comments at 3-5 (6/15/17) (JA 274-276).

Moreover, the Commission cannot predict where providers will build out their networks at the time of licensing. *See Order* ¶88 (JA 842). There is thus "no plausible way for the Commission to meaningfully assess environmental and

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[5] *See also id*. ¶86 (JA 841) ("while carriers generally obtain a geographic area service license before they deploy the facilities through which they will eventually provide that service, they are not legally required to obtain the license until they want to provide service.").

historic preservation effects associated with the deployment of small wireless facilities at the time geographic service licenses issue." *Id*. ¶89 (JA 843). The fact that those effects are not "reasonably foreseeable" at the time of licensing, *see id*. ¶89 & n.191 (JA 843) (citing 36 C.F.R. § 800.5(a)(1) (NHPA); 40 C.F.R. § 1508.8 (NEPA)), further supports the Commission's determination that its issuance of a geographic area service license is neither a NHPA undertaking nor a NEPA major federal action. *Id*.

Petitioners' argument that geographic licensing is sufficient to "federalize" private deployment for purposes of NHPA and NEPA also runs squarely into longstanding precedent that a federal undertaking (and attendant environmental and historic review) is limited by the scope of the authorization at issue. Courts have, for example, rejected a "but for" approach in which *any* antecedent federal involvement in private activity will transform that activity into a covered undertaking. In *Department of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004), the Supreme Court held that "NEPA requires 'a reasonably close causal relationship between the environmental effect and the alleged cause" – that is, the agency's action. That close causal relationship is lacking here.

Just last term, this Court applied the correct approach in *Big Bend*, in which FERC had authorized construction of a natural gas export facility that was connected to a 148-mile intrastate pipeline. This Court held that because there was

no federal action required to authorize the connected 148-mile pipeline, FERC had properly limited its NEPA analysis to the export facility alone. The "'key point' was that the bulk of [the project] was not subject to federal jurisdiction." 896 F.3d at 424. The same result applies to the *Order* under review. The private deployment of small cells bears an even more tenuous relationship to the geographic area service license than the privately-built (but physically connected) pipeline did to the federally-approved export facility in *Big Bend*. Importantly, this Court rejected the argument that "FERC should have asked whether the pipeline would have been constructed but for the agency approval of the Export Facility," noting that it had previously rejected this "test as one that would improperly allow FERC 'to extend its jurisdiction over non-jurisdictional activities simply on the basis that they were connected to a jurisdictional pipeline.'" *Id.* at 425 (quoting *National Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1334 (D.C. Cir. 2004)); *see also Dept. of Transp.*, 541 U.S. at 767 ("[A] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations."); *NRDC v. EPA*, 822 F.2d 104, 130 (D.C. Cir. 1987) (concluding that while "issuance of a discharge permit is an absolute precondition to operation of a facility, … the NPDES process [by which that permit is issued] does not constitute sufficient federal involvement to 'federalize' the private act of construction").

Similarly, in *Sugarloaf Citizens Association*, Montgomery County, Maryland sought certification by FERC of an incinerator as a small power production facility. A citizens' association petitioned for review of the grant of certification on the ground that the certification was a major federal action under NEPA. The court held that FERC did "not have sufficient control over the Incinerator project to federalize it," adding that "for a major Federal action to exist 'the federal agency must possess actual power to control the nonfederal activity.'" 959 F.2d at 513, quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988). While the equipment certification in that case arguably "render[ed] the project economically viable with a guaranteed buyer and tax-exempt financing," it was not a major federal action in that case because it "d[id] not grant [FERC] control over the construction or operation of the Incinerator." *Id.* at 513. Here, unlike in *Sugarloaf*, the spectrum license is not a "contractual prerequisite" to deployment. *See id.* But even if it were, the Commission, no less than FERC, lacks sufficient control of the deployment of small wireless facilities to control, or "federalize," the nonfederal activity of private carriers.

The Ninth Circuit reached a similar conclusion in *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989). In that case, a developer sought to build a large resort complex that included ski facilities, a resort village and a golf course. Construction of the golf course required filling 11 acres of wetlands.

The Corps confined its review to the golf course's impact on the wetlands. The court upheld the Corps' determination, concluding that it could not find that "the golf course and the rest of the resort are two links of a single chain that require the Corps to look further than it did." 884 F.2d at 400. So too here. The Commission was not required to look beyond the contours of its licensing of service to examine the deployment of facilities over which it exercised no control.[6]

These cases also dispose of NRDC's claims (Br. 12) that the Commission has engaged in "splintering tactics" by "separating the wireless services provided by a facility from the facility necessary to provide these services." The Commission is not "splintering" two different approval decisions to attempt to avoid environmental review. Rather, the Commission makes one approval decision (for wireless services), and that approval decision does not extend to certain downstream conduct that, while arguably related, lies outside Commission control (for

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[6] *See also Ringsred v. City of Duluth*, 828 F.2d 1305, 1308 (8th Cir. 1987) (Interior Secretary's involvement in approving contracts relating to the construction of a parking ramp associated with an Indian casino "did give him a factual veto power," but "were not significant enough to establish a major federal action" under NEPA); *Winnebago Tribe v. Ray*, 621 F.2d 269, 273 (8th Cir.) (NEPA did not require the Corps to consider an entire power line when its authority extended only to issuing a permit allowing the line to cross navigable waters), *cert. denied*, 449 U.S. 836 (1980); *Save the Bay, Inc. v. U.S. Corps of Engineers*, 610 F.2d 322, 327 (5th Cir.) (NEPA did not require the Corps to consider a chemical plant when issuing a permit allowing construction of a wastewater pipeline from the plant), *cert. denied*, 449 U.S. 900 (1980).

construction of facilities).[7] The Commission's decision to issue geographic, non site-specific service licenses is simply in keeping with Congress's statutory directive in 47 U.S.C. § 319(d), which forbids the Commission from requiring common carriers to obtain a construction permit in the absence of an affirmative finding that such a requirement would be in the public interest.

Petitioners' arguments also have no limiting principle. There are many pieces of small consumer equipment that require an FCC license, permit, or approval to operate on spectrum but do not undergo federal NHPA or NEPA review – such as consumer signal boosters, WiFi routers, garage door openers, and even ordinary cell phones. Even more so than small wireless facilities, these pieces of equipment are ubiquitous, and their "deployment" or placement at any given time is a matter of private discretion. Also, akin to small wireless facilities, the license or other FCC spectrum authorization permits the equipment to transmit signals on the wireless spectrum, not its physical placement or location. Under petitioners' "but for" test, however, all of these devices would be subject to

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[7] NRDC also contends that the *Order* is itself a major federal action, and that therefore the Commission violated NEPA by failing to conduct an environmental assessment before adopting it. *See* NRDC Br. 10. But just as "the decision of the funding or licensing agency is not an undertaking" under NHPA, *CTIA*, 466 F.3d at 109 n.2 (citation omitted), the agency's decision is not itself a major federal action under NEPA. In any event, the Commission's determination that small wireless facility deployments are not major federal actions was reasonable, as we have explained.

unnecessary and burdensome federal historic preservation and environmental review, despite the obvious impracticalities and enormous costs such a regime would place on consumers.[8]

NRDC's reliance on *New York v. NRC*, 681 F.3d 471 (2d Cir. 2012) is misplaced. NRDC Br. 12-13. In *NRC*, the agency's waste confidence decision ("WCD") was a prerequisite to the licensing of *every* nuclear reactor, concededly a major federal action. *See id.* at 476-77. Here, as explained above, the Commission's geographic service license is not a prerequisite to deployment, nor is there a subsequent licensing process for small-cell deployments. Unlike the WCD in *New York v. NRC*, the geographic service licenses authorize carriers to use spectrum –

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[8] Keetoowah also contends (Br. 26-27) that private infrastructure deployment should be federalized because FCC licenses contain conditions requiring milestones for service coverage and thus, in Keetoowah's view, "the FCC actually requires deployment of wireless infrastructure." Their claim is wrong on the facts and law. On the facts, service milestones can be met without deploying new facilities (as with newly-licensed channels on existing antennas) or without breaking any new ground (as with satellites). On the law, service conditions that may or may not result in new deployment do not amount to actual control over such deployment; again, that authority is exercised by state and local authorities. Indeed, even if the FCC licenses as a practical matter necessitated physical deployments (they do not), that would be no different than in *Big Bend*, in which the FERC Order stated that the "authorized [federal] import/export facility shall be completed and placed in service within three years of the date of issuance of this order," which necessitated the deployment of a non-federal pipeline. *Trans-Pecos Pipeline, LLC*, 2016 WL 2607442 at *18 (FERC 2016).

nothing more and nothing less. There is no separate federal approval process for the private deployment of small cells by private parties.

As the Advisory Council has itself acknowledged, "[u]ltimately, it is the responsibility of each federal agency to determine whether a proposed federal project or a non-federal project requiring federal assistance or authorization should be considered an undertaking subject to Section 106 review."[9] *See also Protection of Historic Properties*, 65 Fed.Reg. 77,698, 77,712 (ACHP 2000) ("The Agency Official is responsible, in accordance with [36 C.F.R.] § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking."). Here the FCC reasonably determined that the deployment of small wireless facilities by private entities is not a Federal undertaking under NHPA or a major federal action under NEPA.[10]

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[9] https://www.achp.gov/digital-library-section-106-landing/what-about-wind-farm-project-triggers-section-106 (2/1/2018)

[10] Keetoowah argues that the Advisory Council, in comments to the Commission, disagreed with the FCC's determination of how NHPA applies to deployment of small wireless facilities. That is incorrect. The Advisory Council took issue, not with the Commission's interpretation of NHPA, but with the FCC's evaluation of the benefits and burdens relating to the "evolution of technology and changes in infrastructure deployment." ACHP Comments at 7 (JA 256). These objections relate to the Commission's public interest analysis, not its undertaking determination. And in that area, the Advisory Council's comments are not dispositive: It is the Commission that is vested by Congress with appraising the public interest in light of rapidly changing technology. *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

II. THE COMMISSION REASONABLY CONCLUDED THAT UNNECESSARILY SUBJECTING SMALL WIRELESS DEPLOYMENTS TO HISTORIC AND ENVIRONMENTAL REVIEW IS NOT IN THE PUBLIC INTEREST.

