Consolidated Case Nos. 19-70123, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Sprint Corporation,
Petitioner,

City of Bowie, Maryland, et al.,
Intervenors,

vs.

Federal Communications Commission
and United States of America,
Respondents.

On Petition for Review of Order of the
Federal Communications Commission

PETITIONER MONTGOMERY COUNTY, MARYLAND'S REPLY BRIEF

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INTRODUCTION

In their opposition brief, Respondents United States and the Federal Communications Commission (collectively the "FCC" or "Commission") do not dispute the key issues raised by Petitioner Montgomery County regarding the challenged Order.[1] Pet'r Br. at 4. First, that the Order fails to address whether the National Environmental Policy Act ("NEPA") applies here and, if it does, why the Commission did not reassess under NEPA whether the FCC's 1996 safety standards governing radiofrequency ("RF") exposures protect against potential health risks of 5G small cells.[2] Second, that the Order fails to address, beyond a conclusory footnote, why the Commission did not consider whether such RF standards remain protective of human health or otherwise evaluate relevant public health concerns, as was required under the Administrative Procedure Act ("APA").

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[1] FCC, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133, WT Docket No. 17-79, WC Docket No. 17-84 (Sept. 27, 2018); 83 Fed. Reg. 51,867 (Oct. 15, 2018).

[2] *See, e.g.*, FCC, *In the Matter of Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies*, First Report and Order; Notice of Proposed Rulemaking and Notice of Inquiry, 2013 FCC LEXIS 1257 (Mar. 27, 2013).

Where the FCC's opposition brief offers a defense, the Commission fares no better. As discussed below, Montgomery County demonstrates that: (i) it has standing to challenge the Order based on its opening brief and the administrative record; (ii) it has not collaterally attacked a prior FCC order related to 5G facilities; (iii) the FCC cannot, for the first time in litigation, argue that NEPA does not apply or that the Commission had discretion under the APA to defer any reassessment of the 1996 RF standards until after the Order was adopted; and (iv) in any event, the FCC otherwise fails to show that NEPA is inapplicable or that the Commission reasonably delayed the RF review.

ARGUMENT

I. Montgomery County Clearly Has Standing Based On Its Opening Brief And The Administrative Record

The FCC argues that Montgomery County does not have Article III standing because, in the Commission's strained interpretation of the County's opening brief, the underlying Petition for Review was filed not on behalf of the County, but rather its citizens. Resp't Br. at 145-48. According to the FCC, municipalities "cannot sue as *parens patriae*"

and, instead, may only seek to vindicate "direct injury to their own proprietary interests." *Id.* at 146-48.

The Commission, however, completely mischaracterizes Montgomery County's lawsuit. The County never claims that it is suing on behalf of its residents. Rather, it is self-evident from evidence discussed in the opening brief and appearing in the administrative record that the County filed suit to protect its own proprietary interests and thus clearly has standing to challenge the Order. *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) ("In many if not most cases the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary for the court to be sure of it.").

To demonstrate Article III standing, Montgomery County must show: (i) a concrete injury; (ii) fairly traceable to the challenged action of the defendant; (iii) that is likely to be redressed by a favorable decision. *Haro v. Sebelius*, 729 F.3d 993, 1001 (9th Cir. 2013) (citation omitted). In the Ninth Circuit, a municipality's proprietary interests are broad. A county may sue to protect its interests in real property, as well as interests "as varied as a municipality's responsibilities, powers,

and assets." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). As discussed below, the FCC's Order threatens multiple interests of Montgomery County that can only be redressed if the Order is vacated and remanded for further proceedings.

To begin, in this Circuit a "plaintiff is presumed to have constitutional standing to seek injunctive relief when [the plaintiff] is the direct object of [government] action challenged as unlawful." *Haro*, 729 F.3d at 1001 (citation omitted) (brackets in original); *see also Duffy v. Riveland*, 98 F.3d 447, 453 (9th Cir. 1996) ("When the suit is one challenging the legality of government action . . . standing depends considerably upon whether the plaintiff is . . . an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will address it.") (citation and internal quotations omitted); *Sierra Club*, 292 F.3d at 900 (same). The FCC's opposition brief, however, does nothing to overcome this strong presumption.

