



March 13, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Ex Parte Presentation, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch,

In these proceedings, CTIA and others have urged the Commission to take a fresh look at its infrastructure deployment policies by recognizing that the installation of a small wireless facility is not an undertaking or a major federal action, and thus is not subject to federal environmental and historic preservation reviews.¹ This finding is expected to result in significant economic and societal benefits without having adverse effects on the environment or historic properties. Indeed, CTIA's member companies report that such reviews have cost millions of dollars and comprise, on average, nearly one third of the total deployment costs per small cell reviewed.² Modernizing federal reviews of new wireless infrastructure – like the reforms in the *Draft Second Order* – could lower the cost to deploy 5G networks by \$1.56 billion.³

¹ See, e.g., Comments of CTIA, WT Docket No. 17-79 (filed June 15, 2017); Letter from Andre J. Lachance, Verizon, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WC Docket No. 17-84 (filed Feb. 26, 2018); Letter from Cathleen A. Massey, T-Mobile, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WT Docket No. 16-421 (filed Feb. 26, 2018); Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Feb. 23, 2018); Comments of Verizon, WT Docket No. 17-79, at 58-62 (filed June 15, 2017) ("Verizon Comments"); Comments of Sprint Corporation, WT Docket No. 17-79, WC Docket No. 17-84 (filed June 15, 2017); Letter from Rebecca Murphy Thompson, Competitive Carriers Association, to Marlene H. Dortch, FCC, WT Docket Nos. 17-79 and 15-180, WC Docket No. 17-84, at 2 (filed Feb. 5, 2018).

² See *Impact of Federal Regulatory Reviews on Small Cell Deployment*, ACCENTURE STRATEGY (Mar. 12, 2018) ("Accenture Small Cell Report"), attached to Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Mar. 13, 2018); see also Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket Nos. 17-79, 16-421, at 2 (filed Feb. 26, 2018).

³ Accenture Small Cell Report at 2.



The Commission has ample authority to find that the deployment of small wireless facilities is neither an undertaking nor a major federal action,⁴ and CTIA encourages the Commission to move forward with the *Draft Second Report and Order* to update these requirements to reflect the changes in technology and infrastructure that have occurred since the obligations were originally created.

The Commission's Environmental and Historic Preservation Review Requirements Were Developed at a Time When Larger Facilities Were the Industry Standard. The National Environmental Policy Act ("NEPA") requires federal agencies to evaluate the environmental effects of their proposed "major Federal actions" significantly affecting the quality of the human environment.⁵ Similarly, Section 106 of the National Historic Preservation Act ("NHPA") requires agencies to take into account the effects of their "undertaking[s]" on historic properties.⁶ The terms "major Federal action" and "undertaking" are generally treated as coextensive by the Commission⁷ and the courts,⁸ and they include actions funded, licensed, or approved by the agency.⁹

The Commission has treated as undertakings/major federal actions the construction of towers that require antenna structure registration ("ASR") and facilities that require site-based approval prior to construction.¹⁰ But as the Commission began to move to geographic

⁴ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, FCC-CIRC1803-01, WT Docket No. 17-79 ¶¶ 33-41, 55-85 (draft rel. Mar. 1, 2018) ("*Draft Second Report and Order*").

⁵ 42 U.S.C. § 4332(2)(C); see *Draft Second Report and Order* ¶ 44.

⁶ 54 U.S.C. § 306108; see *Draft Second Report and Order* ¶ 43.

⁷ *Acceleration of Broadband Deployment*, Notice of Proposed Rulemaking, 28 FCC Rcd 14231, 4249 ¶ 25 (2013); see also *Acceleration of Broadband Deployment*, Report and Order, 29 FCC Rcd 12865, 12899 ¶ 70 (2014) ("*2014 Wireless Infrastructure Order*").

⁸ *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001); see also *Karst Env't Educ. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 515 (4th Cir. 1992); *Ringsred v. City of Duluth*, 828 F.2d 1305, 1309 (8th Cir. 1987); *United States v. 162.20 Acres of Land*, 639 F.2d 299, 304 n.5 (5th Cir. 1981).

⁹ See 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y); 40 C.F.R. § 1508.18(a).

