[ORAL ARGUMENT NOT YET SCHEDULED]

No. 18-1129 [Consolidated with 18-1135, 18-1148, 18-1159, 18-1184]

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

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER NATIVE AMERICAN INDIAN TRIBES AND TRIBAL ORGANIZATIONS, et al.,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES of AMERICA,
Respondents,

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

PETITION FOR REVIEW OF FINAL ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF PETITIONER NATURAL RESOURCES DEFENSE COUNCIL AND INTERVENOR EDWARD B. MYERS

Sharon Buccino
Garett Rose
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
202-289-6868
sbuccino@nrdc.org

Edward B. Myers
14613 Dehaven Court
North Potomac, MD 20878
(717) 752-2032
edwardbmyers@yahoo.com

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GLOSSARY

APHIS	Animal and Plant Health Inspection Service
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
FCC	Federal Communications Commission
GAO	Government Accountability Office
NATOA	National Association of Telecommunication Officers and Advisors
NEPA	National Environmental Policy Act
NRDC	Natural Resources Defense Council

SUMMARY OF ARGUMENT

The Federal Communications Commission ("FCC") has made two critical errors. First, the Commission overlooks the additional responsibilities that the National Environmental Policy Act ("NEPA") imposes on it independent from the Commission's obligations under the Communications Act. Second, the Commission overlooks the continuing federal role it plays in overseeing the conduct of those it licenses to provide wireless service.

ARGUMENT

I. The Challenged Order is a Major Federal Action for which the Commission Failed to Complete the Required NEPA Analysis.

Courts have consistently found rules are major federal actions under NEPA. The Waste Confidence Decision vacated by this Court in *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 476 (D.C. Cir. 2012) is one such decision. *See also, Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

This includes rules that deregulate as the FCC is doing here. *See, e.g.*, 7 U.S.C. §7711 (granting the Animal and Plant Health Inspection Service ("APHIS") the authority to deregulate certain plants); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 145 (2010) ("In deciding whether to grant nonregulated status to a genetically engineered plant variety, the APHIS must comply with NEPA.").

Further, the FCC's NEPA regulations cross-reference the regulations issued by the Council on Environmental Quality ("CEQ"). 47 C.F.R. §1.1302. CEQ's regulations identify "new or revised agency rules, regulations, plans, policies, or procedures" as major federal actions subject to NEPA. 40 C.F.R. §1508.18(a).

The Commission does not dispute that the Order revises agency rules. Agencies have three choices under NEPA. If any "significant" environmental impacts might result from the proposed agency action, it must prepare an Environmental Impact Statement ("EIS"). *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983). Alternatively, it may prepare an Environmental Assessment ("EA") to help determine whether to prepare an EIS or to comply with NEPA when an EIS is not needed. 40 C.F.R. §1508.9. The only way to avoid either an EIS or an EA for a major federal action is pursuant to a categorical exclusion. 40 C.F.R. §1508.9; *see also, Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008). Here, the FCC completed neither an EIS nor an EA, and did not pursue a categorical exclusion.

Industry Intervenors incorrectly imply that the Commission issued its Order using a categorical exclusion. The cases cited by Intervenors all involve the use of categorical exclusions. Ind. Br. at 39. The FCC does not argue that it issued its Order pursuant to a categorical exclusion. CEQ has specific procedures for establishing such an exclusion. JA 935-52 [CEQ, *Memorandum for Heads of*

Federal Departments and Agencies: Establishing, Revising and Applying Categorical Exclusions Under the National Environmental Policy Act (Nov. 23, 2010)]. The FCC chose not to follow them.

The reasonableness of the Commission's "public interest" determination under the Communications Act cannot excuse its failure to comply with NEPA.[1] "[W]hen an agency has taken action without observance of the procedure required by law, that action will be set aside." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) (citing *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567-68 (9th Cir. 2000)).

NRDC and other commenters urged the Commission to conduct a NEPA analysis. NRDC argued that if the FCC sought to exclude an entire category of wireless facilities from NEPA, it was required to establish a categorical exclusion. JA 787-90. Other commenters argued that NEPA required the FCC to evaluate the environmental and health impacts of its rulemaking. JA 770; JA 235-38. *See also* JA 774 (criticizing the FCC's proposed order for "sacrific[ing] local communities' interests without a full and fair assessment of the ramifications of this proposed action.").

[1] Focused on its responsibilities under the Communications Act, the FCC dismisses NRDC's argument that the Order is a major federal action requiring NEPA analysis in a single footnote. FCC Br. at 43 n. 7.

Given these comments, there is no basis for industry's argument that the Commission was not given a fair opportunity to address the issue of NEPA compliance of the final rule. *See, e.g., Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997) ("The purpose of section 405 is to require complainants to give the FCC a 'fair opportunity' to pass on a legal or factual argument before coming to this court.") (quoting *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 667, 681 (D.C. Cir. 1983)).

Moreover, the FCC acknowledged the issue in its Order. JA 868. In addition, two Commissioners dissented from the Order specifically identifying the failure to complete NEPA analysis. JA 899, 905-06. *Time Warner Entm't Co., L.P. v. FCC*, 144 F.3d 75, 79-80 (D.C. Cir. 1998) (Section 405(a) is not an impediment to review if issue is raised in dissent).