Here, it is undisputed that the Order directly regulates Montgomery County. As the FCC stated numerous times, the Order's goal is to prohibit steps allegedly taken by municipalities during

wireless siting proceedings and under their general zoning laws that could prohibit the deployment of 5G facilities. *See, e.g.*, Pet'r Br. at 22-23, 39-41, 44.[3] Significantly, as the Commission also concedes, the Order is designed to accelerate the placement of 5G small cells on the County's own rights-of-way (*e.g.*, sidewalks, alleyways), which will result in RF radiation emitted from those facilities constantly blanketing those properties. Pet'r Br. at 22-23, 39-40, 43-44, 53.[4] Given the environmental and health concerns surrounding RF emissions, including never before used millimeter waves ("MMWs"), the County undoubtedly has a substantial interest in knowing whether its own property is being used to speed up the deployment, densification, and operation of facilities that may pose various risks.

Indeed, as this Circuit has held, municipalities have a proprietary interest in protecting their property from environmental harm. *City of Sausalito,* 386 F.3d at 1198; *see also* MCS3 (Smart Communities rulemaking comments noting that "[l]ocal governments effectively own and manage their property as a private owner would". . . and must

[3] *Citing* MC002, MC008, MC013, MC052.

[4] *See supra* note 3.

guard against "security and safety breaches that could harm local governments and the public.").[5] As Montgomery County stated in its opening brief, the FCC's "Order may impose on Montgomery County . . . the risk of significant environmental impacts that would not otherwise exist." Pet'r Br. at 43. For instance, it noted that "[m]ultiple antennas on each pole will radiate beams of RF energy in the direct-line-of-sight of . . . public spaces." *Id.* at 45; *see also id.* at 44 ("Thus, municipalities will be, by design, inundated with more 5G small cells in a shorter period of time and in more residential and commercial rights-of-way when compared to the status quo."); *id.* at 1, 11, 28 (referencing RF exposures in "public" areas, including streets, sidewalks, and alleyways).[6]

Moreover, "[i]t is beyond cavil that a municipality may protect the health, welfare, and safety of their [sic] citizens by exercising its zoning authority." *Holiday Point Marina Partners v. Anne Arundel County*, 666 A.2d 1332, 1335 (Md. Ct. Spec. App. 1995) (citation omitted),

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[5] Montgomery County is a member of Smart Communities, *see id.* at MCS1, and cited in its opening brief to excerpts from these same rulemaking comments, *see* Pet'r Br. at 13 & n.25.

[6] *Citing, e.g.*, MC226, MC217.

vacated on other grounds, 707 A.2d 829, 833 (Md. Ct. App. 1998); *see* 666 A.2d at 1335 ("It is also beyond question that a county may protect the environment by exercising its zoning authority"); *City of Sausalito*, 386 F.3d at 1199 (holding that municipal entities have a proprietary interest in ensuring "public safety" on their own property); *see also Cal. ex rel. Imperial County Air Pollution Control Dist. v. Dep't of Interior*, 767 F.3d 781, 790 (9th Cir. 2014) ("A sub-state actor may sue to protect its own proprietary interests that might be congruent with those of its citizens") (citations and internal quotations omitted). Not only will 5G facilities be placed in rights-of-way and other public properties (*e.g.*, parks, sidewalks, alleyways) that are frequented by the County's citizens, they will also be located adjacent to other properties, such as residential homes and businesses.[7]

It is no surprise, then, that Montgomery County in its opening brief repeatedly asserted an interest in knowing whether the FCC's current RF safety standards would remain protective of human health. Pet'r Br. at 1 (stating 5G "transmitters will be densely packed into

[7] *See* MCS2 (Smart Communities noting wireless carriers "routinely" use municipal property, including "parks" and other rights-of-way).

residential areas and public spaces"); 4 (noting "accelerated deployment under the Order of numerous 5G facilities in local communities"); 24 (highlighting "FCC's efforts to hasten the deployment of 5G facilities in local rights-of-way" and questioning whether the Commission's current RF standards will "protect local citizens")[8]; 27 (asserting interest in ensuring 5G small cells "do not pose an undue health risk to the general public"); *see also* MCS3 (Smart Communities stating that, "[a]s the owner, landlord and trustee of such public properties, local governments have a fiduciary duty to maintain their property and to protect the public safety and welfare of their residents").

