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**Before the  
Federal Communication Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	<b>APPLICATION FOR REVIEW</b>
<b>Petition for Environmental Review</b>	)	
<b>AT&amp;T Proposed Tower in the Sawtooth</b>	)	
<b>National Recreation Area Near Redfish</b>	)	
<b>Lake, ID</b>	)	
<b>FCC File No. 0009938027</b>	)	
<b>TCNS No. 243769</b>	)	
_____	)	

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## **SUMMARY OF THE FILING**

The Sawtooth Interpretive & Historical Association (“SIHA”) and the Idaho Conservation League (“ICL”) (collectively “Petitioners”) file this application for review, under 47 C.F.R. § 1.115, requesting review of Mr. Leon Jackler’s December 29, 2023 decision (the “Denial”) denying their Petition for Environmental Review (the “Petition”) of AT&T’s proposal to construct a cell tower in the Sawtooth National Recreation Area (“Sawtooth NRA” or “SNRA”) in Idaho. The Petition asked the Federal Communication Commission (the “Commission”) to prepare an environmental impact statement (“EIS”), or at least an environmental assessment (“EA”), under the National Environmental Policy Act (“NEPA”).

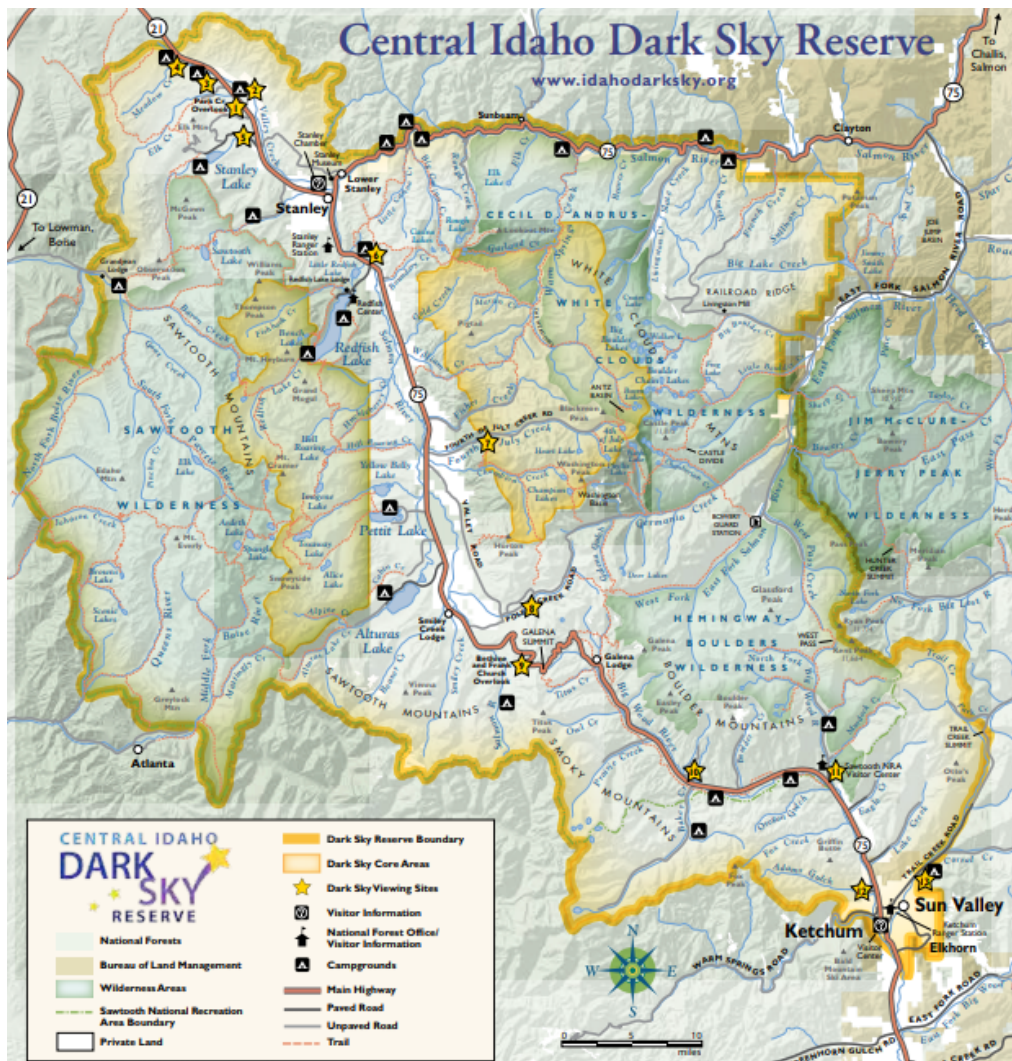
The proposed tower threatens significant adverse effects to the Sawtooth NRA, an area Congress designated over 50 years ago to protect and enhance its natural, scenic, pastoral, fish, wildlife, and recreation values. 16 U.S.C. § 460aa. It also threatens significant adverse effects to the historical Redfish Lake Lodge Complex, the Sawtooth Scenic Byway, the Central Idaho Dark Sky Reserve, and the recreational tourism-based economy of this popular area.

