

SCIENTISTS FOR WIRED TECHNOLOGY

Advocacy based on Scientists' research of the hazards of pulsed, data-modulated, Radiofrequency Microwave Radiation

AUGUST 10, 2019 BY PMG

Federal Court Overturns FCC Order Bypassing Environmental Review For 4G/5G Wireless Small Cell Densification



On August 9, the US Court of Appeals for the District of Columbia Circuit issued a decision substantially setting back the efforts of the Federal Communications Commission to expedite the deployment of densified 4G/5G so-called "Small Cell" cell towers. The FCC had issued an order in March 2018 eliminating environmental and historic preservation review of densified 4G + 5G so-called "small cell" cell towers. The FCC had reasoned that even though the industry planned to deploy as many as 800,000 of these 50-foot (possibly taller) towers in neighborhoods and historic districts around the country by 2026, it was not in the public interest to review their potential impacts on the environment and historical places.

The court vacated the portions of the order that exempted small cells from NEPA and NHPA reviews, delivering a setback to the FCC's efforts to speed up small cell deployment of densified 4G and 5G networks. Cases challenging another recent FCC order that limits local government control over small wireless facilities are currently pending before the U.S. Court of Appeals for the Ninth Circuit.

In an appeal brought by the Natural Resources Defense Council and several Native American Tribes, the Court found that the FCC had failed to adequately address possible harms of its deregulatory efforts and the benefits of environmental and historic preservation review. In particular, the Court observed that the FCC had failed to address the cumulative harms that may result from "densification":

- the crowding of multiple cell towers in a limited area;
- the potential harms from co-location of multiple cell antennas on a pole simultaneously transmitting voice and data on multiple frequency bands (potentially from 600 MHz to 90,000 MHz)
- the FCC quickly and prematurely deploying this densification of Wireless Telecommunications Facilities (WTFs) scheme before the FCC had completed its ongoing investigation into the potential health effects of pulsed, data-modulated, Radio-frequency Electromagnetic Microwave Radiation (RF-EMR) from antennas in such close proximity to where people live, work, study, play, sleep and heal (antennas installed as close as 15 to 50 feet from homes and only 25 to 50 feet off the ground).

The Court found that the FCC's Order was arbitrary and capricious and, therefore, unlawful. Consequently, the Court vacated the FCC's Order 18-30, thereby reinstating prior regulations requiring environmental and historic preservation reviews of densified 4G and 5G cell tower deployments.

Attorney Edward B. Myers an intervenor in the case stated:

"I intervened in opposition to the FCC's order because the order represented a precipitous effort to jam thousands of 4G/5G towers into virtually every neighborhood in the country (including mine) based on woefully outdated RF-EMR exposure exposure guidelines. The efforts of the FCC to develop meaningful RF-EMR exposure exposure guidelines, especially with regard to the health impacts of pulsed, data-modulated, Radio-frequency Electromagnetic Microwave Radiation (RF-EMR) emitted by small cell towers, are practically non-existent. I am gratified by the Court's decision which, in my view, is a cautionary tale against the arbitrary and capricious efforts of the FCC to dispense with NEPA review."

A three-judge panel of the US Court of Appeals for the District of Columbia Circuit issued its unanimous ruling writing that FCC Chair Ajit Pai's order . . .

"does not justify the Commission's determination that it was not in the public interest to require review of small cell deployments. In particular, the Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the Order will principally affect small cells that require new construction."

The FCC also failed to “adequately address possible harms of deregulation and benefits of environmental and historic-preservation review,” which means the commission’s “deregulation of small cells is thus arbitrary and capricious,” judges concluded.

4G and 5G and small cell frequencies impact wildlife. For example, research finds the radiation alters bird navigation, disturbs honeybee colonies, damages trees and impacts plants. Research on insects and 5G finds that their bodies can absorb up to three times more power from 5G millimeter wave frequencies (around 24-28 GHz) and this could lead to major changes in how they behave and function, affecting the capacity of bees and other insects to pollinate crops.

Published reviews on 5G, millimeter waves and wireless (even from decades ago) have cataloged a host of harmful impacts including increased temperature, altered gene expression, faster cell growth, inflammatory and metabolic processes, damage to the eyes and cellular stress, memory problems, sperm damage, genetic damage, behavior issues and brain damage.

In 2018, 19 tribal groups, the Natural Resources Defense Council and attorney Edward B. Myers, filed requests for reconsideration.