While it is true that Montgomery County cannot prohibit the siting of 5G small cells on its property if those facilities comply with the current RF standards, *see* Pet'r Br. at 1, 7, 27-28, the County is not completely without recourse. It brought this lawsuit so that, if the FCC determines RF emissions may pose a risk, the Commission could modify the Order to allow municipalities the leeway to enforce zoning laws that would reduce such emissions on their properties, while at the same time ensuring concerned citizens who use their rights-of-way or live/work

[8] *Citing* MC330-MC341.

nearby that they are in fact safe. *Id.* at 47-58; *see also Cal. ex rel. Imperial County*, 767 F.3d at 790 n.4 ("[P]laintiffs asserting procedural standing need not demonstrate that the ultimate outcome following proper procedures will benefit them.") (citations omitted).

In particular, the County noted in its opening brief that the FCC's Order: (i) substantially restricts the ability of municipalities to require undergrounding of wireless facilities or minimum spacing between 5G poles; and (ii) does not limit the number of transmitters in a given area. Pet'r Br. at 23-24, 49.[9] However, in the event that 5G small cells may present environmental or health risks, the County pointed out (and the FCC did not dispute) that the Commission would have the discretion to amend the Order so that municipalities could, for example, require undergrounding of wireless facilities near schools or residences, or place limits on the density or spacing of poles in highly populated areas. Pet'r Br. at 48-49. That way, Montgomery County could protect its propriety interests in its own property, as well as promote the broader public health, welfare, and safety.[10]

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[9] *Citing* MC046.

[10] We also note that Montgomery County has zoning authority to regulate the siting of 5G facilities based on RF health concerns if those

Further, as the Ninth Circuit has recognized, municipalities have a protectable interest in being able to effectively perform their duties. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950-51 (9th Cir. 2002) (citation omitted); *see also City of Sausalito*, 386 F.3d at 1197-98. In the instant case, Montgomery County is charged under the Order (as well as its own ordinances) with quickly and efficiently concluding 5G facility siting proceedings once a wireless carrier files an application. Pet'r Br. at 23-24, 40-41. However, the County cited in its opening brief to rulemaking comments which, in turn, noted that citizens are raising concerns in "every siting proceeding" about the Commission's failure to update the current RF standards and the potential adverse health effects of new wireless technologies. *Id.* at 24-25[11]; *see also id.* at 25[12] (citing Smart Communities comments which also note that ongoing public opposition to 5G deployments constitutes a barrier to widespread small cell deployments). At this point, until the

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facilities do not comply with the FCC's current safety standards. *See* Pet'r Br. at 1, 7, 27. Thus, in those instances, the County also has an interest in knowing if RF emissions falling outside those standards may pose a risk so that it can exercise such authority accordingly.

[11] *Citing* MC331, MC335, MC339.

[12] *Citing* MC361.

FCC reassesses its current RF standards, the County is unable to provide an adequate response to such opposition in the siting proceedings. Pet'r Br. at 25, 48, 56.[13]

Finally, municipalities have standing in this Circuit to assert procedural injuries, including the government's failure to comply with NEPA and APA. *City of Sausalito*, 386 F.3d at 1197, 1200. For example, "a cognizable procedural injury exists when a plaintiff alleges [as Montgomery County has here] that" a federal government agency has not complied with NEPA and "also alleges a 'concrete' interest . . . that is threatened by the proposed action."[14] *Id.* (citation omitted). As discussed above, Montgomery County asserted a number of concrete

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[13] *Citing* MC330-MC341.

[14] Montgomery County's opening brief also shows that it has non-constitutional standing to proceed under the APA, whether via NEPA or the Telecommunications Act of 1996 ("TCA"), to the extent that such standing is still required in the Ninth Circuit. *City of Sausalito*, 386 F.3d at 1999-1200. Both the Communications Act, 47 U.S.C. § 402(a), as well as 28 U.S.C. § 2344, explicitly provide for judicial review of FCC orders in a suit filed by "[a]ny party aggrieved by the final order." *See* Pet'r Br. at 3. Moreover, the County's environmental and health claims clearly fall within the "zone of interests" protected under NEPA (*see* Pet'r Br. at 33-35, 38-49) and the TCA (*see* Pet'r Br. at 19-22, 51-53 discussing the FCC's repeated acknowledgments that it has a duty to protect public health and safety from RF exposures based on the TCA, 47 U.S.C. § 332(c)(7), and its legislative history).