Mr. Jackler committed multiple errors in denying the Petition. He ignored the evidence Petitioners submitted showing that a tall tower perched on a ridgeline in the heart of a highly-protected, unique, and cherished location in Idaho “may” have significant effects. *See American Bird Conservancy v. FCC*, 516 F.3d 1027, 1032–34 (D.C. Cir. 2008); 47 C.F.R. § 1.1307. He also relied on a lease the State of Idaho issued to AT&T for the tower site, and on an ongoing National Historic Preservation Act process, to improperly excuse the Commission from satisfying its own NEPA duties. Petitioners ask the Commission to grant this application for review and order preparation of an EIS, or EA, including by taking public comment, considering alternatives, and analyzing the aesthetic and environmental effects of AT&T’s proposed tower.

## FACTUAL BACKGROUND

AT&T proposes constructing a 199-foot monopole tower cell tower on a parcel of State of Idaho land on the forested ridge between Redfish Lake to the west and the Sawtooth Scenic Byway (Highway 75) to the east. The tower is within the larger boundaries of the Sawtooth National Recreation Area and the Central Idaho Dark Sky Reserve, which include three Congressionally-designated wilderness areas: the Sawtooth, Cecil D. Andrus-White Cloud, and Jim McClure Jerry Peak wildernesses. These specially-designated and protected areas, Redfish Lake, the Redfish Lake Lodge, and Highway 75 are all depicted in Figure 1 below.

**Fig. 1** Central Idaho Dark Sky Reserve. See 2020 Petition, p. 8.



Despite widespread opposition from local government officials, local organizations, and the public due to concerns that the tower would impair the area’s natural, scenic, recreational, and other values, and because there appeared to be less intrusive alternatives, the Idaho Department of Lands (“IDL”) issued a lease to AT&T for the tower site in 2020.

**Fig. 2** Image depicting proposed tower from the east. *See Attach. A of ECA Apr. 30, 2021 Alternatives Analysis (2022 Petition, Enclosure 2).*



In July 2020, SIHA and ICL submitted a Petition for Environmental Review to FirstNet (the “2020 Petition”). The 2020 Petition explained that the tower threatened adverse impacts on the specially-designated Sawtooth NRA, Central Idaho Dark Sky Reserve, and Sawtooth Scenic Byway, as well as the historic Redfish Lake Lodge Complex, and warned that it threatened the area’s recreation and nature tourism dependent economy. *See 2020 Petition.* In support of the Petition, Petitioners attached the comments submitted to IDL by local homeowners and other members of the public, local governments, and conservation, historical, and search and rescue

organizations, which document and explain ways the tower threatens this highly-protected area's unique values. 2020 Petition, Attach. B. Among other submissions, Petitioners also submitted a study on the area's recreation economy (2020 Petition, Attach. C), Forest Service guidance for protecting natural, scenic, and pastoral values in the Sawtooth NRA (2020 Petition, Attach. D), and the application for the creation of the Central Idaho Dark Sky Reserve (2020 Petition, Attach. E)—which had already been approved as America's first dark sky reserve.

On July 28, 2022, AT&T informed the Commission that it had changed course and that the primary purpose of the tower was commercial service. *See Denial*. On August 18, 2022, the Commission's Wireless Telecommunications Bureau assumed lead agency responsibility for environmental review, and the Petition was transferred to the Commission. *See id.*

On September 1, 2022, Petitioners submitted a Petition for Environmental Review to the Commission (the "2022 Petition"). The 2022 Petition included and incorporated the 2020 Petition (and all attachments thereto) and included additional supporting documents. Mr. Jackler, with the Wireless Telecommunications Bureau (the "Bureau") set a pleading schedule for the Petition. AT&T filed its Opposition on September 12, 2022. Petitioners filed a Reply on September 19, 2022.

Meanwhile, a National Historic Preservation Act ("NHPA") Section 106 consultation process was underway for the tower. In 2020, SHPO notified AT&T that it "determined that the proposed undertaking would have an **adverse effect to historic properties**". 2020 Petition, Enclosure II (Sep. 15 2020 letter from Ashley Brown (SHPO) to Becky John Haney (AT&T)) (emphasis in original). SHPO explained: "As previously stated . . . , our office has determined that the construction of the monopole will adversely affect the feeling and setting of the Redfish Lodge Complex, two aspects of integrity that qualify the property for inclusion in the National

Register.” *Id.* In 2021, AT&T prepared an Alternatives Analysis and Mitigation Proposal. In response to draft MOAs, Petitioners have consistently informed AT&T and other consulting parties that whatever value the proposed mitigation measures have, they are located far from the area of impact and do not mitigate the ways in which the tower will degrade the Redfish Lake Lodge Complex. *See* 2022 Petition, Enclosure III; Reply, Exh. A. Petitioners notified the parties that they would not sign the MOA as proposed, and provided ideas for alternatives they would be willing to explore with the parties but which have so far been rejected. *Id.*

In an email dated December 29, 2023 (the “Denial”), Mr. Jackler denied the Petition.

### **LEGAL BACKGROUND**

NEPA, 42 U.S.C. §§ 4321 *et seq.*, which is “intended to ensure fully informed and well-considered decisionmaking,” requires federal agencies, including the Commission, “to consider and report on the environmental effect of their proposed actions”. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (citations and quotations omitted). “NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Id.* at 303 (citation and quotation marks omitted).