In addition to being consistent with the Communications Act, NHPA, and NEPA, the Commission's decision also easily satisfies APA arbitrary or capricious review. Having concluded that small wireless facility deployments were not undertakings or major federal actions based on the Commission's geographic area licenses, the Commission turned to the question whether it should nevertheless continue to require historic and environmental review, as a matter of public policy, by subjecting these deployments to the "limited approval authority" contained in its Section 1.1312 of its rules, 47 C.F.R. § 1.1312.

The Commission noted two factors that warranted re-examination of the policy reflected in that rule: first, it had "never engaged in a considered analysis of whether the public interest requires such review for *all* wireless facilities." *Order*, ¶39 (JA 819). Second, there had been dramatic changes in wireless deployments since the Commission first adopted the rule – when virtually every wireless deployment was made up of large arrays of antennas mounted on towers or other structures of 100-200 feet. *Id*. ¶41 (JA 820).

As the agency was informed, "[i]n 2017, approximately 62 percent of Verizon's wireless deployments were small cells, a figure that will only grow larger as we deploy 5G in 2018 and beyond." *Id.* citing Verizon 2/26/18 ex parte

(JA 654). Today, moreover, the record reflects that a majority and increasing number of wireless deployments are small facilities. *Id.* ¶39 (JA 819). After its examination of the "extensive record" in this proceeding, the Commission concluded that the public interest did not warrant continuing to apply the requirements of Section 1.1312 to small wireless facility deployments (except on Tribal Lands, *Order* ¶72 (JA 831), "that are deployed to provide service under geographic area licenses and are not subject to [antenna structure registration]." *Order* ¶45 (JA 821).

"An agency's view of what is in the public interest may change, either with or without a change in circumstances," as long as the agency "suppl[ies] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnotes omitted); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). The record amply justifies the Commission's conclusion in this case that the public interest would not be served by subjecting small wireless facility deployments to Section 1.1312's review requirement. *Order* ¶61 (JA 826).

A. The Commission Reasonably Amended Its Rules To Remove Small Cell Facilities.

The Commission relied on two principal rationales in deciding not to subject small cell deployments to it limited approval authority. First, the Commission

concluded that the revised scope of its "limited approval authority" was consistent with the rule's original purpose and current agency practice – namely, conducting historic and environmental review for large wireless facilities. The Commission noted that it had "never engaged in a considered analysis of whether the public interest requires [federal historic preservation and environmental] review for all wireless facilities." *Order* ¶39 (JA 819). But when the Commission last amended its rules in 2004, "virtually every outdoor wireless facility deployed was a 'macro' facility consisting of large arrays of panel antennas mounted on towers, roof tops, or other structures at heights of 100-200 feet or more above ground level." *Id.* It thus stood to reason that the Commission had these facilities in mind when it crafted its historic and environmental review requirements.

The Commission further noted that, under existing practice, it had already made "common-sense accommodations … for types of deployments that have limited potential for environmental and historic preservation effects and for which compliance would be impractical." *Order* ¶66 (JA 828). Thus, the Commission does not impose Section 1.1312 review on such wireless devices as "consumer signal boosters, WiFi routers, or unlicensed equipment used by wireless Internet service providers," *Id.*; *see id.* ¶43 (JA 820), or on larger pieces of equipment, such

as backyard satellite dishes.[11] Nor does the Commission subject to environmental or historic review small wireless equipment that is affixed (collocated) on many existing structures. 47 C.F.R. Part 1, App. B, §VI.

Surveying this landscape, the Commission concluded that excluding small wireless facilities from the scope of federal environmental and historic review would be consistent with the original purpose of the rule and with Commission practice.

Second, the Commission reasonably concluded that the regulatory burdens imposed by continuing to subject these small wireless deployments to NHPA and NEPA review pursuant to the limited approval authority in Section 1.1312 would be "impractical, extremely costly, and contrary to the purposes of the Communications Act." *Order* ¶65 (JA 828).

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[11] The FCC regulates devices that are capable of emitting radio frequency (RF) energy. Although the Commission does not individually license or oversee the deployment of these devices, they are subject to the restrictions and authorization requirements contained in Parts 2 and 15 of the agency's rules. *See* 47 C.F.R. Pts 2, 15. Included are such common and ubiquitous items as WiFi transmitters/routers, wireless garage door openers, wireless microphones, wireless alarm systems, and satellite dishes, all of which may be used by consumers or in a commercial or industrial setting. The Commission has recently adopted rules governing a specific category of such devices – signal boosters – that are also used by consumers and industry to improve wireless coverage in a home, commercial or educational setting. *See Amendment of Rules to Improve Wireless Coverage Through the Use of Signal Boosters*, 28 FCC Rcd 1663 (2013).

The Commission's decision not to apply Section 1.1312 to small cell deployments directly advances the goals of the Communications Act because it promotes the efficient and intensive use of wireless spectrum, 47 U.S.C. §§ 301, 309(j)(3), by removing obstacles to the deployment of wireless infrastructure, 47 U.S.C. § 1302(a). It also is entirely consistent with Congress's decision to amend Section 319(d) of the Act, 47 U.S.C. § 319(d), to remove the construction permit requirement for "stations licensed to common carriers," like wireless carriers, unless the Commission makes a finding that such a requirement is in the public interest. Congress was concerned that if a construction permit were required for such carriers, it "may delay market entry and place an unnecessary administrative and financial burden on both the potential licensee and on the Commission." H.R. Conf. Rep. No. 97-765, 51-52 (1982). As the Commission explained, it would be "contrary to the intent of Section 319(d) to replace the eliminated construction permit requirement with a different approval process that, at least in the small wireless facility context, risks replicating the harmful effects that Congress expressly sought to eliminate." *Order* ¶63 (JA 827).

The record bears out the Commission's concerns about the prohibitive costs that permitting processes can impose on new deployments. Petitioners do not appear to dispute that the new generation of wireless services needed to satisfy consumer demand will require the deployment of numerous small wireless facility

deployments in the coming years. *Order* ¶64 (JA 827). *See also Order* ¶40 (JA 819). As the Commission noted, "Verizon anticipates that 5G networks will require 10 to 100 times more antenna locations than previous technologies," "AT&T estimates that carriers will deploy hundreds of thousands of wireless facilities," and "Sprint … has announced plans to build at least 40,000 new small sites over the next few years." *Order* ¶64 (JA 827).[12]

As a result, as the Commission found, the record "clearly indicates that there are substantial, rising, and unnecessary costs for deployment that stem from compliance with NEPA and the NHPA." *Order* ¶68 (JA 829). For example, Sprint stated that "[o]ver the last several decades" it had performed "preliminary NEPA checklists for thousands of sites at a cost of tens of millions of dollars," of which "approximately 250" triggered preparing an additional assessment, and every one of those resulted in a finding of no significant impact. *Id.* (citing Sprint Comments at 35 (JA 393)). AT&T and Verizon reported similar burdens. *See Order* ¶ 69 (JA 822) (26 percent of Verizon's costs in deploying small cells in five studied markets was due to NEPA and NHPA review, while AT&T reported 17 percent of its small cell deployment costs were due to NEPA and NHPA review). And CTIA, the wireless industry trade association, submitted a report indicating that in 2017

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[12] *See also, e.g.,* CTIA/WIA Comments at 4-5 (JA 301-302) ; Sprint Comments at 8-12, 35-36 (JA 381-385, 393-394) ; T-Mobile Comments at 5-7 (JA 402-404) ; Verizon Comments at 3-5, 44-45. (JA 410-414).

wireless providers spent nearly $36 million on NHPA and NEPA compliance and estimated that without any change in Commission policy those costs would increase to $241 million in 2018 based on providers' plans. *Id*. (citing CTIA 3/13/18 ex parte Att. (JA 665)).

The costs of retaining historical and environmental review for small cell deployments, the Commission pointed out, are measured not simply in financial terms but also in terms of delay in deploying new services. The Commission found such delays due to review likely to be "substantial" and "enough to weigh in our public interest calculus, particularly when aggregated across all the small wireless facility deployments that will be required in the coming years." *Order* ¶71 (JA 831); *see also id.* ¶70 (JA 830) (noting the "aggregate effect" of "time and resource expenditure associated with" NEPA and NHPA review).

"At the same time," the Commission concluded, "the record does not support sufficiently appreciable countervailing environmental and historic preservation benefits associated with subjecting small wireless facility deployments off of Tribal lands to historic preservation and environmental reviews." *Order* ¶72 (JA 831). The Commission found that the benefits associated with historic preservation and environmental review of small cell deployments are likely to be "*de minimis*, both individually and in the aggregate" – and even if the benefits were more than *de minimis*, "those benefits would be outweighed by the detrimental effects on the

roll-out of advanced wireless service." *Order* ¶79 (JA 837). *See also Order* ¶67 (JA 828) ("on balance, … the costs of requiring Section 1.1312 review for small wireless facilities outweigh the marginal benefits, if any, of environmental and historic preservation review").[13]

A particularly striking example "of the way that historic preservation review can impede broadband deployment with minimal to no benefit" involved the 2017 Super Bowl in Houston, Texas. *Order* ¶80 (JA 837). Even though "the stadium construction itself" did not require Tribal consultation under Section 106 of NHPA (because it involved no federal undertaking), wireless carriers "building an antenna in the [stadium] parking lot were obligated by the FCC's rules to engage in the Section 106 process," even though, as might have been expected, "those reviews did not lead to any substantive consultation with Tribal Nations that revealed adverse impacts." *Id*. (citing Sprint Comments at 15-16 (JA 388-389)). That "anomalous outcome," in the Commission's view, "highlights what we see as the misdirected public interest consequences" that would flow from "appl[ying] Section 1.1312's approval requirement to small wireless facility deployment." *Id*.

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[13] The Commission left "undisturbed," however, "the historic preservation and environmental review processes" for the deployment of wireless facilities "[o]n Tribal lands." *Order* ¶72 (JA 831). The Commission found that determination supported by the *Wireless Infrastructure NPRM*'s focus on "areas of Tribal interest" (rather than Tribal lands) and "by [its] review of the record," which showed that "wireless providers have not experienced the same challenges arising from the historic preservation process on Tribal lands." *Id*.

