

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of:

Accelerating Wireless Broadband )  
Deployment by Removing Barriers )  
To Infrastructure Investment )

WT Docket No. 17-79

Motion for Stay

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## I. Statement of Interest

This Motion for Stay (Motion) is submitted in response to the Second Report and Order in this proceeding (Order)<sup>1</sup>. The Order was issued by the Federal Communications Commission (FCC) for the stated purpose of expediting the planned deployment of wireless facilities in the United States. In the Commission's zeal to expedite the deployment of wireless facilities, the Order for the first time exempts so-called "small" wireless facilities from the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (NEPA), and the National Historic Preservation Act of 1966, 54 U.S.C. 300101 *et seq.* (NHPA).

The record indicates that (1) these so-called "small" wireless facilities, once deployed in residential areas, will number in the hundreds of thousands<sup>2</sup> and will consist of cell towers with heights up to 50 feet or more<sup>3</sup> bearing multiple antennas and

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<sup>1</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79 (adopted March 22, 2018; released March 30, 2018). See, 83 FR 19440 (May 3, 2018) (hereinafter "Order").

<sup>2</sup> Order at para. 40: "Verizon states that next generation networks will require 10 to 100 times more antenna locations than previous 3G and 4G networks, while AT&T represents that carriers will deploy hundreds of thousands of wireless facilities- equal to or more than the number of macro facilities deployed over the last few decades."

<sup>3</sup> The Order defines small wireless facilities in the following terms: (i) The facilities are mounted on structures 50 feet or less in height including their antennas..., 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...*, 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; (iv) The facilities do not require antenna structure registration under Part 17 of this chapter; (v) The facilities are not located on Tribal lands...; and (vi) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in [47 CFR] § 1.1307(b) [emphasis added].

associated equipment; and (2) these wireless facilities will use technologies that emit higher frequency radiation, possibly on a continuous or near continuous basis, than technologies currently in use, thereby creating a host of previously un-experienced deleterious, even dangerous, environmental impacts.

The undersigned, a citizen of the United States, is a resident of Montgomery County, Maryland. Like many state and local governments across the United States, Montgomery County is currently grappling with proposals by business interests to deploy wireless facilities directly in residential areas. The undersigned will be directly and indirectly affected by the negative impacts caused by deployment of wireless facilities in residential areas. Consequently, the undersigned has an interest in the outcome of this proceeding and for that reason submits this Motion for Stay.

## **II. Background**

The comments submitted in this proceeding by major telecommunications companies, including AT&T, T-Mobile, and Verizon, attest to plans to deploy hundreds of thousands of new so-called “small” wireless facilities in residential communities across the United States. These wireless facilities will employ high frequency millimeter wave (mmW) spectrum that has only recently been permitted by the FCC without any review of the health and safety impacts from its use.<sup>4</sup> These wireless facilities will broadcast high radiofrequency (RF) waves in direct line-of-sight to residences whose occupants may not be aware of the new RF emissions coming into their homes and will

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<sup>4</sup> *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, et seq.*, GN Docket No. 14-177, *et seq.*, Report and Order and Notice of Proposed Rulemaking (adopted July 14, 2016, released July 14, 2016), published in the Federal Register at 81 FR 58270 (August 24, 2016) at paragraph numbers 356 through 363 (expressly deferring consideration of health and safety impacts).



have no effective means of shielding themselves from the radiation.<sup>5</sup> The health and safety standards for these emissions were promulgated in 1996 based largely on standards developed in 1992. The General Accountability Office (GAO) in 2012 found that the existing standards may not reflect current knowledge and recommended that the FCC formally reassess the standards.<sup>6</sup> While the Commission opened a proceeding to reassess the standards in 2013,<sup>7</sup> it has not completed that reassessment and, in the Order in the present proceeding, continues to rely on the 1996 standards. The Order additionally defines so-called “small wireless facilities” to include cell towers up to 50 feet or more in height, multiple antennas no larger than 3 cubic feet in volume mounted on the towers, and associated equipment, each no larger than 28 cubic feet in volume, either mounted on the towers or secured on the adjacent ground. Subject to these height and volumetric limits, the Order rejects any cumulative limit on the total number of antennas and associated equipment placed on or near each tower.<sup>8</sup> The Order also does not attempt to define any limit on the distances between cell towers or the cumulative number of cell towers in a given area. Consequently, absent limits imposed by other governmental authorities, *i.e.* state or local agencies, there could be any number of antennas simultaneously broadcasting RF radiation into peoples’ homes from a single tower and multiple installations of associated equipment on the towers and/or on the adjacent ground.