To meet these aims, NEPA requires an agency to prepare, and solicit public comment on, an EIS whenever it proposes a “major Federal action[ ] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The EIS must consider “the environmental impact of the proposed action,” “any adverse environmental effects which cannot be avoided,” and any “alternatives to the proposed action” *Id.* “To fulfill their obligations under NEPA, agencies must take a ‘hard look’ at the environmental consequences of their actions, and provide for broad

dissemination of relevant environmental information.” *Eagle Cnty., Colorado v. Surface Transp. Bd.*, 82 F.4th 1152, 1175 (D.C. Cir. 2023) (citation and quotation omitted).

Council on Environmental Quality (“CEQ”) NEPA regulations allow federal agencies to prepare an EA as a first step to determine whether an action may have a significant effects requiring an EIS. *See* 40 C.F.R. § 1501.5. To avoid preparing an EIS, the agency must find the proposed action “will not have significant effects.” 40 C.F.R. § 1501.6(a) The standard for when an agency must prepare an EIS is a “low standard.” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). If “*any* ‘significant’ environmental impacts might result from the proposed agency action, then an EIS must be prepared *before* the action is taken.” *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphases in original).

CEQ NEPA regulations also allow agencies to identify categories of actions that do not have a significant effect on the human environment and do not require an EA or EIS. 40 C.F.R. § 1501.4(a). If a proposed action is covered by the categorical exclusion, “the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect” and, thus, requires an EA or EIS. *Id.* § 1501.4(b).

The Commission’s NEPA regulations categorically exclude communications towers from environmental processing because towers “are deemed individually and cumulatively to have no significant effect on the quality of the human environment.” 47 C.F.R. § 1.1306(a). Under specified circumstances, however, the regulations recognize that new towers may significantly affect the environment and thus requires an Environmental Assessment. *Id.* § 1.1307(a). One such circumstance is: “Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places (*see* 54 U.S.C. 300308; 36



CFR parts 60 and 800), and that are subject to review pursuant to section 1.1320 and have been determined through that review process to have adverse effects on identified historic properties,” 47 C.F.R. § 1.1307(a)(4). Additionally, even if it otherwise qualifies for categorical exclusion, anytime the Commission determines a facility “may have a significant environmental impact,” it must require the applicant to submit an EA. *Id.* § 1.1307(c) & (d).

A party may allege that a “particular action, otherwise categorically excluded, will have a significant environmental effect” and can file a petition with the Commission “setting forth in detail the reasons justifying or circumstances necessitating environmental considerations in the decision-making process.” *Id.* § 1.1307(c). The Commission’s Bureau must then “review the petition and consider the environmental concerns that have been raised.” *Id.* The Commission’s regulation at § 1.1307(c) “requires an EA when an action ‘may’ have a significant environmental effect.” *American Bird Conservancy v. FCC*, 516 F.3d 1027, 1033 (D.C. Cir. 2008) (holding “Commission’s refusal to prepare an EIS without at least first requiring the preparation of an EA” violated NEPA and the Commission’s NEPA regulation).

### **QUESTIONS PRESENTED FOR REVIEW**

The questions presented for review, as required by 47 C.F.R. § 1.115(b)(1), are whether Mr. Jackler erred when he denied SIHA’s and ICL’s Petition for Environmental Review in the following ways:

1. Whether Mr. Jackler erred by concluding Petitioners failed to present any evidence showing the tower “may” significantly affect the natural, scenic, and other values of the Sawtooth NRA and other specially-designated areas?
2. Whether Mr. Jackler erred by relying on the Idaho State Board of Land Commissioner’s leasing process as an excuse to ignore the tower’s environmental effects?

3. Whether Mr. Jackler erred by finding Petitioners failed to provide evidence of impacts to tourism and recreation?

4. Whether Mr. Jackler erred by relying on the ongoing NHPA to forego preparing an EA to consider adverse impacts to the historical Redfish Lake Lodge?

### **FACTORS WARRANTING COMMISSION CONSIDERATION**

The following factors from 47 C.F.R. § 1.115(b)(2) warrant commission consideration of the questions presented.

Mr. Jackler's action denying the Petition for Environmental Review is in conflict with statute, regulation, case precedent, or established Commission policy. *See* 47 C.F.R. § 1.115(b)(2)(i). As explained in detail in the Argument section below, Mr. Jackler's decision conflicts with NEPA, NEPA regulations, and NEPA case precedent, including by: ignoring evidence sufficient to show under 47 C.F.R. § 1.1307(c) that the tower "may" have significant impacts on the natural, scenic, pastoral, recreational, economic, and other values of the Sawtooth NRA, Sawtooth Scenic Byway, Central Idaho Dark Sky Reserve, wilderness areas, and historic Redfish Lake Lodge Complex; relying on the Idaho Land Board's lease to AT&T for the tower as a substitute for fulfilling the Commission's NEPA obligations; and assuming a forthcoming MOA to mitigate adverse impacts relieves the Commission of its duties under NEPA.

Mr. Jackler's action denying the Petition for Environmental Review was also based on erroneous findings as to important or material questions of fact. *See* 47 C.F.R. § 1.115(b)(2)(iv). As explained in detail in the Argument below, the Denial was based on erroneous findings, including: findings that Petitioners failed to provide evidence or explanation when the Petitions and their supporting documents included extensive information on important and material matters including evidence of the unique and specially-protected natural, scenic, pastoral,

recreational, economic, and other values of the Sawtooth NRA, Sawtooth Scenic Byway, Central Idaho Dark Sky Reserve, historic Redfish Lake Lodge Complex, and wilderness areas, and the ways the tower poses significant threats to those values; finding that the Land Board’s leasing process took environmental issues into account when it did not; and finding that the ongoing NHPA process and proposed MOA mitigate the adverse effects the tower would have on Redfish Lake Lodge, when none of the proposals would eliminate or reduce adverse effects to the Lodge.