Contrary to Petitioners' bare assertion that the Commission failed to seriously consider the cumulative effect of its actions (UKB Br. 36), the record amply supports the Commission's conclusion in this regard. For example, Crown Castle (a major tower company) "state[d] that it has never received a report or a negative response from a Tribal Nation regarding a proposed small cell deployment," and Sprint informed the Commission that "in the thousands of tower and antenna projects it has undertaken since 2004 … it has never had a substantive consultation with Tribal Nations that revealed possible adverse impacts on historic properties." *Id*. 79 (JA 837) (citing Crown Castle Comments at 34 (JA 278); Sprint Comments at 6 (JA 379)). *See also* JA 413 (Verizon Comments at 44) (only 0.3% of Verizon requests for Tribal review resulted in findings of an adverse effect to Tribal historic properties); JA 637 (AAR Reply at 5) (more than 99.6 % of deployments "pose no risk to historic, tribal and environmental interests").

The Commission also noted AT&T's observation that the "'vast majority of small cell antennas are placed at a height of less than 60 feet on structures located near similarly sized structures in previously disturbed rights-of-way, greatly reducing the likelihood of adversely impacting the surrounding environment.'" *Order* ¶74 (JA 832) (quoting AT&T 2/23/18 ex parte letter at 1 (JA 640)). And Verizon indicated that only twenty per cent of its small wireless facility deployments involve construction of new structures at all. *Order* n.112 (JA 112), citing

Verizon 2/23/18 ex parte letter at 1 (JA 652). These facts illustrate that, both individually and cumulatively, small cell deployment is unlikely to have a significant historic preservation or environmental effect.

The Commission's small-cell definition itself, framed as an exclusion from the scope of Section 1.1312 review, was constructed "in such a way as to minimize the impact that these facilities, as a class, could have on the environment and historic properties." *Order* ¶73 (JA 832). With this goal in mind, the Commission removed from review only those facilities "that are limited in antenna volume, associated equipment volume, and height." *Id.*

To qualify as such a "small wireless facility," the "antenna associated with the deployment, excluding the associated equipment, must be no more than three cubic feet in volume." *Order* ¶75 (JA 833). The Commission found that size, which is similar to that specified in a number of state laws "seeking to facilitate small wireless facility deployment," *id.* & n.138 (JA 833) (collecting examples), and analogous to facilities that the Commission has eliminated from review when collocated on existing structures, *id.*, is likely to be "unobtrusive and in harmony with the poles, street furniture, and other structures on which they are typically deployed," *id.* (Petitioners simply ignore the Commission's reasonable reliance on state small cell bills in attacking the agency's definition.)

In addition, the Commission decided, the wireless equipment associated with the antenna "must be no larger than 28 cubic feet" in volume. *Order* ¶76 (JA 835). Again, the Commission derived this limit from analogous limits it has employed in excluding collocated equipment from review, as well as the definition of small wireless facilities in many state laws. *Id*. The Commission found that the limit "appropriately balances our policy goal of promoting advanced wireless service" with its "recognition of the importance of environmental and historic preservation concerns where they might meaningfully be implicated." *Id*.

Finally, the Commission determined to remove small wireless facilities from review only "if they are deployed on new structures that are either no taller than the greater of 50 feet (including their antennas) or no more than 10 percent taller than other structures in the area." *Order* ¶74 (JA 832).[14]

Individually and collectively, the Commission's 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. Conversely, because the limits include the kinds of facilities that are most likely to

[14] The Commission also removed "any small wireless facility that is affixed to an existing structure, where as a result of the deployment that structure is not extended to a height of more than 50 feet or by more than 10 percent, whichever is greater." *Order* ¶74 (JA 832).

be needed in rolling out next-generation wireless services, the benefits to streamlining review are likely to be substantial. The Commission thus reasonably determined that the benefits of subjecting small wireless facilities, as defined, to historic preservation and environmental review, even considered in the aggregate, were "far outweigh[ed]" by the costs to deployment of such review. *Order* ¶81 (JA 838).[15] This is a public interest determination under the Communications Act to which courts owe substantial deference.

Finally, the Commission made clear that nothing in its decision "precludes any review conducted by other authorities – such as state and local authorities – insofar as they have review processes encompassing small wireless facility deployments." *Order* ¶77 (JA 835). Indeed, many states have laws similar to NHPA and NEPA.[16] As the Commission noted, such state and local review can

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[15] Keetoowah contends that in 2014 the Commission "declined to adopt a categorical exclusion for small cells based on size" and that the Commission's decision here fails to explain its different conclusion. UKB Br. 35. However, as the Commission explained in the *Order*, it did not, in that earlier proceeding, "consider whether, in the first instance, it could amend its rules to clarify that small wireless facilities are not Commission undertakings or whether the public interest would be served by doing so." *Order* ¶56 (JA 825). In any event, the Commission has more than adequately explained the bases for its decision in the *Order*.

[16] *See, e.g.*, New York State Environmental Quality Review, 6 NYCRR Part 617; New York State Historic Preservation Act of 1980, 1980 N.Y. Laws ch. 354; California Environmental Quality Act, Public Resources Code 21000–21189; 2017 West Virginia Code - §29-1-8b (Protection of historic and prehistoric sites).

"act as an independent check" on wireless deployment in light of local conditions. *Id*. n.153 (JA 836).

Petitioners assert that in a September 2018 order the Commission "moved to pre-empt" local zoning laws, "effectively gutting the very safeguards the Order touts as protections." UKB Br. 19. This misrepresents the Commission's action, which simply clarified the role of local and state zoning authorities under specific Communications Act provisions. *See Accelerating Wireless Broadband Development by Removing Barriers to Infrastructure Investment*, FCC 18-133 (Sept. 27, 2018), *pets. for review filed*, *Sprint Corp. v. FCC*, Nos. 18-9563, *et al.* (10th Cir. Oct. 25, 2018). Indeed, the September order explicitly recognized the authority of state and local governments to permit, approve, or license the construction of physical infrastructure. *Id.* ¶6. *See also* 47 U.S.C. § 332(c)(7) (generally preserving the authority of state and local governments "over decisions regarding the placement, construction, and modification of personal wireless facilities"). Nor does the limited preemption of a non-federal decision turn that decision into an undertaking or major federal action for purposes of NHPA or NEPA. *See Padgett v. Surface Transp. Board*, 804 F.3d 103, 109-110 (1st Cir. 2015).

B. NRDC's Objections To The Order Are Meritless.

Petitioner NRDC and Intervenor Myer also contend that the *Order* is unlawful because the Commission failed to conduct "any analysis of the potential

detriments of wireless technology on the human environment." Br. 10. In particular, they refer to the Commission's statement that it did "not address here any potential for effects associated with the actual provision of licensed service, such as RF [radio frequency] issues." *Order* n.187 (JA 842); *see* NRDC Br. 15.

The *Order* did not itself authorize any provision of wireless services, new or continuing, and there was thus no effect of RF radiation on the human environment to analyze. Instead, the *Order* determined that small wireless deployments are not major federal actions subject to NEPA and thus such deployments need not undergo federal environmental review. The *Order* simply has no impact on the rights or obligations of providers who seek to transmit wireless signals.

In any event, even if the provision of wireless service were at issue in this case, all facilities providing wireless services pursuant to geographic area licenses, including small wireless facilities, "remain subject to [the Commission's] rules governing radiofrequency (RF) emissions exposure." *Order*. ¶45 & n. 58. (JA 821). *See* 47 C.F.R. §§ 1.1307 – 1.1310. Thus, the Commission's exclusion of small wireless facility *deployment* from NEPA review does not eliminate or modify the ongoing obligation of providers to comply with existing FCC RF radiation regulations in providing *service*.

NRDC apparently does not agree with the FCC's existing RF rules, contending that the Commission has "disregard[ed]" a 2012 Government Accountability

Office report that, NRDC alleges, is "critical of the stale science" underlying the FCC's radiofrequency rules. Br. 11. But that report dealt with the RF radiation exposure from cell phones, not from the wireless infrastructure that is at issue here. *Exposure and Testing for Mobile Phones Should Be Reassessed*, GAO-12-771 (July 2012). It thus does not support Petitioners' argument that the Commission must revise its current RF limits before exempting small cells from environmental rules.

Regardless of the evidence, Petitioners' arguments amount to a request that the Commission revisit unrelated rules that were adopted following notice and comment and remain the Commission's considered judgment as to the safe levels of RF emissions. As it happens, partly in response to the GAO report, the Commission has instituted a proceeding to study and reassess its standards and policies governing RF radiation.[17] But the Commission did not have a duty to complete that inquiry before it adopted the *Order* under review in this case. *See U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) ("agencies need not address all problems 'in one fell swoop'"). Here, Petitioners have not come close to demonstrating that it was arbitrary or capricious for the FCC to act to remove unnecessary barriers to small wireless facility deployments before it completes a

[17] *See Order* n.58 (JA 821) (citing *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, 28 FCC Rcd 3498 (2013)).

reassessment of the agency's existing RF radiation regulations that may or may not result in the adoption of any new emission levels.

III. THE COMMISSION ACTED REASONABLY IN CLARIFYING ITS PROCEDURES TO REDUCE REGULATORY IMPEDIMENTS TO DEPLOYMENT OF LARGER WIRELESS FACILITIES.

In addition to removing impediments to the deployment of small wireless facilities, the Commission also reasonably streamlined aspects of the historic review process for larger facilities, first, by clarifying carrier obligations to pay fees in connection with the Section 106 process, and second, by revising the timelines applicable to that process. Petitioners take issue with the Commission's decisions, but both fall comfortably within its authority.

