International Center for Law & Economics

COMMENTS

TELECOMMUNICATIONS & REGULATED UTILITIES

WT Docket No. 25-217

Re: Modernizing the Commission's National Environmental Policy Act Rules

International Center for Law & Economics

November 16, 2026

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Comments of the International Center for Law & Economics

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I. INTRODUCTION AND OVERVIEW

The International Center for Law & Economics (ICLE) submits these comments in response to the Federal Communications Commission's (FCC or Commission) Further Notice of Proposed Rulemaking on its framework for implementing the National Historic Preservation Act (NHPA).[1] ICLE is a nonprofit, nonpartisan research center that applies law & economics to public policy. Its work promotes sound economic analysis and consumer welfare, particularly in dynamic, technology-driven markets such as telecommunications.

The Commission's recent order removed a broad range of wireless deployments from review under the National Environmental Policy Act (NEPA). The order rests largely on a straightforward distinction: Granting a license to operate a radio does not, by itself, authorize or direct a particular construction project. That timely reform will help accelerate broadband deployment.

Many wireless projects nevertheless remain subject to review before construction under Section 106 of the NHPA, which requires federal agencies to consider how their "undertakings" affect historic properties. The Commission has long treated wireless construction under geographic area licenses—licenses to use specified frequencies within a defined area—as federal undertakings. Section 106 review therefore remains the main federal hurdle for most new towers and some new small cells, the compact wireless facilities that supplement tower coverage. That review adds thousands of dollars of cost per site and, more significantly, months of delay before construction can begin. Yet the vast majority of reviews find no adverse effect on historic or Tribal properties.

The reasoning behind the Commission's NEPA reforms applies equally to the NHPA. A spectrum license grants the right to operate a radio on particular frequencies; it does not authorize, locate,

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[1] *Modernizing the Commission's National Environmental Policy Act Rules*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 25-217, FCC 26-64 (rel. Oct. 1, 2026), https://docs.fcc.gov/public/attachments/FCC-26-64A1.pdf [hereinafter Order].

or control facility construction. Permission to build comes from landowners, local governments, pole owners, and, for projects on federal land, the agency that manages it. A licensee's construction project therefore does not "requir[e] a Federal permit, license or approval" merely because the builder holds a spectrum license.

Consistent with its NEPA order, the Commission should conclude that holding a license to operate a radio does not, by itself, make wireless deployment a federal undertaking subject to Section 106 review.

II. SECTION 106 REVIEW IMPOSES SUBSTANTIAL COSTS FOR FEW FINDINGS OF HARM

With NEPA review no longer required for facilities that do not need antenna structure registration, Section 106 remains the only federal review most wireless facilities face before construction. The Order estimates that roughly 13,262 macrocell sites—sites that provide broad wireless coverage—will no longer require NEPA review each year.[2] Yet provider survey data indicate that every new tower and roughly 6% of new outdoor small cells still require Section 106 review.[3] Whether spectrum licensing makes construction a federal "undertaking" therefore determines whether most sites face federal review at all.

Preparing a Section 106 review costs an average of $2,883 per installation, with costs ranging from $1,000 to $5,000. The process takes roughly two to six months.[4] According to Verizon, Tribal Nations typically respond within 30–60 days, but that average rises to 110 days when a Tribal Nation requests formal consultation with the federal government.[5] When NEPA or NHPA review triggers an environmental assessment—as occurs for about 7% of new installations—the assessment adds an average of $15,500 and can cost as much as $50,000.[6]

The direct costs are substantial, but the delays cost broadband providers and consumers even more. Section 106 review can hold up a site for months before construction begins, postponing the benefits of expanded coverage and capacity. The NERA Study estimates that NHPA compliance delays new deployments by about five months on average. Drawing on earlier research, it places the loss in consumer welfare from a six-month delay in mid-band spectrum deployment at roughly $1.3 billion.[7]

Costs also vary sharply by location. In the Commission's 2018 proceeding, one provider reported Tribal review fees of $500 to $2,000 per site on the West Coast, compared with more than $15,000 per site in Indianapolis. The provider attributed that difference to the number of Tribal Nations reviewing each project there.[8]

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[2] Order, *supra* note 1, app. E.

[3] *Quantifying the Opportunity of Reforming the Federal Communications Commission's National Environmental Policy Act and National Historical Preservation Act Rules*, WT Docket No. 25-217, at 10 (filed Jan. 22, 2026), https://www.fcc.gov/ecfs/document/10122774520255/1 [hereinafter NERA Study].

[4] *Id.* at 10, 12.