### **ARGUMENT**

**I. MR. JACKLER ERRED BY CONCLUDING PETITIONERS FAILED TO PRESENT ANY EVIDENCE SHOWING THE TOWER “MAY” SIGNIFICANTLY AFFECT THE NATURAL, SCENIC, AND OTHER VALUES OF THE SAWTOOTH NRA AND OTHER SPECIALLY-DESIGNATED AREAS.**

In denying the Petition, Mr. Jackler concluded, “the Petition does not provide any evidence to support the claims made or provide a specific explanation as to why the tower would significantly affect the scenic and aesthetic environment.” *See Denial*. Mr. Jackler, however, ignored the extensive evidence and explanation in the Petition as to why the tower “may” have significant impacts on the Sawtooth NRA and other specially-designated areas, requiring an EIS or EA under 47 C.F.R. § 1.1307(c).

Crucially—and nowhere acknowledged in Mr. Jackler’s decision—the proposed tower would be perched on a ridgeline located in the heart of the Sawtooth NRA, which was created by Congress for the specific purpose to “assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith....” 16 U.S.C. § 460aa. Congress authorized the Secretary of Agriculture to acquire “scenic easements” from private owners of land within the Sawtooth NRA in order to assure the protection and preservation of scenic values within. *Id.* at § 460aa–2. As the Petition explained:

The proposed tower would directly interfere with the Sawtooth National Recreation Act's stated purpose of preserving the area's natural, scenic, and pastoral values and characteristics. The particular ways in which the prominent tower would affect the scenic and natural characteristics of the SNRA, and how this might undermine its mission, deserves accurate evaluation and public disclosure, through NEPA's environmental analysis process.

The tower also threatens to undermine previous public investments in securing these same values on non-federal land within the SNRA. Primarily within the Sawtooth Valley and Stanley Basin, and along the Salmon River, there are also roughly 20,000 acres of private land and some intermingled Idaho endowment lands. Since 1974, the Forest Service has acquired 92 scenic or conservation easements on private lands in the SNRA land envelope, covering 17,000 acres and approximately 82% of the total private land base....

2020 Petition, p. 6.

Yet nowhere in the Denial does Mr. Jackler give any weight to Congress's determinations that the Sawtooth NRA's natural, scenic, and pastoral values should be preserved and protected, or that the Forest Service has spent decades working to that end.

The Petition also included numerous comments submitted to the Idaho Department of Lands concerning AT&T's lease application, many of which—contrary to Mr. Jackler's statements in the denial—offer evidence and explanation as to how AT&T's proposed tower poses significant adverse effects to the Sawtooth NRA, the Sawtooth Scenic Byway, the Central Idaho Dark Sky Reserve, and three congressionally-designated wilderness areas. *See* 2020 Petition, Attach. B.

The Mayor of the nearby City of Stanley submitted comments of "concern", explaining that the tower "would be 195 feet high and located on top of a ridge that rises 300 feet above the floor of the Sawtooth Valley." 2020 Petition, Attach. B (Jan. 29, 2020 comment letter from Stephen J. Botti). The Mayor added: "The site is deep within the Sawtooth National Recreation Area, and its prominent ridge-top location will make it highly visible from nearby areas of the Sawtooth Valley and surrounding mountains. The tower will be only 0.6 miles from State

Highway 75 and 1.0 mile from the access road to Redfish Lake, making it a substantial visual impairment for thousands of tourists who visit Redfish Lake each year to enjoy its outstanding recreational opportunities. . . . The economy of Stanley is heavily dependent on recreation and tourism, so any impairment to that experience is an important consideration to Stanley businesses and resident alike.” *Id.*

Custer County commissioners commented that they “do not support its current height or location since there are other options that will better resolve the issues at hand”, noting that the “195’ tower is twice as tall as needed and there are better alternatives that are more pleasing.” 2020 Petition, Attach. B (Mar. 4, 2020 comments from Custer County Commissioners).

Sawtooth Search and Rescue raised its “deep concern” about AT&T’s proposal. 2020 Petition, Attach. B (Feb. 6, 2020 comments from Gary Gadwa). The group raised concerns that the tower would not be compatible with the SNRA Act and stated: “We do not believe that a 195’ tower, in one of the most scenic parts of the SNRA, is necessary. We do not want a Cell Tower higher than the [existing] Custer Telephone Tower.” *Id.*

Harvey Dale, who lives in the SNRA across the Sawtooth Scenic Byway (Highway 75) from the proposed tower site, submitted comments. 2020 Petition, Attach B (Jan. 13, 2020 comments from Harvey Dale). He noted that an existing shorter tower (100 feet high) near the proposed AT&T tower is visible from both his home and from the Highway. He warned that “a much higher additional tower would severely and adversely affect the scenic beauty of the SNRA.” *Id.*

Mark Moulton explained in his comments that the “200 foot tower would clearly violate one of the core purposes for which the Sawtooth National Recreation Area was created [] by congress in 1972: the preservation of one of the Nation’s most iconic and scenic landscapes.”