A. The Commission's Clarification Regarding Fees In The Historic Review Process Was Reasonable.

The Advisory Council has long explained that when a federal agency or applicant "seek[s] the views of an Indian tribe to fulfill the agency's obligation to consult with a tribe … the agency or applicant is not required to pay the tribe for providing its views." ACHP Memorandum, "Fees in the Section 106 Review Process" (July 6, 2001) (JA 912) (*ACHP 2001 Fee Guidance*). *See also* ACHP, "Consultation with Indian Tribes in the Section 106 Review Process: A Handbook 13 (2012) (*ACHP 2012 Handbook*) (JA 1015) (no "portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any tribal involvement"). In this regard, the Advisory Council has made clear that "[i]f the

agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process." *ACHP 2001 Fee Guidance* at 3 (JA 914). By contrast, the Advisory Council has explained, if the agency or applicant asks the Tribe 'to fulfill the duties of the agency in a role similar to that of a consultant or contractor," such as asking the Tribe "for specific information and documentation regarding the location, nature and condition of individual sites," or requesting that the Tribe conduct "a survey," the Tribe "would be justified in requesting payment for its services, just as is appropriate for any other contractor." *2012 ACHP Handbook* at 13.

The record before the Commission showed that it has become a "more common practice" for Tribes to charge fees upon being notified that a wireless facility is proposed to be deployed in an area of potential interest to the Tribe, and that "the amounts of these fees have increased significantly over the years." *Order* ¶117 (JA 857); *see also id.* ¶¶12-13 (JA 810), pp. 24-26 above.

In response, the Commission in the *Order* "clarif[ied], consistent with ACHP guidance, that applicants are not required to pay Tribal Nations or [Native Hawaiian Organizations] up-front fees simply for initiating the Section 106 consultative process." *Order* ¶116 (JA 856).

Petitioners challenge the reasonableness of the Commission's clarification on the ground that it "encourages applicants, which have until this point voluntarily paid fees, to refuse paying Tribes for services in reviewing [wireless deployment] notices." UKB Br. 38. But as the Advisory Council has made clear, applicants were never obligated to pay Tribes for providing their views. *2001 ACHP Fee Guidance*.[18] The *Order* simply makes that clear in the context of wireless deployments subject to the Section 106 process. The suggestion that the Commission's action to clarify the issue of Tribal fees in the Section 106 process is in conflict with "ACHP guidance" is thus baseless. *See* UKB Br. 39; *see also* Blackfeet Br. 30.

The Blackfeet Tribe claims that the Commission adopted a "prohibition on the collection of fees." Blackfeet Br. 16, 20. But that is a misreading of the *Order*, which makes very clear that Tribal Nations "remain free to request up-front fees and applicants may, if they choose, voluntarily pay such fees." *Order* ¶120 (JA

[18]The Advisory Council has recently released updated guidance related to Indian tribes' participation in the Section 106 historic preservation process. Its discussion of fees is consistent with its prior guidance and with the FCC's action in the *Order*. *See Guidance on Assistance to Consulting Parties In the Section 106 Review Process* 4-5 (ACHP Nov. 28, 2018).

858). What the Tribes cannot do is insist on up-front fees before providing their views. *Id.*[19]

Petitioners also take issue with the Commission's decision to permit carriers to retain any "properly qualified consultant or contractor when expert services are required, whether in the course of identifying historic properties, assessing effects, or mitigation." *Order* ¶128 (JA 862). *See* UKB Br. 40. In doing so, the Commission made clear that "so long as the underlying obligation to make reasonable and good faith efforts to identify historic property is satisfied, the applicant is not bound to any particular method of gathering information." *Order* ¶125 (JA 860).

Petitioners contend that this "guid[es] industry toward contracting with the lowest bidder." UKB Br. 40. But given that any consultant hired must be "properly qualified," opening up the market for consultant services is no flaw, since, as the

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[19] Keetoowah complains that, in implementing the *Order*, Commission staff no longer permits Tribes to request fees through the Commission's automated Tower Construction Notification System (TCNS). UKB Br. at 38-39 (citing *QA-Wireless Infrastructure Second Report & Order* at 6 (WTB July 2, 2018) (JA 1037)). A Tribe's inability to request fees through the TCNS does not prohibit it from communicating such a request by any other means. Moreover, that staff decision is not before the Court and would not be reviewable in any event. *NTCH, Inc. v. FCC*, 877 F.3d 408, 412 (D.C. Cir. 2017) (petition for review of agency staff action incurably premature).

Commission explained, "competition among experts qualified to perform the services that are needed will generally ensure that the fees charged are commensurate with the work performed." *Order* ¶128 (JA 862).[20]

Keetoowah contends that "Tribes hold unique, and often sacred knowledge regarding where their historic properties are located and what is needed to protect them," and that "[n]on-tribal consultants are not qualified to assess impacts to Tribal historic properties," "to design mitigation measures," or "monitor construction to ensure Tribal historic properties are protected." UKB Br. 40-41. That may be true in certain cases, and the *Order* recognizes this, declaring that, "in selecting a consultant or contractor, the applicant must determine whether the consultant or contractor possesses the appropriate qualifications to perform the work involved in each particular case." *Order* n.307 (JA 863). The Commission thus expected "that where Tribal Nations or NHOs offer services necessary to protect historic properties that they are qualified to provide at competitive rates … applicants will continue to engage them to perform those services." *Order* n.304 (JA 862). In any event, where there is a dispute over whether a non-Tribal consultant is properly qualified, "either party may ask the Commission to decide"

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[20] The Commission noted that "with respect to the identification and evaluation of historic properties, any assessment of effects shall be undertaken by a professional who meets the Secretary of the Interior's Professional Qualification Standards." *Order* ¶128 (JA 862).

whether "the applicant's [NHPA] obligations have been satisfied," in a proceeding in which "the applicant will have the burden" of substantiating that it has done so. *Order* ¶130 (JA 862).

B. The Commission's Limited Revision Of The Procedural Timeline For Consultation Was Reasonable.

The Commission also adopted limited changes in the procedural timelines applicable to the Section 106 historic preservation review process that continues to apply to the deployment of larger wireless facilities not on Tribal lands. Keetoo-wah's one-paragraph challenge to these changes is unavailing.

In the 2004 Nationwide Programmatic Agreement and in a 2005 Declaratory Ruling, the Commission adopted timelines governing applicants' requirements to identify and contact any Tribal Nation that may attach religious and cultural significance to historic properties that may be affected by an undertaking.[21] To facilitate this process, the Commission developed the Tower Construction Notification System (TCNS), which automatically notifies Tribal Nations of proposed constructions within geographic areas that they have confidentially identified as potentially containing historic properties of religious and cultural significance to them.

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[21] *See* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1, App. C, §§ IV.B, IV. C; *Clarification of Procedures Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092 (2005)

In the *Order*, the Commission made two changes to the timeline for Tribal responses to TCNS notifications. First, to address Tribal concerns about receiving insufficient information from applicants, it clarified that applicants must provide Tribes with complete information required by applicable rules before the time period for Tribal responses begins to run. *See Order* ¶¶104, 108 (JA 851, 852). Second, the *Order* clarified that the existing 30-day period for Tribal responses to applicant notifications begins to run on the date the Tribe can be shown to have received or may reasonably be expected to have received the complete information required to be provided by the applicant. *See Order* ¶109 (JA 853).

The Commission also established a new procedure to address circumstances where Tribal Nations fail to respond after receiving applicant information. Under prior procedures, it took at least 60 days to resolve cases where a Tribal Nation failed to respond to an initial notification about an applicant's proposed construction. *See Order* ¶110 (JA 854). In the *Order*, the Commission established a 45-day timetable for moving forward. Under the revised procedures, an applicant that has not received a response "within 30 calendar days" of the date the Tribal Nation or NHO "can be shown or may reasonably be expected to have received notification" that information regarding the proposed construction is available, the applicant "can refer the matter to the Commission for follow-up." *Order* ¶111 (JA 855). Upon receiving such a referral, Commission staff will promptly contact the

Tribal Nation or NHO, which must then "inform the Commission and applicant within 15 calendar days … of its interest or lack of interest in participating in the Section 106 review." *Id*. If the Tribal Nation or NHO does not respond within that time, "the applicant's pre-construction obligations are discharged." *Id*.

The Commission expected that its revised timeline "will reduce delays and facilitate resolution of cases where Tribal Nations … have not provided timely responses" to notifications of construction. *Order* ¶113 (JA 856). At the same time, the Commission emphasized, the revised procedures would provide "multiple opportunities" for Tribal Nations and NHOs "to express their interest in proposed construction." *Id*.

Keetoowah asserts that "[b]y and large Tribes promptly respond to TCNS notices and are not interested in creating additional delay." UKB Br. 41. Nevertheless, it contends that the Commission's shortened timeline is "unreasonable" because Tribes "operate with limited staff and budget." *Id.* The Commission's changes fall well within its discretion to fashion its procedures. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-544 (1978) ("administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'") (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)). Even with limited resources, there is no reason why 45 days should not allow sufficient time

for a Tribe or NHO to provide an expression of interest in proposed construction after a description of that proposal has been made available to it. Precisely where the line should be drawn is a matter for the agency's judgment. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007) (noting the courts "demand[] far less than perfect precision in agency line drawing").

IV. THE COMMISSION'S COMMITMENT TO CONSULT WITH TRIBAL GOVERNMENTS IS NOT JUDICIALLY ENFORCEABLE, BUT WAS IN ANY EVENT FULFILLED.

In 2000, the FCC adopted a statement of policy recognizing the principles of Tribal sovereignty inherent in the relationships between federally-recognized Indian tribes and the federal government. *Tribal Policy Statement*, 16 FCC Rcd at 4079-4080. As part of that statement, the Commission explained that it would, "to the extent practicable … consult with Tribal governments" prior to implementing regulatory action that would significantly impact "Tribal governments, their land and resources." *Id.* The Commission was explicit, however, that the *Tribal Policy Statement* was "not intended to, and does not, create any right enforceable in any cause of action by any party against the United States, its agencies or instrumentalities, officers or employees, or any person." *Id.* at 4080.

1. Contrary to petitioners' claim that the Commission "made absolutely no effort to sit down with the tribes to discuss these issues or hear their views," Blackfeet Br. 21, FCC Commissioners and other agency officials engaged in

numerous meetings with Tribal Nations, both before and after issuance of the *NPRM* in this proceeding, and during which agency officials explained and received feedback on the proposals.