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<sup>5</sup> Verizon Comments at 4-5.

<sup>6</sup> General Accountability Office, Telecommunications--Exposure and Testing For Mobile Phones Should Be Reassessed (GAO-12-771) (July 2012).

<sup>7</sup> *Proposed Changes in the Commission’s Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, ET Docket No. 03-137 (adopted March 27, 2013; released March 29, 2013). See, 78 FR 33634 (July 4, 2013).

<sup>8</sup> Order at para. 75.

The Commission has coined a new term to describe industry plans for the installation of these multitudinous so-called “small” wireless facilities—“network densification”.<sup>9</sup> With network densification, many residential communities across the country will be visited by a host of cell towers that will be significantly taller than the typical residential light pole. These small wireless towers also will be laden with associated equipment either attached to the towers and/or stationed on the adjacent ground.

Whereas, until now Commission regulations have required environmental (including health and safety) review prior to the deployment of so-called “small” wireless facilities, the Commission decided in the Order to remove that requirement for deployments of the so-called “small” wireless facilities, including cell towers, antennas, and associated equipment. The Commission found that the pre-deployment environmental review of these cell towers, antennas, and associated equipment is not required as a matter of law under NEPA or NHPA. The Commission also found in the Order that the pre-deployment environmental review of so-called “small” wireless facilities is not in the public interest.

### **III. Summary of Position**

The undersigned respectfully maintains that the Commission has failed to meet its statutory obligation to examine whether its action in this proceeding will promote the safety of life and property, as required by Section 332(a)(1) of the Communications Act of 1934, 47 U.S.C. § 332(a)(1). The Commission also has erred in its determination that pre-deployment reviews of small wireless facilities are not required by Section 102 of

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<sup>9</sup> Order at para. 1.

NEPA (42 U.S.C. 4332(C)), Section 106 of NHPA (54 U.S.C. § 300320), and by the public interest. Accordingly, the undersigned requests the Commission to stay the Order, as further explained below.

#### **IV. Discussion**

##### **A. The Commission's failure to meaningfully analyze whether the deployment of so-called "small" wireless facilities will promote the safety of life and property violates the Communications Act of 1934.**

Section 332(a)(1) of the Communications Act of 1934 states that "[i]n taking actions to manage the spectrum to be made available for use by...private mobile services, the Commission shall consider...whether such actions will...promote the safety of life and property." Separately, Section 102(C) of NEPA, 42 U.S.C. 4332(C), requires the Commission to prepare an environmental impact statement (EIS) for major Federal actions significantly affecting the quality of the human environment.

While the Commission's statutory responsibility to consider the safety of life and property is legally independent of its NEPA responsibility, the Commission's established practice has been to consider issues bearing on the safety of life and property within the context of the performance of its NEPA responsibilities.<sup>10</sup> In the Order, the Commission analyzed its obligations under NEPA and concluded that NEPA does not apply to so-called "small" wireless facilities. The Commission also concluded that it need not conduct a review of health and safety impacts. See note 187 of the Order which states that the Commission is not addressing any potential effects from the provision of services, such as RF issues, *i.e.* issues dealing with the health and safety impacts due to RF emissions from small wireless facilities. Because the Commission concluded that so-

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<sup>10</sup> Order at note 58.

called “small” wireless facilities were not subject to a NEPA pre-deployment review, it apparently concluded that a pre-deployment review of health and safety impacts also was unnecessary. In this regard, the Commission indicated that its existing health and safety regulations would provide adequate protection to the public following the deployment of so-called “small” wireless facilities.

Section 332(a)(1)’s plain language requires that, in managing spectrum, the Commission meaningfully review the impacts of its actions on life and property before they occur. Consequently, the Commission failed to meet its statutory responsibilities under Section 332(a)(1) of the Communications Act when it determined that deployment of wireless facilities could move forward without first determining whether the deployment would promote the safety of life and property. This obligation exists independent of NEPA and the position taken by the Commission that NEPA does not apply does not excuse the agency from performing its Section 332(a)(1) responsibility.