2020 Petition, Attach B. (Jan. 24, 2020 comments from Mark Moulton). Mr. Moulton stated: “The tower anticipated will be located adjacent to the Sawtooth Scenic Byway, in the most sensitive possible location, between the highway and the scenery. The tower will be *3 times* the height of the native forest it resides within . . . . It will be twice as tall as the existing ~100 foot tower in the same vicinity, and that ‘twice’ will *all* be exposed above the trees, or *5 times* more than is showing with the current tower . . . .” *Id.* (emphases in original).

Petitioner SIHA warned in its comments that AT&T’s “195-foot-tall tower would clearly violate the core purposes for which the Sawtooth National Recreation Area was created.” 2020 Petition, Attach. B (Jan. 27, 2020). SIHA explained: “The proposed tower would be wider and taller than the existing tower, impacting the middle ground viewshed of travelers along the Sawtooth National Scenic Byway and would be visible to valley residents, degrading their view of the Sawtooths. The SNRA was established to preserve and protect one of the nation’s most scenic landscapes and this action would diminish the value of the tens of millions of tax-payer dollars the USDA Forest Service has spent since 1972 to protect the Sawtooth Mountain viewshed, the most recognized and photographed landscape in Idaho.” *Id.*

Petitioner ICL stated in its comments that the “proposed 195-foot tall tower, which is three times taller than surrounding trees, is in direct conflict with the core values protected by the establishing legislation of the SNRA. The SNRA was established by Congress to assure the preservation of the natural, scenic, historic, pastoral, and fish and wildlife values, and to provide for the enhancement of its recreational values. This cell tower, which is proposed to be located adjacent to the Sawtooth Scenic Byway between the highway and the scenic forests and mountain peaks, is clearly contrary to those values.” 2020 Petition, Attach. B (Feb. 4 2020 comments from Josh Johnson and John Robison).

Comments from the Sawtooth Society, a non-profit whose mission is to protect, preserve, and enhance the Sawtooth NRA, warned that a tower “three times taller than surrounding trees, would clearly violate a central purpose of the Sawtooth National Recreation Area, namely preserving the landscape and viewshed,” “will significantly and unacceptably impact the viewshed, not just from the highway but from anywhere in the vicinity,” and “will undermine decades of investment of public funds to protect the mountain vistas and landscapes of the Sawtooth NRA.” 2020 Petition, Attach B. (Jan. 27, 2020 comments from Kathryn Grohusky).

The Petition also included an Idaho Statesman article from January 30, 2020, which explained: “Ed Cannady, who was the longtime [Forest Service] backcountry manager for the [SNRA], said a tower that tall would be a ‘brutal stab wound’ in the scenic wilderness.” 2020 Petition, Attach. G. The Idaho Statesman article added: “According to IDL employee Lomkin’s email in 2018, about 100 feet of the tower would be visible above the tree canopy from nearby properties. Cannady said it would also be visible from Redfish Lake, which is arguably the most popular camping spot in the state, and from the new trail system being built to connect Redfish to Stanley. He said that would undermine the nearly \$65 million in federal taxpayer dollars that have been spent to secure scenic easements and preserve the Sawtooths.” *Id.*

Petitioners also submitted a study on the area’s recreation economy (2020 Petition, Attach. C), Forest Service guidance for protecting natural, scenic, and pastoral values in the Sawtooth NRA (2020 Petition, Attach. D), and the application for the creation of the Central Idaho Dark Sky Reserve—which had already been approved as America’s first dark sky reserve (2020 Petition, Attach. E). The application for the Central Idaho Dark Sky Reserve explained:

Despite the rapid population growth in southern Idaho, the CIDSr remains one of the darkest places in the western United States. Preserving the dark night sky resource is essential to preserving the values enumerated in the Wilderness Act and the Sawtooth National Recreation Area Act. In particular, the Reserve will

preserve the primeval character of the area and ensure that the imprint of man's work is substantially unnoticeable. Protecting the dark night sky resource helps preserve the natural, scenic, historic, fish and wildlife, and recreation values of the Sawtooth NRA. The Sawtooth NRA and wilderness areas include relatively intact natural ecosystems that depend on a night sky unpolluted by sky glow and localized light pollution.

2020 Petition, Attach. E, p. 6.<sup>1</sup>

Petitioners also submitted news articles chronicling the 50th anniversary of Congresses designation of the Sawtooth NRA, which further confirm the unique significance of the tower site and the viewshed where it will be located. *See Reply*, Exhs. C–H. These articles explain that the Forest Service has spent millions of dollars to, as authorized in the legislation creating the Sawtooth NRA, purchase private properties and secure scenic easements on private properties to protect their natural, scenic, and pastoral values—values threatened by the proposed tower.