II. The FCC Continues to Exercise Authority over the Action of Those it Licenses to Provide Wireless Service.

The FCC fails to see the complete scope of its responsibilities. The Commission argues that the deployment of small wireless facilities does not involve federal action because no pre-construction permit is required. FCC Br. at 33-35. The Commission's "limited approval authority" is, however, only one trigger of the FCC's NEPA obligations.

The FCC retains both authority and an affirmative responsibility to ensure any deployment of the wireless services it licenses complies with environmental

and other conditions of the license. 47 U.S.C. §301 (licensing under the Communications Act serves "to maintain the control of the United States over all the channels of radio transmission"). The Commission has the right to modify a license at any time. 47 U.S.C. §316(a)(1).

The FCC is also responsible for ensuring compliance with the conditions tied to permission to use invaluable public resources. *See, e.g.*, 47 U.S.C. §303(n) (Commission powers include authority "to inspect all radio installations . . . to ascertain whether in construction, installation, and operation they conform to . . . the conditions of the license."). Such FCC oversight exists even when a different company constructs the facilities to deploy the licensed service. 47 C.F.R. §1.9020(c)(5) (spectrum lessee must allow Commission "to conduct on-site inspections of transmission facilities" and "suspend operations at the direction of the Commission").

Moreover, the FCC inserted itself in review of applications for site-specific wireless facility deployments made by state and local agencies. JA 1045 [FCC, *Declaratory Ruling and Third Report and Order in WT Docket Nos. 17-79*, 33 FCC Rcd ___, FCC 18-133 (rel. Sep. 27, 2018)]. By way of example, the FCC ruled that the failure of state or local agencies to render a decision within certain time frames would be construed as a presumptive unlawful prohibition of service. JA 1099. This order also dictated to state and local agencies when and to what

extent they may consider aesthetic considerations in their siting decisions. JA 1094-95. The FCC's role is hardly one of limited federal involvement.

Industry and the FCC confuse the issue by citing inapplicable caselaw. This is not a "scope of review" case such as the U.S. Supreme Court addressed in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). In that case, the Federal Motor Carrier Safety Administration issued rules addressing the registration of Mexican motor carriers entering the United States. Since the agency had no control over entry, it could limit the scope of the review in its EA to the effects that arose from the increased roadside inspections needed to ensure the safety of the vehicles. *Id.* at 761. It did not need to include the impacts of the increased operations of the trucks within the United States. *Id.* at 768. The agency did, however, complete an EA. Here, the issue is not what the FCC did and did not include in its review, but its failure to do any NEPA review at all.

Moreover, this is not a "but-for" or "connected-actions" case like *Big Bend Conservation Alliance v. FERC*, 896 F.3d 418 (D.C. Cir. 2018). *Big Bend* involved connection of two physically separate projects – an export facility and a pipeline. Since FERC had *no* role at all in the pipeline because it was contained wholly within Texas, this Court held that FERC's involvement authorizing the export facility was insufficient to federalize the pipeline. *Id.* at 422. Here, the FCC issued a license for the provision of wireless service by the facilities at issue.

Finally, this case is not about Wi-Fi routers, garage door openers or ordinary cell phones. The FCC may certify this equipment, but it does not exercise continuing licensing authority over this equipment unlike the wireless facilities at issue in this case. The FCC fails to acknowledge the distinction in its own regulations between licensed and unlicensed use of the spectrum. *See* 47 C.F.R. §15.1 *et seq*.

The facilities covered by the challenged Order may have a significant impact on the environment. First, not all of them are small. They may be as tall as other structures in the area including a 200-foot tower. JA 832. Second, even small transmitters placed on existing poles can be unsightly and noisy. JA 771-72 (photos). Third, there may be hundreds across a single neighborhood. JA 774-75. ("the *cumulative* effect of these installations could very easily result in significant and severe environmental or historic impacts"). Fourth, the construction (including the cables needed to connect the transmitters to the network) – not just the operation – of the facilities can destroy wetlands, tree cover and quiet. JA 706. Fifth, the wireless facilities at issue threaten the public's health. NRDC/ Myers Br. at 3, 7, 11; JA 235-38.[2] NEPA does not allow the FCC to dismiss such impacts.

[2] The FCC does not dispute that the Government Accountability Office ("GAO") found that the Commission's regulations limiting exposure to radiofrequency emissions were based on stale science. Instead, the FCC argues that this finding is not relevant to the wireless facilities at issue because the GAO's report involved cell phones. FCC Br. at 60. Yet, the radiofrequency emissions involved are the

CONCLUSION

An agency cannot avoid NEPA review altogether. Yet this is exactly what the FCC is attempting to do. The FCC did not do NEPA when it issued geographic licenses. It did not do NEPA when it issued the challenged Order. And it is not going to complete any NEPA analysis when facilities are constructed to deploy the wireless service the Commission licensed. The FCC's Order violates the plain language of NEPA and the definition of "major federal action" in CEQ's regulations. As a result, this Court should vacate the Order.