interests in its opening brief that are jeopardized by the FCC's Order absent a determination, whether under NEPA or otherwise, that the current RF safety standards are protective of human health.[15]

II. Montgomery County's Suit Does Not Constitute A Collateral Attack On The FCC's March 2018 Order

The FCC maintains that Montgomery County's suit is an impermissible collateral attack on a prior order issued by the Commission, in which it was determined that small cell deployments are not "major federal actions" under NEPA. Resp't Br. at 148-50 (*citing* 2018 FCC LEXIS 1008) ("March 2018 Order"). According to the FCC, the County should have challenged the March 2018 Order instead, which until recently was the subject of litigation before the D.C. Circuit (*citing United Keetoowah Band of Cherokee Indians v. FCC*, No. 18-1129). *Id.* at 149-50. At least in the Commission's eyes, because the

[15] "For procedural rights, [a court's] inquiry into the imminence of the threatened harm is less demanding, and the causation and redressability requirements are relaxed." *Cal. ex rel. Imperial County*, 767 F.3d at 790 (citations and internal quotations omitted). "Plaintiffs alleging procedural injury can often establish redressibility with little difficulty, because they need to show only that the relief requested – that the agency follow the correct procedures – may influence the agency's ultimate decision of whether to take or refrain from taking a certain action." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir. 2008) (citation omitted).

County did not oppose the March 2018 Order within the applicable 60-day deadline governing challenges to FCC orders, the County is now out of time. *Id.* at 150 (*citing* 28 U.S.C. § 2344).

The Commission, however, completely misses the mark when describing the nature and scope of Montgomery County's suit and the two FCC orders. As discussed below, the orders operate entirely separate of each other. They each regulate different entities, have distinct underlying purposes, are based on different statutory provisions and, in the context of the County's action, implicate separate NEPA analyses. Accordingly, the instant suit does not collaterally attack the March 2018 order or its underlying rationale.

In the Ninth Circuit, the collateral attack doctrine does not apply to "new orders." *City of Redding v. FERC*, 693 F.3d 828, 837 (9th Cir. 2012). Rather, it only prevents a petitioner from "relitigating the merits of previous administrative proceedings." *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006) (internal citation and quotations omitted); *see Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1092 (9th Cir. 2017) (same). "At its core, the doctrine prohibits a plaintiff from using a later order that implements a prior agency action as a

vehicle to undo the underlying action or order." *Ctr. for Biological Diversity*, 847 F.3d at 1092. A court must ask whether the petitioner is challenging "any of the analyses or conclusions" contained in the prior order, *id.* at 1093 (citation omitted), or is seeking a "new adjudication over the evidence and testimony already considered" by the agency, *Americopters*, 441 F.3d at 738 (citation and internal quotations omitted). None of these circumstances exist here.

The earlier March 2018 Order focuses on issues not raised by the FCC's subsequent Order. As noted above, the former advanced the position that "deployment of small wireless facilities by non-Federal entities does not constitute . . . a 'major federal action' under NEPA." 2018 FCC LEXIS 1008, at *4. The underlying purpose was to spare wireless carriers, the entities subject to the March 2018 Order, the increased costs of preparing Environmental Assessments ("EA") under NEPA during siting proceedings. *See, e.g., id.* at *5, *10-13, *70; Pet'r Br. at 34 (discussing EAs). In doing so, the FCC based its decision primarily on the Communications Act's "mandate to regulate in the public interest." 2018 FCC LEXIS 1008, at *69-74 (*citing* 47 U.S.C. § 319(d)). The Commission ultimately concluded that "it is consistent

with the public interest to eliminate NEPA . . . compliance requirements for all small wireless facility deployments . . . [and that] the costs of requiring [NEPA] review for small wireless facilities outweigh the marginal benefits, if any, of environmental and historic preservation review." *Id.* at *77.