Attorney Edward B. Myers stated in the 2018 press release, “The FCC has ignored the requirements of federal law by ruling without having conducted any impact analysis that so-called ‘small wireless facilities’, are not likely to have any significant environmental impacts and, therefore, do not require any prior review under NEPA or the NHPA. The FCC also failed to meet its responsibilities under the Communications Act, independent of NEPA and the NHPA, to ensure that its actions promote health and safety.”

Read the Court Ruling> <https://ehtrust.org/wp-content/uploads/Court-Opinion.pdf>

You can listen to the oral arguments here.

<https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201903>

(18-1135) <https://www.courtlistener.com/docket/8149347/natural-resources-defense-coun-v-fcc/>

Case Briefs

- Edward B. Myers Request for Consideration 2018 Press Release
- NRDC petition for review of the FCC order (May 14, 2018)
- NRDC opening brief (January 25, 2019) reply brief (January 25, 2019)
- United Keetoowah Band of Cherokee Indians in Oklahoma, et al., and National Association of Tribal Historic Preservation Officers, et al., opening brief (January 25, 2019) reply brief (January 25, 2019)
- CTIA and Sprint brief in support of FCC (January 25, 2019)
- Blackfeet Tribe, et al., opening brief (January 25, 2019) reply brief (January 25, 2019)
- Order regarding oral arguments (January 28, 2019)
- FCC opposition brief (February 1, 2019)

Key Quotes From the August 9, 2019 Ruling

Note: In the following, the term "the Commission" means the Federal Communications Commission (FCC).

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"We grant in part the petitions for review because the Order does not justify the Commission's determination that it was not in the public interest to require review of small cell deployments. In particular, the **Commission failed to justify** its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the Order will principally affect small cells that require new construction. The **Commission accordingly did not, pursuant to its public interest authority, 47 U.S.C. § 319(d), adequately address possible harms of deregulation and benefits of environmental and historic-preservation review.** The Order's deregulation of small cells is thus arbitrary and capricious."

pp. 12-14

The challenged Order eliminated NHPA and NEPA review on small cells that meet certain size and other specifications, based on the Commission's conclusion that such review was not statutorily required and would impede the advance of [densified 4G and] 5G networks, and that its costs outweighed any benefits. The Order also altered Tribal involvement in those Section 106 reviews that are still conducted on wireless facilities that were not encompassed in the small cell exemption . . .

We consolidated five timely petitions for review of the Order into this action.

Challenging the order:

- Petitioner: United Keetoowah Band of Cherokee Indians (Keetoowah) represents a group of Tribes and historic preservation organizations.
- Petitioner: Blackfeet Tribe (Blackfeet) represents another group of Tribes and the Native American Rights Fund.
- Petitioner: The Natural Resources Defense Council (NRDC) represents itself
- Intervenor: Maryland citizen Edward B. Myers

Defending the order:

- Intervenor: CTIA

"We set aside an agency order only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agencies' obligation to engage in "reasoned decisionmaking" means that "not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational . . . An agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

pp. 18-20

- "The **Commission failed to justify** its determination that it is not in the public interest to require review of small cell deployments. We therefore grant the petitions in part because the **Order's deregulation of small cells is arbitrary and capricious.**"

- "The **Commission did not adequately address the harms of deregulation** or justify its portrayal of those harms as negligible."
- "The **Commission did not satisfactorily consider the benefits of review.**"
- "The scale of the deployment the FCC seeks to facilitate, particularly given its exemption of small cells that require new construction, makes it **impossible on this record to credit the claim that small cell deregulation will 'leave little to no environmental footprint.'**"
- "The Commission also **failed to assess** the harms that can attend deployments that do not require new construction, particularly the **cumulative harms from densification**
- "[The Commission] **failed to address** concerns that it was speeding densification "without completing its investigation of . . . **health effects of low-intensity radiofrequency radiation,**" which it is currently reassessing. Comment of BioInitiative Working Grp., J.A. 235"

pp. 26-27

- "The **FCC's conclusion that small cells are inherently unlikely to trigger concerns is arbitrary and capricious**, and describing comments as "generalized" does not excuse the agency of its obligation to consider those comments as part of reasoned decisionmaking. "
- "We hold that the Order's **deregulation of small cells is arbitrary and capricious** because its public-interest analysis did not meet the standard of reasoned decisionmaking."

p. 38-39

- The NRDC argues that promulgating the Order was itself a major federal action that required NEPA review. See NRDC Br. 10-11. But, as intervenor CTIA points out, the **NRDC forfeited that argument by failing to make it to the Commission**, see CTIA Br. 38, and we lack jurisdiction to review a claim that was not raised there. *Free Access & Broad. Telemedia, LLC v. FCC*, 865 F.3d 615, 619 (D.C. Cir. 2017).
- "We grant the petitions to vacate the Order's removal of small cells from its limited approval authority and remand to the FCC. We deny the petitions to vacate the Order's changes to Tribal involvement in Section 106 review and to vacate the Order in its entirety . . . So ordered."