/s/ Sharon Buccino

Sharon Buccino
Garett Rose
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
202-289-6868
sbuccino@nrdc.org

Edward B. Meyers
14613 Dehaven Court
North Potomac, MD 20878
717-752-2032
edwardbmyers@yahoo.com

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same whether they come from network facilities or cell phones. The FCC has not meaningfully addressed the evidence of harm from these emissions contained in either the GAO report or the record in this case.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ Sharon Buccino

Attorney for Natural Resources Defense Council

Dated: January 25, 2019

STATUTORY AND REGULATORY ADDENDUM

Reply Brief of Petitioner Natural Resources Defense Council and Intervenor Edward B. Myers

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Statutes

7 U.S.C. § 7711

(a) Prohibition of unauthorized movement of plant pests

Except as provided in subsection (c), no person shall import, enter, export, or move in interstate commerce any plant pest, unless the importation, entry, exportation, or movement is authorized under general or specific permit and is in accordance with such regulations as the Secretary may issue to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States.

(b) Requirements for processes

The Secretary shall ensure that the processes used in developing regulations under subsection (a) governing consideration of import requests are based on sound science and are transparent and accessible.

(c) Authorization of movement of plant pests by regulation

(1) Exception to permit requirement

The Secretary may issue regulations to allow the importation, entry, exportation, or movement in interstate commerce of specified plant pests without further restriction if the Secretary finds that a permit under subsection (a) is not necessary.

(2) Petition to add or remove plant pests from regulation

Any person may petition the Secretary to add a plant pest to, or remove a plant pest from, the regulations issued by the Secretary under paragraph (1).

(3) Response to petition by the Secretary

In the case of a petition submitted under paragraph (2), the Secretary shall act on the petition within a reasonable time and notify the petitioner of the final action the Secretary takes on the petition. The Secretary's determination on the petition shall be based on sound science.

(d) Prohibition of unauthorized mailing of plant pests

(1) In general

Any letter, parcel, box, or other package containing any plant pest, whether sealed as letter-rate postal matter or not, is nonmailable and shall not knowingly be conveyed in the mail or delivered from any post office or by any mail carrier, unless the letter, parcel, box, or other package is mailed in

compliance with such regulations as the Secretary may issue to prevent the dissemination of plant pests into the United States or interstate.

(2) Application of postal laws and regulations

Nothing in this subsection authorizes any person to open any mailed letter or other mailed sealed matter except in accordance with the postal laws and regulations.

(e) Regulations

Regulations issued by the Secretary to implement subsections (a), (c), and (d) may include provisions requiring that any plant pest imported, entered, to be exported, moved in interstate commerce, mailed, or delivered from any post office--

(1) be accompanied by a permit issued by the Secretary prior to the importation, entry, exportation, movement in interstate commerce, mailing, or delivery of the plant pest;

(2) be accompanied by a certificate of inspection issued (in a manner and form required by the Secretary) by appropriate officials of the country or State from which the plant pest is to be moved;

(3) be raised under post-entry quarantine conditions by or under the supervision of the Secretary for the purposes of determining whether the plant pest--

(A) may be infested with other plant pests;

(B) may pose a significant risk of causing injury to, damage to, or disease in any plant or plant product; or

(C) may be a noxious weed; and

(4) be subject to remedial measures the Secretary determines to be necessary to prevent the spread of plant pests.

47 U.S.C. § 301

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.

47 U.S.C. § 303(n)

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

. . . .

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

47 U.S.C. § 316(a)(1)

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to

protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

Regulations

40 C.F.R. § 1508.4

Categorical exclusion:

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 C.F.R. § 1508.9

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.18(a)

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures;

and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

47 C.F.R. § 1.1302

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.

47 C.F.R. § 1.1307

(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.

47 C.F.R. § 1.9020(c)(5)

(c) Rights and responsibilities of the spectrum lessee.

. . . .

(5) In leasing spectrum from a licensee, the spectrum lessee must accept Commission oversight and enforcement consistent with the license authorization. The spectrum lessee must cooperate fully with any investigation or inquiry conducted by either the Commission or the licensee, allow the Commission or the licensee to conduct on-site inspections of transmission facilities, and suspend operations at the direction of the Commission or the licensee and to the extent that such suspension would be consistent with the Commission's suspension policies.

47 C.F.R. § 15.1

(a) This part sets out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license. It also contains the technical specifications, administrative requirements and other conditions relating to the marketing of Part 15 devices.

(b) The operation of an intentional or unintentional radiator that is not in accordance with the regulations in this part must be licensed pursuant to the provisions of section 301 of the Communications Act of 1934, as amended, unless otherwise exempted from the licensing requirements elsewhere in this chapter.

(c) Unless specifically exempted, the operation or marketing of an intentional or unintentional radiator that is not in compliance with the administrative and technical provisions in this part, including prior equipment authorization, as appropriate, is prohibited under section 302 of the Communications Act of 1934, as amended, and subpart I of part 2 of this chapter. The equipment authorization procedures are detailed in subpart J of part 2 of this chapter.