Moreover, the FCC made clear in the March 2018 Order that it was not addressing whether the current RF standards are protective of human health, the issue raised by Montgomery County in this litigation. Specifically, the FCC distinguished between the deployment of small cell facilities, which it argued does not implicate NEPA, and the provision of telecommunications services, which it conceded is a "major federal action." The FCC stated that "[w]e do not address [in the March 2018 Order] any potential for effects associated with the actual provision of licensed service, such as RF issues." 2018 FCC LEXIS *1008, at *123 n.187; *see also id.* at *115 n.177 ("Similarly, the Commission's regulation of RF emissions is directed at the provision of service and not the deployment of facilities, and thus, contrary to some claims, also provides no basis for concluding small wireless facility deployment is [a federal] undertaking."). Instead, the FCC merely

pointed out that all small cell facilities will "remain subject to our rules governing radio frequency (RF) emissions exposure." *Id.* at *51.

This stands in stark contrast to the FCC's Order opposed by Montgomery County. In particular, the Order directly regulates municipalities, like Montgomery County, not wireless carriers. Pet'r Br. at 22-24. The Order's underlying purpose is to prevent municipal entities from enforcing zoning laws that would allegedly slow down the rollout of 5G small cell facilities, and has nothing to do with the elimination of wireless carriers' EA requirements under NEPA. *Id.* The FCC bases the Order not on the public interest provision of the Communications Act, but rather implements 47 U.S.C. §§ 253, 332(c)(7), which govern the exercise of local zoning authority, including those applying to RF issues. *Id.*

Significantly, the Order also applies to both the deployment of 5G small cells and the resulting provision of services, thus implicating, by the FCC's own admission, the Commission's NEPA obligations related to RF. Indeed, Sections 253 and 332(c)(7) are explicitly intended to facilitate the provision of licensed services. *See* 47 U.S.C. § 253 ("No State or local statute or regulation, or other State or local legal

requirement, may prohibit or have the effect of prohibiting the ability of any entity *to provide any interstate or intrastate telecommunications service*.") (emphasis added); 47 U.S.C. § 332(c)(7)(B)(i)(II) ("The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government . . . shall not prohibit or have the effect of prohibiting the *provision of personal wireless services*.") (emphasis added).

Further, in the Order itself, the FCC time and again claims that it is acting to ensure the provision of wireless services. *See, e.g.*, MC002 (The Order's primary purpose is to "remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services."); MC052 (The FCC maintains that it is delineating "a category of state or local laws [that are] inconsistent with" the Communications Act "because [they] prohibit[] or ha[ve] the effect of prohibiting the relevant covered service."); MC002 (The Order eliminates "regulatory obstacles [that] have threatened the widespread deployment of these new services."); MC014 ("[W]e focus on a subset of other, non-fee provisions of state and local law that could also operate as prohibitions on service.").

Accordingly, Montgomery County has not collaterally attacked the March 2018 Order. As clearly demonstrated above, the FCC's Order is a "new order" that is entirely distinct from the earlier proceedings. The County is not "relitigating" whether wireless carriers should be required to complete EAs under NEPA, nor is it questioning the FCC's "public interest" rationale for determining that siting decisions made by such carriers are not "major federal actions." Additionally, the County is certainly not challenging any "analyses or conclusions" in the March 2018 Order regarding RF or seeking a "new adjudication" on that issue, as the FCC explicitly disavowed any intent to address RF concerns.

Indeed, Montgomery County's suit raises an entirely different NEPA issue, namely whether the Order itself, by restricting certain municipal zoning powers to speed the deployment of 5G small cells and provision of wireless services, constitutes a "major federal action." *See, e.g.*, *Ctr. for Biological Diversity*, 847 F.3d at 1093-94 (no collateral attack on prior Environmental Protection Agency ("EPA") registration decision for an active pesticide ingredient when plaintiff challenged a

related, but sufficiently distinct, subsequent EPA registration for products containing that active ingredient).[16]

III. The FCC Waived Its Ability To Argue That The Order Did Not Trigger NEPA And Otherwise Fails To Support Its Position That NEPA Does Not Apply

The FCC also argues in its opposition brief that NEPA is inapplicable because the Order is not a "major federal action" and "has no environmental impact." Resp't Br. at 150-51. In particular, it attempts to analogize back to the March 2018 Order (as well as the *United Keetoowah Band of Cherokee Indians* suit) in which it concluded that small cell siting decisions made by third party wireless carriers do not sufficiently involve the federal government and thus NEPA does not apply. These arguments fail on multiple grounds.