All of this evidence shows that, unlike typical towers which might be categorically excluded, AT&T's proposed tower would be prominently located in a highly unique, specially protected area, and it “may have a significant environmental impact” requiring at least an EA under 47 C.F.R. § 1.1307(c). In denying the Petition for Environmental Review, however, Mr. Jackler made no reference to any of this evidence from local governments, homeowners, and non-profit organizations—evidence showing that the tower will extend high above the

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<sup>1</sup> In the denial, Mr. Jackler dismisses any effects the tower would have on the Central Idaho Dark Sky Reserve because AT&T “indicated” in its Opposition brief that the tower will not have obstruction lighting and that any security lighting would be “minimal, directed downward, and triggered by motion.” *See Denial*. This was error. First, there are no assurances that what AT&T “indicated” in its brief opposing the Petition will occur, and the Commission cannot rely on vague assurances of mitigation to avoid its NEPA duties. *See infra* pp. 22–23. Second, even minimal security lighting will cause light pollution and degrade the Reserve; plus, the tower itself (when lit or unlit) will obscure and interrupt views of the sky from locations within the Reserve. Because of the prominent location of the tower—elevated on a ridgeline in the heart of the Sawtooth NRA and the Reserve, and visible from popular locations like Redfish Lake and the Sawtooth Scenic Byway—will degrade viewing night skies, detracting from the very purpose for which this first-of its kind in the U.S. Reserve was created.



surrounding forest on a prominent ridgeline, and will be visible from and degrade the natural, scenic, and pastoral character of the Sawtooth NRA, Sawtooth Scenic Byway, Central Idaho Dark Sky Reserve, and Congressionally-designated wildernesses. *See Denial.*

That the tower poses these significant adverse effects is further supported by correspondence between AT&T and the Idaho State Historic Preservation Office (“SHPO”), which were included with the Petition. In one letter, SHPO explained that it “determined that the proposed undertaking would have an **adverse effect to historic properties**”. 2022 Petition, Enclosure 2 (Sep. 2020 letter from Ashley Brown to Becky John Haney) (emphasis in original). The letter added: “As previously stated . . . , our office has determined that the construction of the monopole will adversely affect the feeling and setting of the Redfish Lodge Complex, two aspects of integrity that qualify the property for inclusion in the National Register.” *Id.*<sup>2</sup> For the same reasons that SHPO found the tower would adversely affect “feeling and setting” of the Redfish Lake Lodge, the tower will also adversely affect the natural, scenic, and pastoral feeling and setting of Redfish Lake and other locations throughout the Sawtooth NRA, Central Idaho Dark Sky Reserve, Sawtooth Scenic Byway, and wilderness areas.

Under the Commission’s NEPA regulations, Mr. Jackler was required to “review the petition and consider the environmental concerns that have been raised.” 47 C.F.R. § 1.1307(c). But Mr. Jackler failed to do so when he baldly asserted that Petitioners failed to present any evidence and explanation showing the tower may significantly affect the area. *See Denial.*

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<sup>2</sup> Similarly, another letter, SHPO explained: “Near the proposed 199-foot self-support communications tower is an existing 100-foot tower that is owned by Custer Telephone Cooperative, Inc. that is not visible from the Red Fish Lake Lodge Complex . . . , an eligible historic property. Our office is concerned that an additional 99-feet in height may be visible from the Redfish Lake Lodge Complex (37-14944), an eligible historic property, in which the setting is a very significant aspect of integrity.” 2022 Petition, Enclosure 2 (July 9 letter from Ashley Brown to Laura Mancuso).

Moreover, Mr. Jackler’s demand for more detailed evidence is contrary to NEPA and D.C. Circuit precedent. In *American Bird Conservancy*, the D.C. Circuit held that the Commission violated NEPA when it refused to prepare an EIS or an EA for an action that “‘may’ have a significant environmental effect.” 516 F.3d at 1033 (D.C. Cir. 2008) (citation omitted). The Commission gave two reasons for denying a request for environmental review, each of which the Court rejected: (1) “the lack of specific evidence . . . concerning the impact of the towers on the human environment,” and (2) “the lack of consensus among scientists regarding the impact of communications towers on migratory birds.” *Id.* The Court found that the Commission’s “demand for definitive evidence of significant effects . . . plainly contravenes the ‘may’ standard” for when an EIS, or at least an EA, is required. *Id.*

The *American Bird Conservancy* Court admonished, “it must be remembered that the basic thrust of the agency’s responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects fully known.” *Id.* (citation omitted). “A precondition of certainty before initiating NEPA procedures would jeopardize NEPA’s purpose to ensure that agencies consider environmental impacts before they act rather than wait until it is too late.” *Id.*

Here, Petitioners submitted extensive evidence and explanation sufficient to show that AT&T’s proposed tower “may” significantly impact the Sawtooth NRA and the natural, scenic, and pastoral values for which Congress chose to protect it, as well as the similar values of the Central Idaho Dark Sky Reserve, the Sawtooth Scenic Byway, and nearby wilderness areas. In the face of these potentially significant affects, it is the Commission’s obligation under NEPA—not Petitioners’ obligation—to study the effects in greater detail in an EA or EIS.

## **II. MR. JACKLER ERRED BY RELYING ON THE IDAHO STATE BOARD OF LAND COMMISSIONER'S LEASING PROCESS AS AN EXCUSE TO IGNORE THE TOWER'S ENVIRONMENTAL EFFECTS.**

Mr. Jackler acknowledged that the Commission does consider specially protected areas and aesthetic effects as bearing on whether a tower may have significant impacts requiring an EA under 47 C.F.R. § 1.1307(c). *See Denial*. He added: “Aesthetic concerns considered by the Commission include site-specific factors such as the presence of a nearby designated area of significance, a designated scenic highway or a specially protected scenic area.” *Id.* But in dismissing Petitioners’ concerns that the tower may have significant impacts on the natural, scenic, and pastoral values of the specially-protected SNRA, Central Idaho Dark Sky Reserve, Congressionally-designated wilderness areas, and Sawtooth Scenic Byway, Mr. Jackler stated that the Commission gives “considerable weight to any site approval obtained from a local, state, or regional land use authority . . . if that approval has taken into account the environmental impact of the proposal.” *Id.* Mr. Jackler added: “With regard to this site, the record reveals that the Idaho State Board of Land Commissioners granted a lease to AT&T for this site for the purpose of constructing the proposed tower after it held a hearing addressing environmental issues and received comments addressing environmental concerns on this issue.” *Id.*

Mr. Jackler erred in relying on the lease issued by ICL and the Idaho State Board of Land Commissioners (the “Land Board”). While the Land Board did hold a hearing and take comment on AT&T’s lease, and while members of the public, public officials, and non-profit organizations did raise environmental concerns at the hearing and in their comments, the Land Board did not take into account the environmental impacts of the proposal.