As the Commission explained in substantial detail in the *Order,* it "engaged in extensive consultations" with federally recognized Tribal Nations with regard to its reexamination of the regulatory framework governing the deployment of the next generation of wireless broadband. *Order* ¶18 (JA 812). The *Order* noted that its outreach efforts began in 2016, before adoption of the *NPRM*, and that through early 2018 "Commissioners and FCC staff visited at least nine different states, including Arizona, California, Connecticut, New Mexico, North Carolina, Oregon, South Dakota, Virginia, and Wisconsin." *Id*. In addition, the Commission stated, there were many discussions with Tribal representatives "at FCC headquarters" and "numerous, widely-attended conference calls." *Id*. "One of the in-person consultations was attended by over 70 representatives of more than 50 Tribal Nations and organizations." *Id.* The Commission set forth a detailed description of these consultations that extends over 16 paragraphs of the *Order*. *See id.* ¶¶19-35 (JA 812-817).

Petitioners contend that the Commission "mischaracterizes the nature and extent" of the agency's consultation efforts. UKB Br. 45-46. Despite Petitioners' disagreement with the Commission's characterization of specific meetings, they

cannot dispute that the Commission engaged in extensive and numerous discussions with Tribal Nations by the agency's Chairman, other Commissioners and staff over more than a year concerning the very issues raised by the *Order*. *See Order* ¶¶19-35 (JA 812-817).

Petitioners contend that the Commission failed to "meaningfully consult" with them on those issues. UKB Br. 45. But they fail to identify the standards by which they would determine whether a "meaningful" consultation has occurred, or to explain why the extensive set of meetings between Commission officials and Tribal Nation representatives do not qualify as meaningful. In any event, neither the *Policy Statement* nor Commission orders or regulations define the term "consult." The term is therefore appropriately construed in accordance with its ordinary meaning – which is simply to "seek advice or information of." AMERICAN HERITAGE DICT. 395 (5th ed. 2011).

"Consultation is not the same as obeying those who are consulted." *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986). The Tribes who disagreed with the Commission "were heard, even though their advice was not accepted." *Id.*; *see also Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 167 (1st Cir. 2003). The record shows that Tribal Nations had a fair opportunity to present their concerns to the agency. That is all that the *Tribal Policy Statement* contemplates.

2. Even if the extensive consultations between the Commission and Tribal Nations had fallen short of the Commission's *Tribal Policy Statement* commitment, it would not provide Petitioners with a basis for contesting the validity of the *Order*. The *Tribal Policy Statement* by its terms does not give rise to any judicially enforceable rights. 16 FCC Rcd at 4080 (the *Statement* "does not, create any right enforceable in any cause of action by any party against the United States, its agencies or instrumentalities, officers or employees, or any person."). This express statement forecloses Petitioners' claim that the *Order* can be rendered procedurally infirm for failure to consult in accordance with the *Tribal Policy Statement*. *See, e.g.*, *Yankton Sioux Tribe v. DHHS*, 533 F.3d 634, 643-44 (8th Cir. 2008) (no enforceable consultation right where consultation policy stated that nothing in it "creates a right of action against the Department … for failure to comply").

The Eighth Circuit's decision in *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979), upon which Petitioners rely (UKB Br. 42), is not to the contrary. In that case, "the government d[id] not argue that the [Bureau of Indian Affairs was] not bound by [its] consultation guidelines, or that the guidelines [were] not enforceable by the affected tribes or … members of tribes." *Id*. at 718. In contrast, the Commission's consultation policy, "is not intended to, and does not create any right enforceable in any cause of action by any party." *Tribal Policy Statement*, 16 FCC Rcd at 4080-81 (JA 909-910). Likewise, *Wyoming v. Dept. of the Interior*,

136 F.Supp.3d 1317 (D. Wyo. 2015), *vacated and remanded*, *Wyoming v. Sierra Club*, 2016 WL 3853806 (10th Cir. 2016) (Blackfeet Br. 21 n.7), involved a challenge to action by the Bureau of Land Management implementing a Department of Interior policy that did not contain the preclusive language of the FCC *Tribal Policy Statement* related to judicial enforceability. *See* Dept. of Interior Secretarial Order No. 3317 (2011).

Petitioners' reliance on *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018) (UKB Br. 44) is similarly misplaced. That case involved the tribal consultation requirement imposed by NHPA, which provides that "[i]n carrying out its responsibilities under [section 106 of the Act]," "a Federal agency shall consult with any Indian Tribe or Native Hawaiian Organization that attaches religious and cultural significance" to "[p]roperty of traditional religious and cultural importance" to it. 54 U.S.C. § 302706(b). But federal agencies have Section 106 responsibilities only with regard to federal "undertakings." *Id*. § 306108. In *Oglala Sioux v. NRC*, the agency action at issue was the NRC's grant of a uranium mining license, which the NRC acknowledged was an action subject to NHPA obligations. *See* 896 F.3d at 525-526. As we have explained, the deployment of small wireless facilities is not a federal undertaking under NHPA.

3. Finally, Petitioners claim that several Executive Orders mandate federal agency consultations with Tribal Nations. UKB Br. 42-43; Blackfeet Br. 21. These

claims are equally without merit. None of the Executive Orders cited by petitioners applies to the FCC.

Executive Order 13175, 65 Fed.Reg. 67249 (2000), which generally establishes procedures for "Consultation and Coordination with Indian Tribal governments," by its terms applies to government agencies, but defines "Agency" to "mean[] any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5)." EO 13175, §1(c), 65 Fed. Reg. at 67249. And 44 U.S.C. § 3502(5) specifically lists the "Federal Communications Commission" as such an "independent regulatory agency." Other Executive Orders cited by Petitioners contain the same limitations. *See* Executive Order 12875, 58 Fed.Reg. 58093 (1993); Executive Order 13007, 61 Fed.Reg. 26771 (1996).

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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January 31, 2019

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STATUTORY ADDENDUM

47 U.S.C. -

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

***

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

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§ 319. Construction permits

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(d) Government, amateur, or mobile station; waiver

A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.

§ 1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in

particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area--

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection:[1]

(1) Advanced telecommunications capability

The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term “elementary and secondary schools” means elementary and secondary schools, as defined in section 7801 of Title 20.

§ 332. Mobile services

***

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
(ii) enforcement of such provision is not necessary for the protection of consumers; and
(iii) specifying such provision is consistent with the public interest.
(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.
(C) As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.
(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).
(2) Non-common carrier treatment of private mobile services
A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.
(3) State preemption
(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.
(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.
(4) Regulatory treatment of communications satellite corporation
Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].
(5) Space segment capacity
Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.
(6) Foreign ownership
The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that

lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:
(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.
(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.
(7) Preservation of local zoning authority
(A) General authority
Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
(B) Limitations
(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.
(C) Definitions
For purposes of this paragraph--
(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and
(iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but

does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term “commercial mobile service” means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term “interconnected service” means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term “private mobile service” means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

54 U.S.C. -

§ 300320. Undertaking (Formerly cited as 16 USCA § 470w)

In this division, the term “undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--

(1) those carried out by or on behalf of the Federal agency;

(2) those carried out with Federal financial assistance;

(3) those requiring a Federal permit, license, or approval; and

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

§ 302706. Eligibility for inclusion on National Register (Formerly cited as 16 USCA § 470a)

(a) In general.--Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
(b) Consultation.--In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).
(c) Hawaii.--In carrying out responsibilities under section 302303 of this title, the State Historic Preservation Officer for Hawaii shall--
(1) consult with Native Hawaiian organizations in assessing the cultural significance of any property in determining whether to nominate the property to the National Register;
(2) consult with Native Hawaiian organizations in developing the cultural component of a preservation program or plan for the property; and
(3) enter into a memorandum of understanding or agreement with Native Hawaiian organizations for the assessment of the cultural significance of a property in determining whether to nominate the property to the National Register and to carry out the cultural component of the preservation program or plan.

§ 306108. Effect of undertaking on historic property (Formerly cited as 16 USCA § 470f)

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

36 C.F.R. -

§ 800.3 Initiation of the section 106 process.

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.
(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.
(2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in

existence before January 11, 2001, the agency official shall follow the program alternative.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) Identify the appropriate SHPO and/or THPO. As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) Tribal assumption of SHPO responsibilities. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) Undertakings involving more than one State. If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) Conducting consultation. The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) Failure of the SHPO/THPO to respond. If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) Consultation on tribal lands. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) Plan to involve the public. In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).
(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.
(1) Involving local governments and applicants. The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).
(2) Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.
(3) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.
(g) Expediting consultation. A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

§ 800.5 Assessment of adverse effects.

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.
(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:
(i) Physical destruction of or damage to all or part of the property;
(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;
(iii) Removal of the property from its historic location;
(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.
(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).
(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.
(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.
(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.
(2) Disagreement with finding.
(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also

concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.
(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.
(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.
(3) Council review of findings.
(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.
(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.
(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.
(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.
(d) Results of assessment—
(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in

accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.
(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

§ 800.16 Definitions.

(a) Act means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w–6.
(b) Agency means agency as defined in 5 U.S.C. 551.
(c) Approval of the expenditure of funds means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.
(d) Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.
(e) Comment means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.
(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's “Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act” provide further guidance on consultation.
(g) Council means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.
(h) Day or days means calendar days.
(i) Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.
(j) Foreclosure means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.
(k) Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.
(l)(1) Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term eligible for inclusion in the National Register includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.
(m) Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(n) Local government means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.
(o) Memorandum of agreement means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.
(p) National Historic Landmark means a historic property that the Secretary of the Interior has designated a National Historic Landmark.
(q) National Register means the National Register of Historic Places maintained by the Secretary of the Interior.
(r) National Register criteria means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).
(s)(1) Native Hawaiian organization means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.
(2) Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
(t) Programmatic agreement means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).
(u) Secretary means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.
(v) State Historic Preservation Officer (SHPO) means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.
(w) Tribal Historic Preservation Officer (THPO) means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.
(x) Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.
(y) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) Senior policy official means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

47 C.F.R.

§1.1301 Basis and purpose.

The provisions of this subpart implement Subchapter I of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321-4335.

§1.1302 Cross-reference; Regulations of the Council on Environmental Quality.

A further explanation regarding implementation of the National Environmental Policy Act is provided by the regulations issued by the Council on Environmental Quality, 40 CFR 1500-1508.28.

§1.1303 Scope.