Furthermore, as discussed above, the GAO found in 2012 that the existing health and safety regulations are dated and may not reflect current knowledge about the health and safety impacts of RF emissions. Because the Order relies on these dated standards and stale scientific data to support a change in policy and regulations, the Commission’s action is arbitrary and capricious and unlawful.<sup>11</sup> Before implementing such a change in

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<sup>11</sup> Agency decisions resting on stale scientific data will be set aside as arbitrary and capricious. *Seattle Audobon Soc’y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993); *Desert Citizens of Am. v. Bisson*, 231 F.3d 1172, 1188 (9th Cir. 2000). Courts are all the more likely to deem agency actions relying on stale data arbitrary and capricious if, as is the case here, the agency has access to more current and accurate data. *Am. Horse Prot. Ass’ v. Lyng*, 812 F.2d 1, 6-7 (D.C. Cir. 1986) (holding agency’s action arbitrary and capricious for failure to consider an intervening study about inhumane treatment of horses); *Golden Northwest Aluminum, Inc. v. Bonneville Power Adm’n*, 501 F.3d 1037, 1052 (9th Cir. 2007) (holding that an agency should have considered “changed market

regulations and policy, the Commission first should have completed the updating of its health and safety regulations. Only after the regulations are properly updated will the Commission be in a position to reasonably evaluate whether the deployment of so-called “small” wireless facilities will promote the safety of life and property, as required by Section 332(a)(1).<sup>12</sup>

**B. The Commission’s determination in the Order that the deployment of so-called “small” wireless facilities will not constitute “a major federal action” violates NEPA.**

The Order states that the deployment of so-called “small” wireless facilities will not constitute “a major federal action” under Section 102(C) of NEPA and, therefore, will not require a pre-deployment environmental review. As discussed *infra*, the reason given to support this determination is that there will be only limited federal involvement in the deployment decision. The Commission accordingly amends Section 1.1312 of its regulations (47 C.F.R. § 1.1312) to exempt small wireless facilities on non-Tribal lands<sup>13</sup> from Section 1.1312’s requirement of a pre-deployment review for facilities that “may have a significant environmental impact”.

In support of its determination that so-called “small” wireless facilities are exempt from NEPA, the Commission points to the fact that it has previously promulgated regulations dispensing with site-specific construction licenses for small wireless facilities.

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conditions”); and *Northern Plains Resource Council Inc. v. Surface Transportation Board*, 668 F.3<sup>rd</sup> 1067 (9<sup>th</sup> Cir. 2011) (holding that reliance on ten year old aerial surveys was arbitrary and capricious).

<sup>12</sup> The Intergovernmental Advisory Committee to the Federal Communications Commission made a similar recommendation in its Advisory Recommendation No. 2018-01, submitted in this proceeding on March 21, 2018.

<sup>13</sup> Unless stated otherwise, the term, “small wireless facilities”, as used throughout this document, refers to small wireless facilities on non-Tribal lands that are subject to geographic area licensing but not subject to the Commission’s antenna structure registration system. See Order at paras. 36 and 45.

In place of the site-specific construction licenses, the Commission has implemented regulations providing for geographic area licenses authorizing the use of spectrum. According to the Commission, issuance of site-specific construction licenses required pre-deployment NEPA reviews because those licenses authorized activities with foreseeable environmental impacts. The presence of foreseeable environmental impacts, the Commission finds, meant that the issuance of each site-specific construction license was “a major federal action” significantly affecting the human environment. See 40 C.F.R. § 1508.18. Under NEPA, such major federal actions must be preceded by a meaningful environmental review that takes a “hard look” at the proposed action to inform agency decision-making. On the other hand, the Commission maintains that issuing geographic area spectrum licenses does not have foreseeable environmental impacts. The Commission maintains that: (a) it is not foreseeable from the issuance of a geographic area spectrum license that a licensee will actually construct and install wireless facilities; and (b) because the construction and installation of small wireless facilities are not foreseeable consequences of the geographic area spectrum license, issuance of the spectrum license does not involve significant federal involvement and thus does not constitute “a major federal action” triggering NEPA review.