¹⁰ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3340, ¶ 26 (2017) ("*NPRM/NOI*"); 47 C.F.R. § 1.1303 (1975) ("The provisions of this subpart [implementing the National Environmental Policy Act] apply to all major Commission actions authorizing the construction of communications facilities"); *Streamlining the Antenna Structure Clearance Procedure*, Report and Order, 11 FCC Rcd 4272, 4289, ¶ 41 (1995) (concluding that "registering a structure" through the antenna structure registration process "constitutes a 'federal action' or 'federal undertaking'").



area licensing, it concluded that it would serve the public interest to amend Section 1.1312 of the rules to require that where construction of a facility is allowed without a construction permit, the licensee or applicant must determine prior to construction whether the facility may have a significant environmental effect (and if so file an Environmental Assessment (“EA”).¹¹ The D.C. Circuit subsequently found that the Commission’s ruling in 2004 that its “retained approval” authority over tower construction, even where an ASR is not required, is an undertaking, was neither arbitrary nor capricious.¹² That decision was adopted over the dissents of then Commissioners Abernathy and Martin, who explained that the Commission’s assertion of jurisdiction to require historic preservation review exceeded its statutory authority in the absence of a construction permit or a site-by-site license.¹³ As Commissioner Abernathy explained, “I cannot agree that the construction of *all* communications antenna facilities invariably constitutes a federal undertaking.”¹⁴

The *Draft Second Report and Order* correctly notes that the Commission’s decision to broadly apply its environmental rules was made at a time when large tower and macrocell construction were the norm, and did not contemplate the deployment of minimally impactful small wireless facilities over which the Commission has little to no involvement.¹⁵ Nor did that decision account for the fact that similar and often larger facilities today do *not* require federal environmental or historic review, including many other communications facilities (e.g., Wi-Fi deployments, intrastate lines, or cable distribution facilities), non-communications facilities (e.g., traffic or power equipment), or more impactful construction (e.g., buildings) that already today are *not* subject to NEPA/NHPA.¹⁶ In light of the evolution in technology

¹¹ 47 C.F.R. § 1.1312(a); see Amendment of Environmental Rules, *Report and Order*, 5 FCC Rcd 2942, 2943 ¶¶ 9-11 (1990) (“*Pre-Construction Review Order*”).

¹² *CTIA – The Wireless Ass’n v. FCC*, 466 F.3d 105, 114 (D.C. Cir. 2006). In the 2004 order, the Commission declined to revisit the treatment of tower construction as an undertaking. Nationwide Programmatic Agreement Regarding the Section 106 Review Process, *Report and Order*, 20 FCC Rcd 1073, 1093 ¶ 24 (2004) (“2004 NPA R&O”).

¹³ See *id.* at 1230 (Statement of Commissioner Kathleen Q. Abernathy), 1233 (Statement of Commissioner Kevin J. Martin).

¹⁴ *Id.* at 1230 (Statement of Commissioner Kathleen Q. Abernathy). In a recent op-ed, Commissioner Abernathy reiterates her belief that the 2004 decision was overbroad, and calls on the Commission to rethink how it regulates wireless construction by excluding smaller antenna projects that do not require site-specific permits from FCC environmental and historic preservation review. See Kathleen Q. Abernathy, *The Need to Lead for 5G Requires Right-Sized Regulation*, MORNING CONSULT (Mar. 8, 2018), <https://morningconsult.com/opinions/need-lead-5g-requires-right-sized-regulation/>.

¹⁵ See *Draft Second Report and Order* ¶¶ 36, 38, 63.

¹⁶ See, e.g., *Implementation of NEPA*, Memorandum Opinion and Order, 56 FCC 2d 635, 639 (1975) (cable distribution facilities and intrastate lines are state or local actions and not major federal actions subject to



and the lack of Commission involvement in small wireless facility siting – and to better align the federal environmental and historic review processes for small wireless facilities with the treatment of many other similar facilities – it is appropriate for the Commission to revisit the scope of its retained authority under Section 1.1312 to exclude the deployment of small wireless facilities, and find that such siting is not an undertaking/major federal action.