The provisions of this subpart shall apply to all Commission actions that may or will have a significant impact on the quality of the human environment. To the extent that other provisions of the Commission's rules and regulations are inconsistent with the subpart, the provisions of this subpart shall govern.

[55 FR 20396, May 16, 1990]

§1.1304 Information and assistance.

For general information and assistance concerning the provisions of this subpart, the Office of General Counsel may be contacted, (202) 632-6990. For more specific information, the Bureau responsible for processing a specific application should be contacted.

§1.1305 Actions which normally will have a significant impact upon the environment, for which Environmental Impact Statements must be prepared.

Any Commission action deemed to have a significant effect upon the quality of the human environment requires the preparation of a Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) (collectively referred to as EISs) (*see* §§1.1314, 1.1315 and 1.1317). The Commission has reviewed representative actions and has found no common pattern which would enable it to specify actions that will thus automatically require EISs.

NOTE: Our current application forms refer applicants to §1.1305 to determine if their proposals are such that the submission of environmental information is required (*see* §1.1311). Until the application forms are revised to reflect our new environmental

rules, applicants should refer to §1.1307. Section 1.1307 now delineates those actions for which applicants must submit environmental information.

§1.1306 Actions which are categorically excluded from environmental processing.

(a) Except as provided in §1.1307 (c) and (d), Commission actions not covered by §1.1307 (a) and (b) are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing.

(b) Specifically, any Commission action with respect to any new application, or minor or major modifications of existing or authorized facilities or equipment, will be categorically excluded, provided such proposals do not:

(1) Involve a site location specified under §1.1307(a) (1)-(7), or

(2) Involve high intensity lighting under §1.1307(a)(8).

(3) Result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in §1.1307(b).

(c)(1) Unless §1.1307(a)(4) is applicable, the provisions of §1.1307(a) requiring the preparation of EAs do not encompass the construction of wireless facilities, including deployments on new or replacement poles, if:

(i) The facilities will be located in a right-of-way that is designated by a Federal, State, local, or Tribal government for communications towers, above-ground utility transmission or distribution lines, or any associated structures and equipment;

(ii) The right-of-way is in active use for such designated purposes; and

(iii) The facilities would not

(A) Increase the height of the tower or non-tower structure by more than 10% or twenty feet, whichever is greater, over existing support structures that are located in the right-of-way within the vicinity of the proposed construction;

(B) Involve the installation of more than four new equipment cabinets or more than one new equipment shelter;

(C) Add an appurtenance to the body of the structure that would protrude from the edge of the structure more than twenty feet, or more than the width of the structure at the level of the appurtenance, whichever is greater (except that the deployment may exceed this size limit if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable); or

(D) Involve excavation outside the current site, defined as the area that is within the boundaries of the leased or owned property surrounding the deployment or that is in proximity to the structure and within the boundaries of the utility easement on which the facility is to be deployed, whichever is more restrictive.

(2) Such wireless facilities are subject to §1.1307(b) and require EAs if their construction would result in human exposure to radiofrequency radiation in excess of the applicable health and safety guidelines cited in §1.1307(b).

NOTE 1: The provisions of §1.1307(a) requiring the preparation of EAs do not encompass the mounting of antenna(s) and associated equipment (such as wiring, cabling, cabinets, or backup-power), on or in an existing building, or on an antenna tower or other man-made structure, unless §1.1307(a)(4) is applicable. Such antennas are subject to §1.1307(b) of this part and require EAs if their construction would result in human exposure to radiofrequency radiation in excess of the applicable health and safety guidelines cited in §1.1307(b) of this part. The provisions of §1.1307 (a) and (b) of this part do not encompass the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use, established by the applicant or others. The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged. The provisions of §1.1307(a) and (b) of this part do not encompass the construction of new submarine cable systems.

NOTE 2: The specific height of an antenna tower or supporting structure, as well as the specific diameter of a satellite earth station, in and of itself, will not be deemed sufficient to warrant environmental processing, *see* §1.1307 and §1.1308, except as required by the Bureau pursuant to the Note to §1.1307(d).

NOTE 3: The construction of an antenna tower or supporting structure in an established “antenna farm”: (*i.e.*, an area in which similar antenna towers are clustered, whether or not such area has been officially designated as an antenna farm), will be categorically excluded unless *one or more of the antennas to be mounted on the tower or structure are subject to the provisions of §1.1307(b) and the additional radiofrequency radiation from the antenna(s) on the new tower or structure* would cause human exposure in excess of the applicable health and safety *guidelines* cited in §1.1307(b).

[51 FR 15000, Apr. 22, 1986, as amended at 51 FR 18889, May 23, 1986; 53 FR 28393, July 28, 1988; 56 FR 13414, Apr. 2, 1991; 64 FR 19061, Apr. 19, 1999; 77 FR 3952, Jan. 26, 2012; 80 FR 1268, Jan. 8, 2015]

§1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see §§1.1308 and 1.1311) and may require further Commission environmental processing (*see* §§1.1314, 1.1315 and 1.1317):

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

NOTE: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and part 226. To ascertain the status of proposed species and habitats, inquiries may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places (*see* 54 U.S.C. 300308; 36 CFR parts 60 and 800), and that are subject to review pursuant to section 1.1320 and have been determined through that review process to have adverse effects on identified historic properties.

(5) Facilities that may affect Indian religious sites.

(6) Facilities to be located in floodplains, if the facilities will not be placed at least one foot above the base flood elevation of the floodplain.

(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, *see* Executive Order 11990.)

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof,

equipment authorizations or modifications in existing facilities, require the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in §§1.1310 and 2.1093 of this chapter. Applications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities must contain a statement confirming compliance with the limits unless the facility, operation, or transmitter is categorically excluded, as discussed below. Technical information showing the basis for this statement must be submitted to the Commission upon request. Such compliance statements may be omitted from license applications for transceivers subject to the certification requirement in §25.129 of this chapter.

(1) The appropriate exposure limits in §§1.1310 and 2.1093 of this chapter are generally applicable to all facilities, operations and transmitters regulated by the Commission. However, a determination of compliance with the exposure limits in §1.1310 or §2.1093 of this chapter (routine environmental evaluation), and preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed in table 1, or those specified in paragraph (b)(2) of this section. All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA, except as indicated in paragraphs (c) and (d) of this section. For purposes of table 1, *building-mounted antennas* means antennas mounted in or on a building structure that is occupied as a workplace or residence. The term *power* in column 2 of table 1 refers to total operating power of the transmitting operation in question in terms of effective radiated power (ERP), equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in §2.1 of this chapter. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the Personal Communications Service, part 24 of this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, the phrase *total power of all channels* in column 2 of table 1 means the sum of the ERP or EIRP of all co-located simultaneously operating transmitters owned and operated by a single licensee. When applying the criteria of table 1, radiation in all directions should be considered. For the case of transmitting facilities using sectorized transmitting antennas, applicants and licensees should apply the criteria to all transmitting channels in a given sector, noting that for a highly directional antenna there is relatively little contribution to ERP or EIRP summation for other directions.

[TABLE 1 OMITTED]

(2)(i) Mobile and portable transmitting devices that operate in the Commercial Mobile Radio Services pursuant to part 20 of this chapter; the Cellular Radiotelephone Service pursuant to part 22 of this chapter; the Personal Communications Services (PCS) pursuant to part 24 of this chapter; the Satellite Communications Services pursuant to part 25 of this chapter; the Miscellaneous Wireless Communications Services pursuant to part 27 of this chapter; the Upper Microwave Flexible User Service pursuant to part 30 of this chapter; the Maritime Services (ship earth stations only) pursuant to part 80 of this chapter; the Specialized Mobile Radio Service, the 4.9 GHz

Band Service, and the 3650 MHz Wireless Broadband Service pursuant to part 90 of this chapter; the Wireless Medical Telemetry Service (WMTS), the Medical Device Radiocommunication Service (MedRadio), and the 76-81 GHz Band Radar Service pursuant to part 95 of this chapter; and the Citizens Broadband Radio Service pursuant to part 96 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in §§2.1091 and 2.1093 of this chapter.

(ii) Unlicensed PCS, unlicensed NII, and millimeter-wave devices are also subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in §§15.255(g), 15.257(g), 15.319(i), and 15.407(f) of this chapter.

(iii) Portable transmitting equipment for use in the Wireless Medical Telemetry Service (WMTS) is subject to routine environmental evaluation as specified in §§2.1093 and 95.2385 of this chapter.

(iv) Equipment authorized for use in the Medical Device Radiocommunication Service (MedRadio) as a medical implant device or body-worn transmitter (as defined in subpart I of part 95 of this chapter) is subject to routine environmental evaluation for RF exposure prior to equipment authorization, as specified in §§2.1093 and 95.2585 of this chapter by finite difference time domain (FDTD) computational modeling or laboratory measurement techniques. Where a showing is based on computational modeling, the Commission retains the discretion to request that supporting documentation and/or specific absorption rate (SAR) measurement data be submitted.

(v) All other mobile, portable, and unlicensed transmitting devices are categorically excluded from routine environmental evaluation for RF exposure under §§2.1091, 2.1093 of this chapter except as specified in paragraphs (c) and (d) of this section.

(3) In general, when the guidelines specified in §1.1310 are exceeded in an accessible area due to the emissions from multiple fixed transmitters, actions necessary to bring the area into compliance are the shared responsibility of all licensees whose transmitters produce, at the area in question, power density levels that exceed 5% of the power density exposure limit applicable to their particular transmitter or field strength levels that, when squared, exceed 5% of the square of the electric or magnetic field strength limit applicable to their particular transmitter. Owners of transmitter sites are expected to allow applicants and licensees to take reasonable steps to comply with the requirements contained in §1.1307(b) and, where feasible, should encourage co-location of transmitters and common solutions for controlling access to areas where the RF exposure limits contained in §1.1310 might be exceeded.

(i) Applicants for proposed (not otherwise excluded) transmitters, facilities or modifications that would cause non-compliance with the limits specified in §1.1310 at an accessible area previously in compliance must submit an EA if emissions from the applicant's transmitter or facility would result, at the area in question, in a power density that exceeds 5% of the power density exposure limit applicable to that transmitter or

facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility.