Yet the Commission’s NEPA analysis is incorrect. The Commission presents no explanation of why the Order itself (as distinct from subsequent actions licensing spectrum, discussed *infra*) is not a major federal action because it changes regulations and policy regarding the applicability of NEPA and creates a new exclusion from NEPA for an entire class of wireless facilities. There can be no question of substantial federal involvement since the Commission’s action in the Order is what is at issue. Furthermore,

as discussed *infra*, the record contains substantial evidence showing significant harm to the human environment from so-called “small” wireless facilities. The Commission should have fully considered this evidence before concluding that the facilities in question posed no objectionable environmental impact and were exempt from NEPA.

In this connection, the undersigned observes that the Commission could have undertaken a programmatic environmental review of the regulatory exemption before the Order was issued.<sup>14</sup> As the Council on Environmental Quality (CEQ) stated in its Final Guidance regarding the use of Programmatic NEPA reviews, “[t]he analyses in a programmatic NEPA review are valuable in setting out the broad view of environmental impacts and benefits for a proposed decision such as a rulemaking, or establishing a policy, program, or plan.”<sup>15</sup> Such a programmatic environmental review seems particularly appropriate in the present context. Among other considerations, the preparation of a programmatic environmental review would have given the Commission an opportunity to explore the record evidence of direct, indirect, and cumulative impacts of so-called “small” wireless facilities in residential communities. It also would have identified reasonable but less harmful or intrusive alternatives to the widespread deployment of small wireless facilities.<sup>16</sup> The failure of the Commission at a minimum to undertake such a programmatic review fails to follow the Final Guidance from CEQ, violates NEPA, is a failure of reasoned decision-making, and is arbitrary and capricious and unlawful.

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<sup>14</sup> See, *Notice of Availability, Final Guidance for Effective Use of Programmatic NEPA Reviews*, issued by the Council on Environmental Quality, 79 FR 76986 (Dec. 23, 2014) (Final Guidance).

<sup>15</sup> *Id.*

<sup>16</sup> See discussion in Final Guidance of “reasonable alternatives.” *Id.* at 76988—76989.

Furthermore, the Commission's insistence that the issuance of geographic area spectrum licenses do not constitute "major federal actions" also is unpersuasive. Several commenters pointed to this legal infirmity. The National Resources Defense Council (NRDC), for example, pointed out that (1) NEPA applies to all "major federal actions"; (2) the regulations of the Council for Environmental Quality (CEQ) define "major federal action" as "projects or programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies"; (3) courts, including the U.S. Supreme Court have regularly found that the issuance of a license is a "major federal action"; and (4) the Commission has applied NEPA to its licensing decisions since it began issuing licenses in 1974.

Notwithstanding these arguments, the Commission wrongly maintains that the extent of federal involvement in the issuance of spectrum licenses is not a major federal action under NEPA. As previously described, the premise of the Commission's reasoning is that there is no foreseeable environmental impact from the issuance of geographic area spectrum licenses because those licenses do not constitute site-specific authority to construct any particular small wireless facility. The Commission, however, misses the fact that, even setting aside other environmental impacts, the geographic area spectrum license constitutes authorization to emit high frequency RF radiation and this radiation poses a serious environmental threat to persons in residential areas where small wireless facilities will be deployed. There is no question about foreseeability in this circumstance because the authority to use spectrum is itself the cause of foreseeable environmental impacts and, therefore, the Commission has erred by determining that



NEPA review is not required. In addition, as discussed *infra*, the Commission appears to be employing a strategy of segmentation in order to avoid meaningful NEPA review.

**C. The Commission's exemption of so-called "small" wireless facilities from pre-deployment historic preservation review violates NHPA.**

The Commission finds that a pre-deployment review of small wireless facilities on non-Tribal lands is generally not required by NHPA because the issuance of geographic area spectrum licenses is not a "federal undertaking," as defined in Section 3 of the National Historic Preservation Act (54 U.S.C. § 300320). "Federal Undertaking" includes 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.<sup>17</sup>

The same legal infirmities that apply to the Commission's determination to exempt small wireless facilities from the requirement for pre-deployment NEPA review apply also to the Commission's determination that small wireless facilities should be excluded from pre-deployment NHPA review. The Commission has erred in not considering that the Order itself is a "federal undertaking" under the NHPA because it represents a federal action changing established regulations requiring NHPA review for an entire class of small wireless facilities. In addition, the Commission has erred in concluding that the issuance of geographic area spectrum licenses does not present

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<sup>17</sup> The Commission maintains that, at least from an operational standpoint, the definition of "major federal action" under NEPA and "federal undertaking" under NHPA are co-extensive. It is not clear that this is the case, however.

foreseeable historic preservation impacts requiring pre-deployment historic preservation reviews. The Order, in short, violates NHPA just as it also violates NEPA.