Commission authority to determine what is an undertaking/major federal action is well established. As set forth in the 2004 Nationwide Programmatic Agreement, “[t]he Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA,”¹⁷ and the Commission specifically contemplated that its interpretation of what is an undertaking might change over time.¹⁸ The Commission has similar authority to determine what is a major federal action under NEPA.¹⁹

Given the changed landscape, now is an appropriate inflection point to once again revisit the Commission’s approach on what constitutes an undertaking or major federal action.²⁰ Accordingly, it is appropriate for the Commission to determine that the deployment

NEPA); *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12907 ¶ 91 (Wi-Fi/unlicensed deployments, as well as traffic and power equipment, occur without NHPA review); *Implementation of NEPA*, Memorandum Opinion and Order, 56 FCC 2d 635, 639 (1975) (FCC does not authorize the construction of buildings)); see also *Draft Second Report and Order* ¶¶ 40, 63.

¹⁷ *Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process* § I.B (Sept. 2004), 47 C.F.R. Pt. 1, App. C; see also 36 C.F.R. § 800.3(a).

¹⁸ See, e.g., *2004 NPA R&O*, 20 FCC Rcd at 1231 (Att. 2) (“The [FCC] may determine in the future that ... certain covered facilities ... no longer constitute Undertakings for purposes of Section 106.”).

¹⁹ See *Consideration of Biological Effects of Radiofrequency Radiation*, Report and Order, 100 F.C.C.2d 543, 546 ¶ 8 (1985) (“[T]he Commission is required to make a threshold determination as to whether the facilities it approves are ‘major Federal actions significantly affecting the quality of the human environment,’ thus triggering environmental review”).

²⁰ The Commission’s view on what comprises an undertaking or major federal action has changed before. For example, in 1987, the Chief of the Common Carrier Bureau (“CCB”) explained in letters to Congress and the Advisory Council on Historic Preservation (“ACHP”) that where a licensee’s existing license allowed it to add new sites without prior approval and subject only to after-the-fact notification, “it does not appear that there is a Commission ‘undertaking’ within the meaning of the NHPA.” Letter from Albert Halprin, Chief, CCB, to Rep. Louise Slaughter, U.S. House of Representatives (Feb. 18, 1987); Letter from Albert Halprin, Chief, CCB, to Don L. Klima, Chief, Eastern Division, ACHP (Mar. 9, 1987). But by the 1990s, the Commission changed its approach and began treating all tower construction as an undertaking/major federal action. See *supra* notes 10-11 and accompanying text. More recently, the Commission classified all macrocell deployments, including collocations, as undertakings. See *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12904-05 ¶ 84.



of small wireless facilities is not an undertaking or major federal action, and therefore is not subject to NHPA or NEPA review.

Commission involvement in the deployment of small wireless facilities is negligible at best.²¹ “It does not finance or otherwise assist with small cell deployments, does not require preconstruction authorization, does not license or approve individual facilities, and has no involvement in siting decisions.”²² The Commission’s only role is its retained authority to act on EAs, but that retention of authority is predicated on small facility siting being an undertaking/major federal action in the first instance.²³ The lack of Commission involvement in small facility siting confirms it should *not* be an undertaking/major federal action.²⁴

The *Draft Second Report and Order* charts an appropriate path forward. CTIA agrees that the Commission should revisit its decision to retain authority to require EAs for all wireless deployments, and modify the rule to exclude small wireless facility deployments from the scope of Section 1.1312.²⁵ The 1990 decision invoked the Commission’s public interest authority under the Communications Act,²⁶ which empowers the agency to perform all acts

²¹ See *Draft Second Report and Order* ¶¶ 80-81.

²² Verizon Comments at 61. While the Commission generally issues wireless carriers blanket licenses to operate on specific radio frequencies within given geographic area, see 47 U.S.C. § 301, the choice of when and where to deploy small wireless facilities is a private activity that does not require a license (or other permit or approval). See *Procedures for Reviewing Requests for Relief from State and Local Regulations*, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 13494, 13502 ¶ 20 (1997); 47 U.S.C. § 319(d); 47 C.F.R. §§ 24.11(b), 27.11(a); *Pre-Construction Review Order*, 20 FCC Rcd. at 1230-31 (Statement of Commissioner Kathleen Q. Abernathy), 1233 (Statement of Commissioner Kevin J. Martin).

²³ See, e.g., *Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989) (“NHPA imposes obligations only when a project is undertaken either by a federal agency or through the auspices of agency funding or approval.”); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 128 (D.C. Cir. 1986) (“NEPA review ... is triggered only by a major Federal action.”).