(ii) Renewal applicants whose (not otherwise excluded) transmitters or facilities contribute to the field strength or power density at an accessible area not in compliance with the limits specified in §1.1310 must submit an EA if emissions from the applicant's transmitter or facility results, at the area in question, in a power density that exceeds 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter of facility.

(c) If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (*See* §1.1313). The Bureau shall review the petition and consider the environmental concerns that have been raised. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA (*see* §§1.1308 and 1.1311), which will serve as the basis for the determination to proceed with or terminate environmental processing.

(d) If the Bureau responsible for processing a particular action, otherwise categorically excluded, determines that the proposal may have a significant environmental impact, the Bureau, on its own motion, shall require the applicant to submit an EA. The Bureau will review and consider the EA as in paragraph (c) of this section.

NOTE TO PARAGRAPH (d): Pending a final determination as to what, if any, permanent measures should be adopted specifically for the protection of migratory birds, the Bureau shall require an Environmental Assessment for an otherwise categorically excluded action involving a new or existing antenna structure, for which an antenna structure registration application (FCC Form 854) is required under part 17 of this chapter, if the proposed antenna structure will be over 450 feet in height above ground level (AGL) and involves either:

1. Construction of a new antenna structure;

2. Modification or replacement of an existing antenna structure involving a substantial increase in size as defined in paragraph I(C)(1)(3) of Appendix B to part 1 of this chapter; or

3. Addition of lighting or adoption of a less preferred lighting style as defined in §17.4(c)(1)(iii) of this chapter. The Bureau shall consider whether to require an EA for other antenna structures subject to §17.4(c) of this chapter in accordance with §17.4(c)(8) of this chapter. An Environmental Assessment required pursuant to this note will be subject to the same procedures that apply to any Environmental Assessment

required for a proposed tower or modification of an existing tower for which an antenna structure registration application (FCC Form 854) is required, as set forth in §17.4(c) of this chapter.

(e) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations contained in this chapter concerning the environmental effects of such emissions. For purposes of this paragraph:

(1) The term *personal wireless service* means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(2) The term *personal wireless service facilities* means facilities for the provision of personal wireless services;

(3) The term *unlicensed wireless services* means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services; and

(4) The term *direct-to-home satellite services* means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

[51 FR 15000, Apr. 22, 1986]

§1.1308 Consideration of environmental assessments (EAs); findings of no significant impact.

(a) Applicants shall prepare EAs for actions that may have a significant environmental impact (*see* §1.1307). An EA is described in detail in §1.1311 of this part of the Commission rules.

(b) The EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect. To assist in making that determination, the Bureau or the Commission may request further information from the applicant, interested persons, and agencies and authorities which have jurisdiction by law or which have relevant expertise.

NOTE: With respect to actions specified under §1.1307 (a)(3) and (a)(4), the Commission shall solicit and consider the comments of the Department of Interior, and the State Historic Preservation Officer and the Advisory Council on Historic Preservation, respectively, in accordance with their established

procedures. *See* Interagency Cooperation—Endangered Species Act of 1973, as amended, 50 CFR part 402; Protection of Historic and Cultural Properties, 36 CFR part 800. In addition, when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe. *See* §1.1307(a)(5).

(c) If the Bureau or the Commission determines, based on an independent review of the EA and any applicable mandatory consultation requirements imposed upon Federal agencies (*see* note above), that the proposal will have a significant environmental impact upon the quality of the human environment, it will so inform the applicant. The applicant will then have an opportunity to amend its application so as to reduce, minimize, or eliminate environmental problems. *See* §1.1309. If the environmental problem is not eliminated, the Bureau will publish in the FEDERAL REGISTER a Notice of Intent (*see* §1.1314) that EISs will be prepared (*see*§§1.1315 and 1.1317), or

(d) If the Bureau or Commission determines, based on an independent review of the EA, and any mandatory consultation requirements imposed upon Federal agencies (*see* the note to paragraph (b) of this section), that the proposal would not have a significant impact, it will make a finding of no significant impact. Thereafter, the application will be processed without further documentation of environmental effect. Pursuant to CEQ regulations, *see* 40 CFR 1501.4 and 1501.6, the applicant must provide the community notice of the Commission's finding of no significant impact.

[51 FR 15000, Apr. 22, 1986; 51 FR 18889, May 23, 1986, as amended at 53 FR 28394, July 28, 1988]

§1.1309 Application amendments.

Applicants are permitted to amend their applications to reduce, minimize or eliminate potential environmental problems. As a routine matter, an applicant will be permitted to amend its application within thirty (30) days after the Commission or the Bureau informs the applicant that the proposal will have a significant impact upon the quality of the human environment (*see* §1.1308(c)). The period of thirty (30) days may be extended upon a showing of good cause.

§1.1310 Radiofrequency radiation exposure limits.

(a) Specific absorption rate (SAR) shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in §1.1307(b) within the frequency range of 100 kHz to 6 GHz (inclusive).

(b) The SAR limits for occupational/controlled exposure are 0.4 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 8 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and

pinnae, where the peak spatial-average SAR limit for occupational/controlled exposure is 20 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 6 minutes to determine compliance with occupational/controlled SAR limits.

(c) The SAR limits for general population/uncontrolled exposure are 0.08 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 1.6 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit is 4 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 30 minutes to determine compliance with general population/uncontrolled SAR limits.

(d)(1) Evaluation with respect to the SAR limits in this section and in §2.1093 of this chapter must demonstrate compliance with both the whole-body and peak spatial-average limits using technically supportable methods and exposure conditions in advance of authorization (licensing or equipment certification) and in a manner that permits independent assessment.

(2) At operating frequencies less than or equal to 6 GHz, the limits for maximum permissible exposure (MPE), derived from whole-body SAR limits and listed in Table 1 of paragraph (e) of this section, may be used instead of whole-body SAR limits as set forth in paragraph (a) through (c) of this section to evaluate the environmental impact of human exposure to RF radiation as specified in §1.1307(b), except for portable devices as defined in §2.1093 as these evaluations shall be performed according to the SAR provisions in §2.1093 of this chapter.

(3) At operating frequencies above 6 GHz, the MPE limits shall be used in all cases to evaluate the environmental impact of human exposure to RF radiation as specified in §1.1307(b).

(4) Both the MPE limits listed in Table 1 of paragraph (e) of this section and the SAR limits as set forth in paragraph (a) through (c) of this section and in §2.1093 of this chapter are for continuous exposure, that is, for indefinite time periods. Exposure levels higher than the limits are permitted for shorter exposure times, as long as the average exposure over the specified averaging time in Table 1 is less than the limits. Detailed information on our policies regarding procedures for evaluating compliance with all of these exposure limits can be found in the FCC's *OET Bulletin 65,* “Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields,” and in supplements to *Bulletin 65,* all available at the FCC's Internet Web site: *http://www.fcc.gov/oet/rfsafety.*

Note to paragraphs (a) through (d): SAR is a measure of the rate of energy absorption due to exposure to RF electromagnetic energy. The SAR limits to be used for evaluation are based generally on criteria published by the American National

Standards Institute (ANSI) for localized SAR in §4.2 of "IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," ANSI/IEEE Std C95.1-1992, copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017. The criteria for SAR evaluation are similar to those recommended by the National Council on Radiation Protection and Measurements (NCRP) in "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86, §17.4.5, copyright 1986 by NCRP, Bethesda, Maryland 20814. Limits for whole body SAR and peak spatial-average SAR are based on recommendations made in both of these documents. The MPE limits in Table 1 are based generally on criteria published by the NCRP in "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86, §§17.4.1, 17.4.1.1, 17.4.2 and 17.4.3, copyright 1986 by NCRP, Bethesda, Maryland 20814. In the frequency range from 100 MHz to 1500 MHz, these MPE exposure limits for field strength and power density are also generally based on criteria recommended by the ANSI in §4.1 of "IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," ANSI/IEEE Std C95.1-1992, copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017.

(e) Table 1 below sets forth limits for Maximum Permissible Exposure (MPE) to radiofrequency electromagnetic fields.

[TABLE 1—OMITTED]

(1) Occupational/controlled exposure limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/controlled exposure also apply in situations when a person is transient through a location where occupational/controlled limits apply provided he or she is made aware of the potential for exposure. The phrase *fully aware* in the context of applying these exposure limits means that an exposed person has received written and/or verbal information fully explaining the potential for RF exposure resulting from his or her employment. With the exception of *transient* persons, this phrase also means that an exposed person has received appropriate training regarding work practices relating to controlling or mitigating his or her exposure. Such training is not required for *transient* persons, but they must receive written and/or verbal information and notification (for example, using signs) concerning their exposure potential and appropriate means available to mitigate their exposure. The phrase *exercise control* means that an exposed person is allowed to and knows how to reduce or avoid exposure by administrative or engineering controls and work practices, such as use of personal protective equipment or time averaging of exposure.

(2) General population/uncontrolled exposure limits apply in situations in which the general public may be exposed, or in which persons who are exposed as a consequence of their employment may not be fully aware of the potential for exposure or cannot exercise control over their exposure.

(3) Licensees and applicants are responsible for compliance with both the occupational/controlled exposure limits and the general population/uncontrolled exposure limits as they apply to transmitters under their jurisdiction. Licensees and applicants should be aware that the occupational/controlled exposure limits apply especially in situations where workers may have access to areas in very close proximity to antennas and access to the general public may be restricted.

(4) In lieu of evaluation with the general population/uncontrolled exposure limits, amateur licensees authorized under part 97 of this chapter and members of his or her immediate household may be evaluated with respect to the occupational/controlled exposure limits in this section, provided appropriate training and information has been provided to the amateur licensee and members of his/her household. Other nearby persons who are not members of the amateur licensee's household must be evaluated with respect to the general population/uncontrolled exposure limits.

[78 FR 33650, June 4, 2013]

§1.1311 Environmental information to be included in the environmental assessment (EA).

(a) The applicant shall submit an EA with each application that is subject to environmental processing (*see*§1.1307). The EA shall contain the following information:

(1) For antenna towers and satellite earth stations, a description of the facilities as well as supporting structures and appurtenances, and a description of the site as well as the surrounding area and uses. If high intensity white lighting is proposed or utilized within a residential area, the EA must also address the impact of this lighting upon the residents.