**D. The Commission erred in concluding that pre-deployment environmental reviews of so-called “small” wireless facilities are not consistent with the public interest.**

The Order, at paragraph 39, concludes that pre-deployment environmental reviews of small wireless facilities are not consistent with the public interest. The Commission’s public interest analysis in the Order is guided by the alleged economic and social benefits of the deployment of high frequency communications technologies versus the alleged costs and delays allegedly associated with environmental and historic preservation reviews.<sup>18</sup> The Commission is heavily swayed by concerns expressed by communications industry stakeholders with a pecuniary interest in seeing that small wireless facility deployment is expedited and uncritically accepts industry’s benefit and cost claims. The Commission also gives uncritical credit to industry’s claims that the number of public complaints regarding the impacts of small wireless facility installations has not been large.<sup>19</sup> On the basis of these factors, the Commission concludes that “small wireless facilities pose little or no risk of adverse environmental or historic preservation

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<sup>18</sup> Order at para. 2 presents outsized estimates submitted by communications companies and their representatives of jobs that will be created by the deployment of 5G technologies. Order at para. 3 refers to the costs and delays allegedly associated with the regulatory process. Order at para. 11 summarizes additional cost claims submitted by communications companies. Also see Order at para. 44. The Commission does not provide any analysis of the basis for these claims.

<sup>19</sup> Order at para. 79.

effects”<sup>20</sup> and, accordingly, pre-deployment environmental and historic preservation reviews of small wireless facilities do not serve the public interest.<sup>21</sup>

Missing from the Commission’s review of comments is any meaningful consideration of the specific record evidence in this and connected actions of the significant potential negative environmental impacts from the planned deployment of small wireless facilities, particularly in terms of health and safety and aesthetic impacts on residential neighborhoods. The Commission’s public interest analysis does not support its determination to do away with pre-deployment environmental and historic preservation reviews of so-called “small” wireless facilities. Because the Commission failed to review and seriously consider all relevant evidence, the Order’s public interest analysis and the resulting determination to eliminate pre-deployment environmental are unlawful.

More specifically, there are several critical facts that the Commission failed to consider. There is ample record evidence submitted in this proceeding of negative impacts from the widespread deployment of so-called “small” wireless facilities. This evidence is presented in comments and attachments to comments filed in this proceeding, including references and electronic links contained therein to peer-reviewed scientific studies and letters from medical professionals. This documentation points to significant potential harm to the human body and brain functioning from RF radiation.<sup>22</sup> As

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<sup>20</sup> Order at para. 42.

<sup>21</sup> Order at para. 79.

<sup>22</sup> See, e.g. Herbert, M.R. and Sage, C. “Autism and EMF? Plausibility of a Pathophysiological Link”. Part 1: Pathophysiology , 2013, Jun;20(3):191-209, epub Oct 4, PMID 24095003. Pubmed abstract for Part 1. Part II: Pathophysiology, 2013 Jun;20(3):211-34. Epub 2013 Oct 8, PMID 24113318. Pubmed

discussed above, the Commission frankly states that it is not going to examine this evidence.

Furthermore, the Commission unlawfully has failed to consider relevant evidence submitted in connected actions.<sup>23</sup> There are two such connected actions: (1) the proceeding begun in 2013,<sup>24</sup> but never concluded, to review and update the RF emissions health and safety regulations promulgated in 1996;<sup>25</sup> those regulations, apparently based on standards established in 1992,<sup>26</sup> are out of date but the Commission appears to be unnecessarily delaying its updating of those regulations while hastily moving ahead with efforts to expedite the deployment of small wireless facilities in residential neighborhoods; and (2) the order issued in 2016 in which the Commission for the first time sanctioned the use of higher frequency RF bands while ruling that health and safety

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abstract for Part II, which are summarized in the submission of the Environmental Health Trust, filed June 7, 2017 in this proceeding.