Under the Idaho Constitution, the Land Board does not consider environmental impacts in making these types of leasing decision. Rather, the Land Board is constitutionally bound to maximize long-term financial return and no other factors, including environmental impacts. “The

State's endowment lands are part of a sacred trust reserved for the benefit of Idaho's public schools and public institutions. The Board, which manages those endowment lands, is the epitomic public trustee." *Wasden v. State Bd. Of Land Comm'rs*, 153 Idaho 190, 195, 280 P.3d 693, 698 (Idaho 2012). Article IX, § 8 of the Idaho Constitution expressly states that endowment lands must be held in trust to secure the maximum long term financial return:

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the [endowment] lands ... in such manner as will secure the maximum long-term financial return to the institution to which granted or to the state if not specifically granted....

Idaho Const. art. IX, § 8.

Moreover, during the Land Board meeting at issue, the Land Board made clear to the public that it was not considering environmental impacts of AT&T's proposal, and was instead focused solely on money. Land Board member and Attorney General Lawrence Wasden explained that, while he was willing to hear from the public on other matters, those other matters would have no bearing on the leasing decision:

Our job is one thing only, and that is to act on behalf of those beneficiaries. What actions we take must be aligned with their interest, that is to produce the money that supports the schools or the other beneficiaries. It's helpful to us to hear what other people have to say. I welcome that input. But it's important that people understand that very narrow focus is what we must make our decision on, not based upon all of the other – relevant and important information, but not on point.

AT&T Opposition, Ex. F, p. 76. Mr. Jackler, thus, erred in finding that the Land Board took into account environmental impacts when it issued the lease to AT&T.

Petitioners also note that, even if the Land Board could legally (which it cannot) and did factually (which it did not) take environmental impacts into account in granting the lease, that would be no excuse for the Commission to shirk its NEPA responsibilities. Federal agencies cannot rely on non-NEPA and state agency processes and decisions to comply with NEPA. *See, e.g., S. Fork Band Council v. Dept. of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) ("A non-NEPA

document—let alone one prepared and adopted by a state government—cannot satisfy a federal agency’s obligations under NEPA.”); *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998 (9th Cir. 2004) (rejecting as “without merit” argument that agency may avoid NEPA where a “facility operates pursuant to a state permit”); *Idaho v. Interstate Commerce Comm’n*, 35 F.3d 585, 595–96 (D.C. Cir. 1994) (agency fails to take a “hard look” where it “defer[s] to the scrutiny of others”, because “to rely entirely on the environmental judgments of other agencies [is] in fundamental conflict with the basic purpose of NEPA.”).

Petitioners made each of the above points in their Reply in support of the Petition for Environmental Review. Pet’rs’ Reply, p. 8. But Mr. Jackler failed to address these points when he relied on the Land Board’s leasing process to deny the Petition. *See Denial*. This was error. The Land Board’s granting of a lease simply has no bearing on environmental matters and the Commission’s duty to comply with NEPA. Mr. Jackler was wrong both factually and legally in using the Land Board’s leasing process as an excuse for the Commission to avoid preparing an EA studying the tower’s adverse aesthetic effects to the specially protected Sawtooth NRA, Central Idaho Dark Sky Reserve, Sawtooth Scenic Byway, and designated wilderness areas.

### **III. MR. JACKLER ERRED BY FINDING PETITIONERS FAILED TO PROVIDE EVIDENCE OF IMPACTS TO TOURISM AND RECREATION.**

In dismissing Petitioners’ argument that the proposed tower threatens significant adverse effects to the Sawtooth NRA’s exceptional role in the regional ecotourism economy, Mr. Jackler stated Petitioners “do not explain their concerns regarding economic impacts to ecotourism in the area, however, and provide no evidence that the proposed tower will have a significant impact on ecotourism.” *See Denial*. Once again, Mr. Jackler ignored the information and explanation submitted by Petitioners—information showing the tower “may” have significant impacts, requiring an EIS or EA under 47 C.F.R. § 1.1307(c).

As the Petition explained, Congress established the Sawtooth NRA to protect the area's "natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreation values associated therewith." 16 U.S.C. § 460aa. The Petition includes a section specifically explaining that ecotourism and outdoor recreation are a significant part of the regional economy in and around the City of Stanley and in Custer County. 2020 Petition, pp. 6–7. The Petition cited to and included a report by Headwater Economics, "High Divide Region – Summary of Recreation Economy" (Nov. 2014), and that report explained:

The Sawtooth National Recreation Area (SNRA) is one of the highest profile unit[s] managed by the U.S. Forest Service and anchors the western edge of the High Divide region. The SRNA covers 756,000 acres and includes a number of remarkable lakes, mountains, and a range of outdoor recreation activities. For the twelve months from October 2004 to September 2005, a Forest Service National Visitor Use Monitoring study found that there were more than 623,000 visitors to the SNRA (visitation to the entire Sawtooth National Forest is described below).