[16] The two cases cited by the FCC for support are inapposite. Both of those decisions involve direct attacks on prior agency decisions. *United States v. Lowry*, 512 F.3d 1194, 1197 (9th Cir. 2007) (plaintiff, who was charged with unlawful occupancy of Forest Service land, was prohibited from challenging a previous decision by the federal government to deny plaintiff an authorized land allotment); *Biggerstaff v. FCC*, 511 F.3d 178, 181 (D.C. Cir. 2007) (finding a collateral attack where plaintiff filed suit under a final rule regarding junk faxes to challenge a decade-old agency decision that was not implicated by the rule).

First, the Commission never raised these defenses in response to rulemaking comments and thus cannot make them here. "Long-standing principles of administrative law require [court's] to review the [agency's] decision based on the reasoning and factual findings offered by the [agency] – not *post hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) ("[I]n dealing with a determination or judgment which an administrative agency alone is authorized to make, [courts] must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.") (additional citation omitted); *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1189 (9th Cir. 2005) ("We may affirm the [agency] only on grounds set forth in the opinion under review.").

As discussed in Montgomery County's opening brief, the FCC never responded to rulemaking comments submitted by the County and other stakeholders arguing that the Commission had a legal obligation

to first complete the 2013 NEPA RF proceeding before adopting the Order. Pet'r Br. at 24-27; *see, e.g.*, MC314 (Smart Communities, including Montgomery County, requesting that the FCC complete the 2013 RF review and stating the Commission "is arguably required to do so before preempting local authority any further").

Moreover, the FCC failed to offer any explanation in the Order, as is required under NEPA and case law in this Circuit, as to why it does not constitute a "major federal action" or "significantly" affect the quality of the human environment. Pet'r Br. at 36-38, 49. Indeed, the Commission completely ignored substantial evidence in the record showing otherwise (*id.* at 5-18, 26-27, 38-47) and, instead, simply "disagree[d]" with those comments and reasserted its authority to adopt RF safety standards (*id.* at 26-27, 36-37, 49). This is sufficient, standing alone, for the Court to vacate and remand the Order. No more analysis is required.

Second, the D.C. Circuit in *United Keetoowah Band of Cherokee Indians* recently vacated and remanded the March 2018 Order, at least with respect to the NEPA EA issue, thus rendering that Order's conclusions regarding 5G small cell deployment a nullity. 2019 U.S.

App. LEXIS 23762, at *56-57 (D.C. Cir. Aug. 9, 2019) ("We grant the petitions too vacate the [March 2018] Order's removal of small cells from its limited approval authority and remand to the FCC.").

Third, even if this Court entertains the FCC's arguments, the Commission once again misleadingly conflates the two orders. As discussed above, the March 2018 Order was limited to the deployment of 5G small cells by third party wireless carriers. The FCC specifically stated that it did not address the provision of wireless services and thus concerns about RF issues were irrelevant to the proceeding. But under the Order challenged by Montgomery County, the FCC sought not only to facilitate deployment, but also accelerate the provision of 5G services. As such, unlike the prior order, the current RF safety standards and whether they are protective of human health have been, according to the FCC's rationale, directly placed at issue. *See supra* pgs. 15-17. The Order, in other words, is not restricted to siting decisions alone.

Fourth, even if one only focuses on the siting proceedings themselves, the FCC has exercised a much higher degree of control over such decisions in this case when contrasted with the March 2018 Order. *See Ka Makani 'O Kohala Ohana Inc. v. Dep't of Water Supply*, 295 F.3d

955, 960 (9th Cir. 2002) (whether federal involvement rises to a "major federal action" under NEPA is a matter of "degree"). In the earlier order, the Commission relinquished a substantial amount of control over siting decisions by eliminating any requirement for wireless carriers to complete EAs. *See supra* pgs. 14-15. That is not the case here. When dealing with the municipalities, the FCC exercised a substantial amount of discretion to remove virtually all decision-making authority from entities like Montgomery County to influence the placement 5G facilities. Pet'r Br. at 22-24, 39-41. In other words, the Commission essentially retained authority to, and in fact did, make those decisions itself. The FCC is *the* actor under the Order.