<sup>23</sup> The scope of an agency's NEPA review must include "connected actions". 40 C.F.R. §1508.25(a)(1). Actions are "connected" if they trigger other actions, cannot proceed without previous or simultaneous actions, or are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. §1508.25(a)(1)(iii). As discussed in this Motion for Stay, neither the current proceeding nor the proceeding approving the use of higher frequency mmW spectrum can reasonably proceed to conclusion without the Commission first or concluding the proceeding begun in 2013 to update its RF regulations. The proceeding to update the RF regulations is the "larger proceeding" on which the other two proceedings depend for their justification. Moreover, the same considerations which require review of connected actions for purposes of NEPA apply equally to the Commission's public interest analysis.

<sup>24</sup> See note 7 *supra*.

<sup>25</sup> *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, ET Docket No. 93-62 (adopted August 1, 1996; released August 1, 1996). See, 61 FR 41006 (August 7, 1996). In this proceeding, the Commission adopted recommended Maximum Permissible Exposure limits for field strength and power density for the transmitters operating at frequencies of 300 kHz to 100 GHz. In addition, the Commission adopted the specific absorption rate (SAR) limits for devices operating within close proximity to the body as specified within the ANSI/IEEE C95.1-1992 guidelines.

<sup>26</sup> *Id.*

concerns were beyond the scope of its decision and would have to wait until the review and update proceeding begun in 2013 was concluded.<sup>27</sup>

**E. The Commission appears to be employing a strategy of unlawful segmentation in order to avoid meaningful NEPA review.**

In failing to consider the above evidence submitted in this proceeding and in the two other connected actions, the Commission has fallen short of well-established standards of reasoned decision-making necessary to establish that it has acted in the public interest. Indeed, taking the current proceeding and the two other connected actions together, it appears that the Commission is engaged in a strategy of segmenting connected actions for the purpose of evading meaningful environmental review. This segmentation strategy is a clear violation of NEPA.<sup>28</sup> It also is a violation of the Commission's responsibility to serve the public interest. In order to cure this violation, the Commission must complete its reassessment of the RF health and safety regulations begun in 2013 and factor those standards into both its 2016 decision permitting the use of higher frequency RF bands and the Order at issue in this proceeding.

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<sup>27</sup> *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, et seq.*, GN Docket No. 14-177, *et seq.*, Report and Order and Notice of Proposed Rulemaking (adopted July 14, 2016, released July 14, 2016), published in the Federal Register at 81 FR 58270 (August 24, 2016) at paragraph numbers 356 through 363 (expressly deferring consideration of health and safety impacts).

<sup>28</sup> It is unlawful for agencies to evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without significant impact. *O'Reilly v. U.S. Army Corp. Engineers*, 950 F.2d 1129 (5th Cir. 2007).

**F. The Commission Errs In Concluding That Pre-Deployment Environmental Reviews Will Provide Only *De Minimis* Benefits And In Suggesting That Existing RF Health and Safety Regulations Are Adequate To Protect The Public Interest.**

The Commission indicates, at paragraph 63 of the Order, that existing RF health and safety regulations will continue to apply regardless of the fact that pre-deployment environmental reviews will no longer be required. At paragraph 79, the Order concludes that the benefits of pre-deployment environmental reviews will be *de minimis*. Also, at paragraph 92, the Order states that the deployment of small wireless facilities are “inherently unlikely” to trigger environmental concerns.

The Commission apparently has concluded that individuals are not significantly put at risk by network densification of small wireless facilities in residential communities, that those who might justifiably be concerned over the health and safety impacts can reasonably rely for protection on the Commission’s existing RF regulations, and that little, if anything, would be gained by requiring pre-deployment environmental reviews. But as discussed above, the existing RF safety regulations are based on standards developed in 1992 and the regulations were promulgated in 1996. They clearly need to be re-examined and updated, as evidenced by the Commission’s establishment of a proceeding to do just that in 2013. Asking the public to rely on those outdated standards is asking the public to take an unwarranted risk. Moreover, after-the-fact legal actions to cure environmental injuries are no substitute for pre-deployment environmental reviews based on updated standards. The Commission in fact recognized in a 1990 Order that its “responsibility under the environmental laws is to consider potential harm to the environment before it occurs, not simply to await environmental damage and then