[5] Order, *supra* note 1, ¶ 197.

[6] NERA Study, *supra* note 3, at 10.

[7] *Id.* at 13.

[8] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd. 3102, ¶ 14 (2018), https://docs.fcc.gov/public/attachments/FCC-18-30A1.pdf.

Those burdens might warrant greater weight if reviews frequently identified harm to historic properties. The record instead shows very few findings of adverse effects. Verizon reported that only 0.3% of its requests for Tribal review between 2012 and 2015 produced such a finding. The Texas Historical Commission likewise reported adverse effects on historic properties in only 0.25% of projects reviewed since 2014.[9]

The Commission can address these costs while preserving review where the NHPA requires it. Section 106 should apply when a federal agency has the requisite authority over a project; a spectrum license alone should not trigger review of construction the Commission neither authorizes nor controls. Projects with an independent basis for federal review would remain subject to Section 106, and landowners, local governments, pole owners, and federal land managers would retain their authority over facility siting.

III. A SPECTRUM LICENSE ALONE DOES NOT TRIGGER SECTION 106 REVIEW

As in its NEPA order, the Commission should ground Section 106 review in its statutory authority over the project itself. A spectrum license grants the right to transmit; permission to build comes from property owners and separate permitting authorities. Licensees can meet their service obligations without new construction, and tower owners can build without holding spectrum licenses. A spectrum license alone therefore does not make private construction a federal undertaking. Section 106 review should apply where an independent federal approval provides the necessary basis.

A. A Spectrum License Grants Transmission Rights

The Communications Act's licensing regime governs the right to transmit radio signals. Section 301 prohibits any person from "us[ing] or operat[ing] any apparatus for the transmission of energy or communications or signals by radio" without a Commission license. It also states the regime's purpose: to maintain federal control over radio transmission channels and "to provide for the use of such channels, but not the ownership thereof . . . under licenses granted by Federal authority."[10] The statutory definition of a "radio station license" likewise concerns "the use or operation of apparatus for transmission of energy, or communications, or signals by radio."[11] Through licensing, the Commission seeks to prevent harmful interference among users and promote efficient spectrum use.[12]

Within those limits, a license grants meaningful rights. Depending on the service, a licensee may use assigned frequencies within a defined area for the license term, choose its technology and services under flexible-use rules, and receive protection against harmful interference. It may also, subject to Commission approval, assign or transfer the license, lease spectrum access, divide the licensed area through partitioning, or divide the assigned frequencies through disaggregation.

[9] *Id.* ¶¶ 78–79 & nn.155, 159.

[10] 47 U.S.C. § 301.

[11] 47 U.S.C. § 153(49).

[12] J. Pierre de Vries & Jeffrey Westling, *Not a Scarce Natural Resource: Alternatives to Spectrum-Think* (Sept. 9, 2017) (unpublished manuscript presented at TPRC 45), https://ssrn.com/abstract=2943502.

Each of these rights concerns spectrum use, with boundaries defined by frequency, geography, power, emissions, and time.

Congress also expressly limited those rights. A license may not "be construed to create any right, beyond the terms, conditions, and periods of the license."[13] Every applicant must waive "any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States."[14] And every license carries the condition that it does "not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein."[15]

B. Permission to Build Comes From Other Authorities

A spectrum license defines what a licensee may transmit; it does not grant permission to build at a particular site. The rights needed to construct a wireless network come from property owners and authorities acting under separate laws.

The Commission does not require a licensee to build new infrastructure simply because it receives a license. Buildout requirements set service benchmarks rather than mandate "the construction of particular facilities in any specific place."[16] Licensees can meet those benchmarks by placing antennas on existing towers, rooftops, water tanks, or utility poles, or, in some cases, by upgrading equipment without construction.[17] Congress has also eliminated Commission construction permits for mobile stations and, absent a specific public-interest finding, for common-carrier and privately owned fixed microwave stations.[18]

A licensee that wants to install an antenna must therefore secure permission from the property owner. Often, that owner holds no spectrum license. The Commission's data show that infrastructure companies with at least 100 registered antenna structures collectively own roughly 80,816 structures, compared with about 21,857 owned by service providers with similarly sized portfolios. Leading tower companies average roughly two tenants per tower.[19] Tower owners make their own siting, financing, and construction decisions, sometimes building before any licensee signs a lease.[20]

A spectrum license also grants no right to use public rights-of-way. The Communications Act expressly preserves state and local authority "to manage the public rights-of-way" and "require fair and reasonable compensation" for their use. It likewise preserves their authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities."[21] Federal law limits how state and local governments exercise that authority, but those limits do not replace local permission with a federal grant of access.