Moreover, in doing so, the FCC through its own actions increased the potential for RF-related environmental and health risks to Montgomery County and its citizens. The Commission does not dispute, as it cannot, that 5G facilities will continuously flood the environment with rising levels of potentially harmful RF radiation. *Id*. at 8-11; *see also id.* at 14, 16, 18 (citing rulemaking comments discussing "environmental" impacts). This is precisely the type of impact on the physical environment that NEPA is designed to address. Indeed, the

FCC's own 2013 RF proceedings – which seek to determine whether the current RF standards are protective of human health and safety – is being conducted under NEPA. *Id*. at 19. Thus, the Commission's claims to the contrary, first made in this litigation, have no merit.[17]

Finally, the D.C. Circuit's decision in *United Keetoowah Band of Cherokee Indians* vacating the March 2018 Order also casts serious doubt on the FCC's claims. While that court did not explicitly decide whether small cell construction by wireless carriers triggers NEPA's EA obligations, *see* 2019 U.S. App. LEXIS 23762, at *38, it did find in the context of the Commission's public interest review that the FCC had failed to justify, as required by the APA, its wholesale removal of NEPA

[17] The cases cited by the FCC in support are easily distinguishable. Those court opinions either did not implicate environmental harms or involved federal decision-making far removed from the activity of concern. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1103 (9th Cir. 2005) (denying NEPA claim where plaintiff's alleged injuries were economic or strictly health-based, not environmental); *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998) (finding insufficient federal control where it only recommended "research, management strategies and information sharing" and did not "call for specific actions directly impacting the physical environment"); *Ka Makani 'O Kohala Ohana Inc.*, 295 F.3d at 960-61 (holding no "major federal action" where federal government only provided two percent of the project funding and otherwise only acted in an advisory capacity).

review during siting proceedings, *id.* at *37. In particular, among many other shortcomings, it found that the FCC should have "addressed concerns that it was speeding [5G facility] densification without completing its investigation of health effects of low-intensity radiofrequency radiation." *Id.* at *29 (rulemaking citation omitted). Montgomery County makes a similar argument, albeit in a different context, that the FCC cannot simply brush aside substantial concerns regarding potential RF adverse impacts in light of rulemaking comments highlighting the Commission's NEPA obligations.

IV. The FCC Waived Its Ability To Argue Under The APA That It Reasonably Delayed Any Reassessment Of The 1996 RF Standards Until After The Order Was Adopted

The FCC lastly maintains that it was not required under the APA to complete its 2013 RF proceedings before adopting the Order. The Commission claims that it "reasonably decided to address effective prohibitions on next-generation networks now, while continuing to study and reassess the governing radiofrequency exposure limits in" the 2013 RF docket. Resp't Br. at 151-53.

The FCC, however, never asserted this position during the rulemaking and thus is prohibited under the Supreme Court's *Chenery*

decision from making it now. *Bray v. Comm'r of SSA*, 554 F.3d at 1225-26. Nowhere in the Order did the Commission explain why it believed Montgomery County's concerns, as well as those of numerous other commenters, could be reasonably put off. Completely absent is any discussion on how hundreds of thousands of 5G small cells (if not more) could be rolled out across the country in public rights-of-way without knowing if the resulting RF emissions could cause damages that cannot be undone. Pet'r Br. at 10-11, 54-57.

Instead, in a mere footnote, the Commission in summary fashion "disagree[d]" with the RF-related comments and simply listed various authorities allowing it to set RF standards. *Id.* at 27, 36-37, 57. Although the footnote referenced the 2013 RF proceedings at the end of that recitation, at no point did the Commission actually justify delaying its reassessment. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must "articulate a satisfactory explanation for its action"); *Nat'l Parks Conservation Ass'n v. United States EPA*, 788 F.3d 1134, 1146 (9th Cir. 2015) (an agency must "meaningfully address" record comments). Accordingly, neither Montgomery County nor the FCC know whether 5G small cells pose

risks at emissions falling below the current RF standards while, at the same time, the FCC speeds the deployment and provision of services.

Curiously, only hours before the FCC filed its opposition brief, it issued a cryptic press release claiming that the Commission's Chairman was internally circulating a "draft" proposal that would "resolve" the 2013 proceeding. Resp't Br. at 152 n.34. However, that proposal has yet to be made public and thus it remains to be seen the extent to which, if any, it will address the issues raised by this litigation.

CONCLUSION

Based on the foregoing, this Court should grant Montgomery County's Petition for Review and vacate/remand the Order to the FCC for further proceedings.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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