Key Quotes From the May 29, 2018 Intervenor Filing

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- "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.¹¹

11. 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*, 82 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 conditions"); and *Northern Plains Resource Council Inc. v. Surface Transportation Board*, 668 F.3d 667 (9th Cir. 2011) (holding that reliance on ten year old aerial surveys was arbitrary and capricious)

pp. 11-12

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

pp. 16-17

- *"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."*
- *"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."*

pp. 20-22

- *"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 1934 Communications Act, NEPA, NHPA, and the public interest."*
- *"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. Said installation poses the threat of irreparable injury to the undersigned and to his family and neighbors . . . Any pecuniary harm from granting the stay will be outweighed by the irreparable harm occasioned by not granting the stay."

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

DC Circuit Court of Appeals Unanimously Overturns FCC Effort to Eliminate NEPA and Historic Review

Washington, D.C., August 13, 2019 for immediate release | [Original Press Release here.](#)

Appeals Court unanimously overturns FCC Effort to Eliminate NEPA and Historic Review

A federal appeals court has vacated and remanded the “arbitrary and capricious” Federal Communications Commission’s order 18-30 to allow AT&T Inc., Verizon, and other wireless carriers, cell phone facilities owners and operators to bypass historic preservation and environmental reviews for densified 4G and 5G networks.

On August 9, the U.S. Court of Appeals for the District of Columbia Circuit unanimously denied the FCC order that would have exempted 800,000 or more Close Proximity Microwave Radiation Antenna (CPMRA) Wireless Telecommunications Facilities (WTFs) (aka the misnomer of Small Cells) from historic-preservation review under the National Historic Preservation Act (NHPA) and environmental review under the National Environmental Policy Act (NEPA). The overturned FCC order had let carriers deploy small-cell equipment on non-tribal lands without any federally required reviews.

“Small cells” is an industry created term to refer to cell antennas which can be mounted on utility poles, lamp posts, or their own towers. The three-judge panel declared that the FCC failed to “adequately address possible harms of deregulation and benefits of environmental and historic-preservation review.... In particular, the Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the Order will principally affect small cells that require new construction.”

Attorney Edward B. Myers, of counsel to Environmental Health Trust, and an intervenor in the Court proceeding along with the Natural Resources Defense Council and 19 tribal groups, commented on the decision’s importance: “The FCC’s order represented a precipitous effort to jam thousands of 5G towers into virtually every neighborhood in the country based on woefully outdated safety standards. The efforts of the FCC to develop meaningful safety standards, especially as regards the health impacts of radiofrequency radiation emitted by 5G cell facilities, are woefully out of date. I am gratified by the Court’s decision which, in my view, is a cautionary tale against the arbitrary and capricious efforts of the FCC to dispense with environmental and historic preservation reviews.”

Growing evidence indicates that wireless radiation and the frequencies used in 5G can seriously impact wildlife. For example, research shows that 5G radiofrequency radiation could affect the capacity of bees and other insects to pollinate crops. Studies also indicate that this radiation can alter animal navigation, disturb honeybee colonies, damage trees and impact other plants. Published reviews on 5G, millimeter waves and wireless radiation (even from decades ago) have cataloged a host of harmful impacts, including increased temperature, altered gene expression, faster cell growth, inflammatory and metabolic processes, damage to the eyes and cellular stress, memory problems, sperm damage, genetic damage, behavior issues and brain damage.