(2) A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or Federal authorities on matters relating to environmental effect.

(3) A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community.

(4) A discussion of environmental and other considerations which led to the selection of the particular site and, if relevant, the particular facility; the nature and extent of any unavoidable adverse environmental effects, and any alternative sites or facilities which have been or might reasonably be considered.

(5) Any other information that may be requested by the Bureau or Commission.

(6) If endangered or threatened species or their critical habitats may be affected, the applicant's analysis must utilize the best scientific and commercial data available, *see* 50 CFR 402.14(c).

(b) The information submitted in the EA shall be factual (not argumentative or conclusory) and concise with sufficient detail to explain the environmental consequences and to enable the Commission or Bureau, after an independent review of the EA, to reach a determination concerning the proposal's environmental impact, if any. The EA shall deal specifically with any feature of the site which has special environmental significance (e.g., wilderness areas, wildlife preserves, natural migration paths for birds and other wildlife, and sites of historic, architectural, or archeological value). In the case of historically significant sites, it shall specify the effect of the facilities on any district, site, building, structure or object listed, or eligible for listing, in the National Register of Historic Places. It shall also detail any substantial change in the character of the land utilized (e.g., deforestation, water diversion, wetland fill, or other extensive change of surface features). In the case of wilderness areas, wildlife preserves, or other like areas, the statement shall discuss the effect of any continuing pattern of human intrusion into the area (e.g., necessitated by the operation and maintenance of the facilities).

(c) The EA shall also be accompanied with evidence of site approval which has been obtained from local or Federal land use authorities.

(d) To the extent that such information is submitted in another part of the application, it need not be duplicated in the EA, but adequate cross-reference to such information shall be supplied.

(e) An EA need not be submitted to the Commission if another agency of the Federal Government has assumed responsibility for determining whether of the facilities in question will have a significant effect on the quality of the human environment and, if it will, for invoking the environmental impact statement process.

[51 FR 15000, Apr. 22, 1986, as amended at 51 FR 18889, May 23, 1986; 53 FR 28394, July 28, 1988]

§1.1312 Facilities for which no preconstruction authorization is required.

(a) In the case of facilities for which no Commission authorization prior to construction is required by the Commission's rules and regulations the licensee or applicant shall initially ascertain whether the proposed facility may have a significant environmental impact as defined in §1.1307 of this part or is categorically excluded from environmental processing under §1.1306 of this part.

(b) If a facility covered by paragraph (a) of this section may have a significant environmental impact, the information required by §1.1311 of this part shall be submitted by the licensee or applicant and ruled on by the Commission, and

environmental processing (if invoked) shall be completed, see §1.1308 of this part, prior to the initiation of construction of the facility.

(c) If a facility covered by paragraph (a) of this section is categorically excluded from environmental processing, the licensee or applicant may proceed with construction and operation of the facility in accordance with the applicable licensing rules and procedures.

(d) If, following the initiation of construction under this section, the licensee or applicant discovers that the proposed facility may have a significant environmental effect, it shall immediately cease construction which may have that effect, and submit the information required by §1.1311 of this part. The Commission shall rule on that submission and complete further environmental processing (if invoked), see §1.1308 of this part, before such construction is resumed.

(e) Paragraphs (a) through (d) of this section shall not apply:

(1) To the construction of mobile stations; or

(2) Where the deployment of facilities meets the following conditions:

(i) The facilities are mounted on structures 50 feet or less in height including their antennas as defined in §1.1320(d), or the facilities are mounted on structures no more than 10 percent taller than other adjacent structures, or the facilities do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(ii) Each antenna associated with the deployment, excluding the associated equipment (as defined in the definition of antenna in §1.1320(d)), is no more than three cubic feet in volume;

(iii) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and

(iv) The facilities do not require antenna structure registration under part 17 of this chapter; and

(v) The facilities are not located on tribal lands, as defined under 36 CFR 800.16(x); and

(vi) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in §1.1307(b).

[55 FR 20396, May 16, 1990, as amended at 56 FR 13414, Apr. 2, 1991; 83 FR 19458, May 3, 2018]

§1.1320 Review of Commission undertakings that may affect historic properties.

(a) *Review of Commission undertakings.* Any Commission undertaking that has the potential to cause effects on historic properties, unless excluded from review pursuant to paragraph (b) of this section, shall be subject to review under section 106 of the National Historic Preservation Act, as amended, 54 U.S.C. 306108, by applying—

(1) The procedures set forth in regulations of the Advisory Council on Historic Preservation, 36 CFR800.3-800.13, or

(2) If applicable, a program alternative established pursuant to 36 CFR 800.14, including but not limited to the following:

(i) The Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, as amended, Appendix B of this part.

(ii) The Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings, Appendix C of this part.

(iii) The Program Comment to Tailor the Federal Communications Commission's Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure, 79 FR 30861 (May 29, 2014).

(b) *Exclusions.* The following categories of undertakings are excluded from review under this section:

(1) *Projects reviewed by other agencies.* Undertakings for which an agency other than the Commission is the lead Federal agency pursuant to 36 CFR 800.2(a)(2).

(2) *Projects subject to program alternatives.* Undertakings excluded from review under a program alternative established pursuant to 36 CFR 800.14, including those listed in paragraph (a)(2) of this section.

(3) *Replacement utility poles.* Construction of a replacement for an existing structure where all the following criteria are satisfied:

(i) The original structure—

(A) Is a pole that can hold utility, communications, or related transmission lines;

(B) Was not originally erected for the sole or primary purpose of supporting antennas that operate pursuant to the Commission's spectrum license or authorization; and

(C) Is not itself a historic property.

(ii) The replacement pole—

(A) Is located no more than 10 feet away from the original pole, based on the distance between the centerpoint of the replacement pole and the centerpoint of the original pole; *provided* that construction of the replacement pole in place of the original pole entails no new ground disturbance (either laterally or in depth) outside previously disturbed areas, including disturbance associated with temporary support of utility, communications, or related transmission lines. For purposes of this paragraph, "ground disturbance" means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils;

(B) Has a height that does not exceed the height of the original pole by more than 5 feet or 10 percent of the height of the original pole, whichever is greater; and

(C) Has an appearance consistent with the quality and appearance of the original pole.

(4) *Collocations on buildings and other non-tower structures.* The mounting of antennas (including associated equipment such as wiring, cabling, cabinets, or backup power) on buildings or other non-tower structures where the deployment meets the following conditions:

(i) There is an existing antenna on the building or structure;

(ii) One of the following criteria is met:

(A) *Non-Visible Antennas.* The new antenna is not visible from any adjacent streets or surrounding public spaces and is added in the same vicinity as a pre-existing antenna;

(B) *Visible Replacement Antennas.* The new antenna is visible from adjacent streets or surrounding public spaces, provided that

(*1*) It is a replacement for a pre-existing antenna,

(*2*) The new antenna will be located in the same vicinity as the pre-existing antenna,

(*3*) The new antenna will be visible only from adjacent streets and surrounding public spaces that also afford views of the pre-existing antenna,

(*4*) The new antenna is not more than 3 feet larger in height or width (including all protuberances) than the pre-existing antenna, and

(*5*) No new equipment cabinets are visible from the adjacent streets or surrounding public spaces; or

(C) *Other Visible Antennas.* The new antenna is visible from adjacent streets or surrounding public spaces, provided that

(*1*) It is located in the same vicinity as a pre-existing antenna,

(*2*) The new antenna will be visible only from adjacent streets and surrounding public spaces that also afford views of the pre-existing antenna,

(*3*) The pre-existing antenna was not deployed pursuant to the exclusion in this paragraph,

(*4*) The new antenna is not more than three feet larger in height or width (including all protuberances) than the pre-existing antenna, and

(*5*) No new equipment cabinets are visible from the adjacent streets or surrounding public spaces;

(iii) The new antenna complies with all zoning conditions and historic preservation conditions applicable to existing antennas in the same vicinity that directly mitigate or prevent effects, such as camouflage or concealment requirements;

(iv) The deployment of the new antenna involves no new ground disturbance; and

(v) The deployment would otherwise require the preparation of an Environmental Assessment under 1.1304(a)(4) solely because of the age of the structure.

NOTE 1 TO PARAGRAPH (B)(4): A non-visible new antenna is in the “same vicinity” as a pre-existing antenna if it will be collocated on the same rooftop, façade or other surface. A visible new antenna is in the “same vicinity” as a pre-existing antenna if it is on the same rooftop, façade, or other surface and the centerpoint of the new antenna is within ten feet of the centerpoint of the pre-existing antenna. A deployment causes no new ground disturbance when the depth and width of previous disturbance exceeds the proposed construction depth and width by at least two feet.

(c) *Responsibilities of applicants.* Applicants seeking Commission authorization for construction or modification of towers, collocation of antennas, or other undertakings shall take the steps mandated by, and comply with the requirements set forth in, Appendix C of this part, sections III-X, or any other applicable program alternative.

(d) *Definitions.* For purposes of this section, the following definitions apply:

Antenna means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated

with that antenna and added to a tower, structure, or building as part of the original installation of the antenna. For most services, an antenna will be mounted on or in, and is distinct from, a supporting structure such as a tower, structure or building. However, in the case of AM broadcast stations, the entire tower or group of towers constitutes the antenna for that station. For purposes of this section, the term antenna does not include unintentional radiators, mobile stations, or devices authorized under part 15 of this title.

Applicant means a Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.

Collocation means the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure.

Tower means any structure built for the sole or primary purpose of supporting Commission-licensed or authorized antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that tower but not installed as part of an antenna as defined herein.

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of the Commission, including those requiring a Commission permit, license or approval. Maintenance and servicing of towers, antennas, and associated equipment are not deemed to be undertakings subject to review under this section.

[82 FR 58758, Dec. 14, 2017]

CERTIFICATE OF FILING AND SERVICE

I, C. Grey Pash, Jr., hereby certify that on February 1, 2019, I filed the FINAL Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. The participants in the case, listed below, who are registered CM/ECF users will be served electronically by the CM/ECF system.

s/ C. Grey Pash, Jr.

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