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[13] 47 U.S.C. § 301.

[14] 47 U.S.C. § 304.

[15] 47 U.S.C. § 309(h)(1).

[16] Order, *supra* note 1, ¶¶ 37, 47.

[17] *Id.*

[18] Order, *supra* note 1, ¶ 38.

[19] Order, *supra* note 1, ¶¶ 41–42.

[20] *Id.*

[21] 47 U.S.C. §§ 253(c), 332(c)(7)(A).

Section 224 provides a separate right of access to utility poles, ducts, and conduits. That right depends on an entity's status as a telecommunications carrier or cable system, not on whether it holds a spectrum license. Carriers and cable systems secure access through attachment agreements with pole owners. Electric utilities may deny access when capacity is insufficient or safety, reliability, or engineering concerns warrant it. States that certify their own pole-attachment regulatory programs oversee access under state law.[22]

For facilities on federal property, the licensee must obtain a right-of-way, easement, or lease from the agency that manages the land, under that agency's own authority.[23] Those grants constitute federal approvals of the facility, and the issuing agencies have their own Section 106 obligations. Historic-preservation review thus already applies where a federal agency controls whether construction may proceed on a particular parcel.

Finally, the Commission's power to modify or revoke a spectrum license concerns the licensee's authority to transmit. It does not give the Commission control over the underlying infrastructure.[24]

C. Section 106 Requires Federal Authority Over the Project Itself

The NHPA defines an "undertaking" as "a project, activity, or program" funded in whole or in part under a federal agency's direct or indirect jurisdiction, including "those requiring a Federal permit, license or approval."[25] The question is whether the project requires federal approval—not whether the company carrying it out holds federal authorization for another aspect of its business. Holding a spectrum license does not make every tower a company builds a federally licensed project. The relevant inquiry is whether the tower, pole attachment, or rooftop installation requires federal permission to proceed.

The U.S. Court of Appeals for the D.C. Circuit has read Section 106 to apply only where a federal agency has authority to fund or license the project itself.[26] Under that reading, a spectrum license alone does not make facility construction an undertaking. The two are legally independent: A tower can secure siting approval and permits, proceed through construction, and attract tenants without its owner holding a spectrum license. A licensee, in turn, can fully exercise its spectrum rights and meet its buildout obligations without new construction.

When the D.C. Circuit upheld the Commission's earlier treatment of tower construction as an undertaking, it relied on the Commission's separate "approval authority under NEPA," rather than the spectrum license itself. That authority arose from the pre-construction environmental review requirement in former Section 1.1312.[27] The Order has now rescinded that requirement. Without it, the spectrum license grants only the right to transmit. Any permission to build comes from a

[22] 47 U.S.C. § 224(c), (f).

[23] *See, e.g.*, 43 U.S.C. § 1761; 47 U.S.C. § 1455(c).

[24] Order, *supra* note 1, ¶ 39; 47 U.S.C. §§ 312, 316.

[25] 54 U.S.C. § 300320(3).

[26] *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 755–56 (D.C. Cir. 1995), https://law.justia.com/cases/federal/appellate-courts/F3/49/750/551032.

[27] *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 115 (D.C. Cir. 2006); Order, *supra* note 1, ¶ 189.

local government, a landowner, a federal land-managing agency, or a separate Commission process governing the structure owner.

CTIA-Wireless Ass'n v. FCC leaves open whether towers that require antenna structure registration for aviation safety could still qualify as undertakings. The court did not hold that registration necessarily makes a tower an undertaking; it held only that the Commission's earlier determination was reasonable.[28] Even if registration provides a sufficient basis for Section 106 review, that process covers towers over 200 feet tall or near airports. It does not reach the much larger universe of new construction and antenna placements on existing structures that currently face Section 106 review.

IV. CONCLUSION

The Commission should apply the reasoning of its NEPA order to Section 106: A spectrum license grants the right to transmit, but does not authorize, locate, or control construction. Permission to build comes from property owners and separate permitting authorities. A construction project does not "requir[e] a Federal permit, license or approval" merely because the company building it holds a spectrum license.

That distinction has practical consequences. Section 106 review adds substantial costs and months of delay, postponing improved wireless coverage and capacity, while rarely identifying adverse effects on historic properties. The Commission should conclude that a spectrum license alone does not make construction a federal undertaking. That approach would remove an unwarranted barrier to deployment while preserving Section 106 review where an independent federal approval supplies the necessary basis.

[28] *CTIA-Wireless Ass'n*, 466 F.3d at 113–15.