²⁴ See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244-45 (D.C. Cir. 1980) (for NEPA to apply, the federal government must undertake “some ‘overt act’ in furtherance of [a] party’s project;” passivity or inaction are insufficient); *Lee*, 877 F.2d at 1058 (where “the planning and construction of [a] facility is neither funded nor dependent on approval by a federal agency,” the “provisions of NHPA ... do not apply”); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988) (where an agency’s involvement is discretionary and limited to receipt of notice of the project, agency action “is only a marginal federal action rather than a major action”).

²⁵ See *Draft Second Report and Order* ¶¶ 33, 35, 41.

²⁶ See *Pre-Construction Review Order*, 5 FCC Rcd at 2941 ¶ 11; see also *id.* at 2944 ¶ 19 (citing, e.g., 47 U.S.C. §§ 154(i), 303(r)); *Draft Second Report and Order* ¶ 36 & n.48.



and make such rules as necessary in executing its functions.²⁷ Those functions include accelerating broadband deployment and removing barriers to infrastructure investment,²⁸ while balancing environmental concerns.²⁹

These public interest functions can be achieved by revising Section 1.1312 to exclude the deployment of small wireless facilities.³⁰ Importantly, the *Draft Second Report and Order* recognizes that environmental and historic preservation reviews for small wireless facilities are not needed to protect the environment or historic resources.³¹ Indeed, the Commission has already determined that small wireless facilities can be mounted on existing structures with “little or no impact,”³² confirming the appropriateness of its public interest finding here. Moreover, the record in this proceeding demonstrates that eliminating unnecessary environmental and historic preservation reviews for small wireless facilities will help reduce delays and speed the roll-out of new advanced wireless services like 5G.³³ In turn, by removing small wireless facilities from the scope of Section 1.1312 and the resulting NEPA and NHPA reviews, the Commission’s already negligible involvement in the deployment of small wireless facilities is reduced to zero – and that lack of involvement mandates a finding that small wireless facilities are not an undertaking/major federal action.³⁴

²⁷ See *Draft Second Report and Order* ¶ 59; 47 U.S.C. §§ 154(i), 303(r).

²⁸ See, e.g., 47 U.S.C. § 1302 (the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... regulating methods that remove barriers to infrastructure investment”); 47 U.S.C. § 151 (the purpose of the FCC is to “make available ... to all the people of the United States ... a rapid, efficient, nationwide, and world-wide ... radio communication service”); 47 U.S.C. § 309(j)(3)(A), (D) (the Commission “shall seek to promote ... the development and rapid deployment of new technologies, products and services for the benefit of the public”); see also *Draft Second Report and Order* ¶ 59.

²⁹ See *Amendment of Environmental Rules*, Second Report and Order, 6 FCC Rcd 1716, 1718 n.13 (1991) (agencies should “address and balance environmental issues with other issues within their mandates”) (citing *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971)); see also *Amendment of Environmental Rules*, Report and Order, 60 Rad. Reg. 2d (P&F) 13, 16 ¶ 7 (1986); *Draft Second Report and Order* ¶¶ 69, 87.

³⁰ See *Draft Second Report and Order* ¶¶ 36-41, 57-76.

³¹ See *id.* ¶¶ 69-72 (citing record support).

³² 2014 *Infrastructure Order*, 29 FCC Rcd at 12867 ¶ 3.

³³ See *id.* ¶¶ 3, 15, 37, 68 (citing record support).

³⁴ See *Draft Second Report and Order* ¶ 35 (“Having made the threshold determination that Section 1.1312 does not apply to the deployment of small wireless facilities, ... there is no longer any cognizable federal control over such deployments for purposes of NHPA or NEPA, and hence, those deployments are neither ‘undertakings’ nor ‘major Federal actions’ subject to federal historic preservation or environmental review obligations.”); see also *id.* ¶¶ 80-81, 87; *supra* note 23.



* * *

By taking the steps outlined above, the Commission will advance the public interest in the deployment of wireless connectivity by eliminating unnecessary federal historic preservation and environmental reviews that are slowing and adding unnecessary costs to small wireless deployments without commensurate benefit to environmental or historic preservation. Therefore, CTIA urges the Commission to move forward with adoption of the *Draft Second Report and Order*.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being electronically submitted into the record of these proceedings. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Scott K. Bergmann

Scott K. Bergmann
Senior Vice President, Regulatory Affairs