attempt to rectify it.”<sup>29</sup> Failing here to recognize the advantages to the public welfare of pre-deployment environmental reviews is contrary to the public interest. Indeed, as a practical matter, it is likely to prove extremely harmful to some individuals who suffer real harm from small cell network densification: in the absence of pre-deployment environmental reviews and up-to-date health and safety regulations, the injuries sustained by these claimants will continue to grow while their claims are pending resolution; those injuries might be avoided altogether if there were pre-deployment environmental reviews that incorporated up-to-date health and safety regulations.

Moreover, pre-deployment environmental reviews, possibly a programmatic review, and the development of up-to-date uniform standards for small wireless facilities would actually benefit both communications companies and individual residents. It would minimize uncertainties for both sides by easing concerns over the plans for deployment and would reduce the likelihood that residents will pursue hundreds, if not thousands, of individual claims of environmental degradation, claims of health and safety rule violations, or other claims of uncompensated takings of property. Both sides thus would benefit and, therefore, the public interest, convenience, and necessity would be better served.

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<sup>29</sup> *Amendment of Environmental Rules*, First Report and Order, 5 FCC Rcd 2942, 2943, para. 10 (1990) (*1990 Order*).

**G. The Commission Errs In Suggesting That State And Local Laws And Regulations Are Adequate To Protect The Public Interest From Environmental Impacts Of Small Wireless Facilities.**

The Commission advises at paragraph 77 of the Order that, even in the absence of federal pre-deployment environmental reviews, state and local laws and regulations still will reduce the likelihood of adverse impacts from small wireless facilities. On the other hand, the Commission acknowledges at note 153 of the Order that existing limits on state and local laws will not provide the same scope of protection as would pre-deployment reviews. The Commission additionally acknowledges at note 58 of the Order that federal authority has generally pre-empted conflicting regulations by state and local authorities. At note 153, the Order describes the extent to which state and local governmental regulations vary from jurisdiction to jurisdiction. These variations in large measure appear to be due to differences in the interpretation of the extent of federal pre-emption.

Given these limits on state and local authorities and the differing understandings of what authority remains for state and local agencies, the Commission's refusal to wield federal authority to ensure a uniform review of environmental and historic preservation impacts of small wireless facility deployments does not serve the public interest and is unreasonable. In this respect, the Commission is failing to carry out its statutory mandate to protect the public safety. See note 53 of the Order. The Commission's Order gives undue weight to the second of these two mandates at the expense of the first. The result is not in the public interest, convenience, and necessity, and, therefore, is unlawful.



## V. A Stay Is In the Public Interest

Given the actions taken by the Commission to date, hundreds of thousands of small wireless facilities may be deployed in residential neighborhoods across the nation and emitting high frequency radiation into peoples' homes by the time the Commission completes its review of health and safety regulations. Thus, by promoting the rapid deployment of high frequency technologies at the expense of public wellbeing, the Commission has violated the public trust in government and, as a legal matter, has acted contrary to the Communications Act, NEPA, NHPA, and the public interest. The evidence of record raises substantial concerns over the impact of deployment of so-called "small" wireless facilities on human health and safety and the environment. The threatened injuries cannot be fully repaired once inflicted. The Commission should stay the effectiveness of its Order pending issuance of a decision on this Motion for Stay.

In determining whether to stay the effectiveness of one of its orders, the Commission applies the traditional four-factor test established by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").<sup>30</sup> To qualify for a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of the stay. The Commission's consideration of each factor is weighed against the others, with no single factor dispositive. Thus, "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher

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<sup>30</sup> *Id.* (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (Holiday Tours); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (VA Petroleum Jobbers)).

probability of success on the merits.”<sup>31</sup>

The preceding discussion in support of this Motion for Stay also establishes “good cause” to support a stay of the Order. This is borne out by applying the four-factor test, as follows:

**A. The undersigned is likely to prevail on the merits of the issues.**

The arguments and facts presented above all contribute to the conclusion that the undersigned, a proposed intervenor in the pending court appeals of the Commission’s action,<sup>32</sup> is likely to prevail on the merits of the issues in those appeals. Of these arguments, all count but a few warrant special mention.