About Environmental Health Trust

Edward B. Myers, J.D., was an intervenor in this case, having recently retired as a Senior Federal Attorney. He is legal and policy advisor to EHT. Environmental Health Trust (EHT) educates individuals, health professionals and communities about controllable environmental health risks and policy changes needed to reduce those risks. Currently EHT is addressing health impacts from 4G and 5G, cell phones and wireless in schools and recommends practical steps to reduce wireless exposures. The Environmental Health Trust maintains a regularly updated database of worldwide precautionary policies on cell phone radiation and health. The foundation's website is the go-to place for clear, science-based information to prevent disease. www.ehtrust.org

The Must Quotes

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All "major Federal actions significantly affecting the quality of the humanity of the human environment" trigger environmental review under NEPA, just as federal "undertakings" trigger historic preservation review under the NHPA. 42 U.S.C. § 4332(C). Major federal actions "include[] actions . . . which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Under the Commission's procedures implementing NEPA, if an action may significantly affect the environment, applicants must conduct a preliminary Environmental Assessment to help the Commission determine whether "the proposal will have a significant environmental impact upon the quality of the human environment," and so perhaps necessitate a more detailed Environmental Impact Statement. 47 C.F.R. § 1.1308; see also 40 C.F.R. § 1508.9. If, after reviewing the Environmental Assessment, the Commission determines that the action will not have a significant environmental impact, it will make a "finding of no significant impact" and process the application "without further documentation of environmental effect." 47 C.F.R. § 1.1308(d).

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In re Amendment of Envtl. Rules (1990 Order), 5 FCC Rcd. 2942 (1990). Limited approval authority required that, "where construction of a Commission-regulated radio communications facility is permitted without prior Commission authorization (i.e., without a construction permit), the licensee must nonetheless comply with historic preservation and environmental review procedures." Order ¶ 51; see also 47 C.F.R. § 1.1312.

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We set aside an agency order only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agencies' obligation to engage in "reasoned decisionmaking" means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998))

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If petitioners prevail on any one or more of those grounds, we must vacate the Order's deregulation of small cells and remand to the FCC. The Commission failed to justify its determination that it is not in the public interest to require review of small cell deployments. We therefore grant the petitions in part because the Order's deregulation of small cells is arbitrary and capricious. The Commission did not adequately address the harms of deregulation or justify its portrayal of those harms as negligible. In light of its mischaracterization of small cells' footprint, the scale of the deployment it anticipates, the many expedients already in place for low-impact wireless construction, and the Commission's decades-long history of carefully tailored review, the FCC's characterization of the Order as consistent with its longstanding policy was not "logical and rational." Michigan v. EPA, 135 S. Ct. at 2706. Finally, the Commission did not satisfactorily consider the benefits of review.

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The NRDC argues that promulgating the Order was itself a major federal action that required NEPA review. See NRDC Br. 10-11. But, as intervenor CTIA points out, the NRDC forfeited that argument by failing to make it to the Commission, see CTIA Br. 38, and we lack jurisdiction to review a claim that was not raised there. Free Access & Broad. Telemedia, LLC v. FCC, 865 F.3d 615, 619 (D.C. Cir. 2017). While the NRDC points to its own and others' comments "urg[ing] the Commission to conduct a NEPA analysis," NRDC Reply Br. 3, none of those comments said the Commission was required to perform a NEPA analysis of the Order. The NRDC cites its own comment "that if the FCC sought to exclude an entire category of wireless facilities from NEPA, it was required to establish a categorical exclusion." Id. (citing J.A. 787-90). But the NRDC did not there contend, as it now does, that the Order is a major federal action. Rather, the NRDC's argument was that the federal character of the geographic area license meant that the Commission could not entirely exempt wireless facility construction from NEPA review, J.A. 790—the same statutory argument it made here— and that the proper approach to exempting federal "activities that by their nature do not have significant impacts on the environment is with a categorical exclusion," J.A. 789. Whether the licenses or construction are federal, the basis of the NRDC's argument, is irrelevant to the question whether the Order overall is a major federal action that requires NEPA review. One of the other two comments it cites asserted that the proposed rule failed to comply with NEPA, but again, not because the Order required NEPA analysis—rather because the issuance of licenses constitutes a major federal action. See Comment of the Nat'l Trust for Historic Pres., J.A. 770. The third comment urged the Commission to consider the cumulative effects of radiofrequency exposure, but did not even mention NEPA. See Comment of BioInitiative Working Grp., J.A. 235-38. The argument that the Order required independent NEPA review was never fairly before the Commission

CONCLUSION

We grant the petitions to vacate the Order's removal of small cells from its limited approval authority and remand to the FCC. We deny the petitions to vacate the Order's changes to Tribal involvement in Section 106 review and to vacate the Order in its entirety.

<https://scientists4wiredtech.com/2019/08/federal-court-overturms-fcc-order-bypassing-environmental-review-for-4g-5g-wireless-small-cell-densification/>