First, the Commission, by rule amendment, has attempted in the Order to create a new class of wireless facilities exempt from NEPA and NHPA without a meaningful review of the environmental (including health and safety) impacts and historic preservation impacts of its action. The Order posits that this change in regulations is warranted apparently because so-called small wireless facilities are unlikely to have much of an impact on the locations in which they are placed. The Commission appears to have assumed the result that it uses to justify the action, *i.e.* it has assumed that there will be no impacts and this supports the conclusion that it is unnecessary to conduct a meaningful impact analysis. The undersigned submits that the reviewing Court will not sustain such circular reasoning.

Second, the fact that the Commission has ignored substantial evidence of record

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<sup>31</sup> *Id.* (citing *VA Petroleum Jobbers*, 259 F.2d at 925; and *Holiday Tours*, 559 F.2d at 844).

<sup>32</sup> *United Keetoowah Band of Cherokee ) Indians in Oklahoma, et al. v. Federal Communications Commission*, Case Nos. 18-1129, 18-1135, 18-1148, and 18-1159, in *United States Court of Appeals for the District of Columbia Circuit*.

of significant environmental impacts, including deleterious health and safety impacts, lends further support to the likelihood of prevailing on the merits in the court appeals.

Third, so too, does the fact that the Commission appears to be engaged in a strategy of unlawful segmentation, a clear violation of NEPA that the reviewing court is unlikely to sustain.

Fourth, an appeal is even more likely to prevail when a court considers that the Commission is continuing to rely on outdated health and safety regulations developed on stale scientific data; reliance on such stale data is a clear indication that the Commission's action is arbitrary and capricious. A reviewing court is likely to be swayed by this fact, especially because the outdated regulations expose the public to unknown risks from high frequency RF radiation when the Commission could have prevented that situation by completing the updating of its regulations begun in 2013.

**B. Absent grant of a stay, the petitioner will suffer irreparable harm.**

As discussed above, so-called "small" wireless facilities pose a threat of irreparable harm to the human environment, including the health and safety of residents in communities in which the facilities are placed. This threat is specific to the undersigned. He is a resident of Montgomery County Maryland and communications companies are presently proposing to place small wireless facilities approximately sixty feet from his family's home. The undersigned has appended to this pleading an affidavit attesting to his observation of the plans for this installation. Said installation poses the threat of irreparable injury to the undersigned and to his family and neighbors.

**C. Other interested parties may be harmed if the stay is granted but this harm is outweighed by the irreparable harm to the public if the stay is not granted.**

The business interests supporting the deployment of so-called “small” wireless facilities will likely suffer some pecuniary harm if the stay is granted. Persons desirous of access to next generation wireless communications may also be mildly harmed as they will have to continue to put up with existing communications devices. However, any such harm is uncertain since the adequacy of existing communications devices has not been put in question and any such harm from granting the stay will be outweighed by the far greater irreparable harm occasioned by not granting the stay.

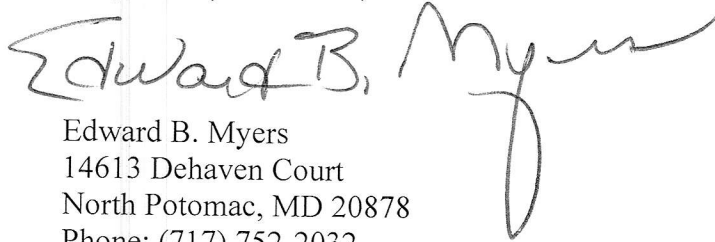
**D. The public interest favors grant of the stay.**

The arguments and facts presented in this Motion for Stay clearly demonstrate that the Commission’s Order is not consistent with the public interest. The public interest requires that the Commission complete the updating of its health and safety regulations and also perform a full environmental review of its proposed action before deployment of so-called “small” wireless facilities commences. This is particularly true of deployment in residential communities. Accordingly, for all of the reasons presented herein, the public interest favors grant of the stay.

## **VI. Conclusion**

For the reasons set forth above, the undersigned requests the Commission to stay the effectiveness of the Order herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward B. Myers". The signature is fluid and cursive, with the first name "Edward" and last name "Myers" clearly distinguishable.

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