For the SNRA, 77 percent of those interviewed visited for recreation. The top five recreation activities were viewing natural features (58%), hiking/walking (55%), relaxing (52%), viewing wildlife (47%), and driving for pleasure (40%).

2020 Petition, Attach. C, p. 5 (citations omitted). The report documented spending attributable to visitors to the Sawtooths in 2005 at over \$100 million. *Id.* at 6.

The Petition also stated, with supporting documentation: "Redfish Lake, the largest lake in the Sawtooth National Recreation Area, is perhaps the most popular camping spot in the area, perhaps even the State of Idaho, and is among the most visited tourist sites in the state." 2020 Petition, p. 7. The Petition also explained that the tower could degrade the scenic and recreational qualities of the Sawtooth Scenic Byway (Highway 75), and the new Redfish to Stanley trail system, and provided documents showing the importance of the new trail to the area's tourism based economy. *Id.*

Petitioners also submitted public comments from the City of Stanley and from Custer County to the Idaho Department of Lands concerning the proposed tower. Again, the County

commissioners commented that they “do not support its current height or location since there are other options that will better resolve the issues at hand”, noting the “195’ tower is twice as tall as needed and there are better alternatives that are more pleasing.” 2020 Petition, Attach B (Mar. 4, 2020 comments from Custer County Commissioners). And again, the City of Stanley warned:

The site is deep within the Sawtooth National Recreation Area, and its prominent ridge-top location will make it highly visible from nearby areas of the Sawtooth Valley and surrounding mountains. The tower will be only 0.6 miles from State Highway 75 and 1.0 mile from the access road to Redfish Lake, making it a substantial visual impairment for thousands of tourists who visit Redfish Lake each year to enjoy its outstanding recreational opportunities. . . . The economy of Stanley is heavily dependent on recreation and tourism, so any impairment to that experience is an important consideration to Stanley businesses and resident alike.

2020 Petition, Attach. B (Jan. 29, 2020 comment letter from Stephen J. Botti).

Despite the requirement that the Bureau “shall review the petition and consider the environmental concerns that have been raised,” 47 C.F.R. § 1.1307(c), Mr. Jackler ignored the information Petitioners submitted, information documenting how AT&T’s proposed tall tower in the heart of the Sawtooth NRA poses significant threats to recreation and tourism by degrading the area’s unique and highly-protected natural, scenic, and pastoral character. This is enough evidence to show the tower “may” have significant effects, triggering the Commission’s duty to prepare at least an EA. *See id.*; *American Bird Conservancy*, 516 F.3d at 1032–34.

**IV. MR. JACKLER ERRED BY RELYING ON AN ONGOING NHPA PROCESS TO FOREGO PREPARING AN EA TO CONSIDER ADVERSE IMPACTS TO THE HISTORICAL REDFISH LAKE LODGE.**

While FCC NEPA regulations categorically exclude some new towers from undergoing an EA, the regulations recognize that other towers may significantly affect the environment and require at least an EA. 47 C.F.R. § 1.1307(a). One circumstance requiring an EA is: “Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the

National Register of Historic Places (*see* 54 U.S.C. 300308; 36 CFR parts 60 and 800), and that are subject to review pursuant to section 1.1320 and have been determined through that review process to have adverse effects on identified historic properties.” 47 C.F.R. § 1.1307(a)(4). This circumstance is present here, requiring preparation of an EA.

Again, SHPO “determined that the proposed undertaking would have an **adverse effect to historic properties**” because it “will adversely affect the feeling and setting of the Redfish Lodge Complex, two aspects of integrity that qualify the property for inclusion in the National Register.” 2020 Petition, Enclosure 2 (Sep. 15 2020 letter). In dismissing Petitioners’ argument that the tower requires at least an EA due to these adverse effects to the Lodge, Mr. Jackler stated: “To the extent the Petition seeks further environmental review due to adverse effects on historic properties, we deny the Petition because Section 106 [(under the NHPA)] of the proposed tower is ongoing.” Mr. Jackler also relied on AT&T’s representations that “it negotiated a Memorandum of Agreement with the parties in order to mitigate adverse effects.”

The mere existence of potential mitigation measures is no excuse for refusing to evaluate environmental effects under NEPA. “Mitigation measures . . . while relevant to the adequacy of an environmental analysis [under NEPA] . . . are not a panacea for inadequate data collection and analysis.” *Or. Natural Desert Ass’n v. Jewell*, 840 F.3d 562, 570–71 (9th Cir. 2016) (citation omitted). To assess whether an agency has shown that a project’s environmental impacts are adequately addressed by mitigation measures under NEPA, the agency must have discussed the mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Indian River Cty. v. U.S. Dep’t of Transp.*, 945 F.3d 515, 522 (D.C. Cir. 2019) (quotation omitted).



Moreover, the Commission must make its own independent determinations and cannot simply rely on the applicant (AT&T) and the other entities involved in the MOA to comply with NEPA. *See Idaho*, 35 F.3d at 596 (holding agency failed to satisfy NEPA duties by “deferr[ing] not only to the judgments of other agencies, but also to that of the . . . licensee”); *Illinois Commerce Comm’n v. ICC*, 848 F.2d 1246, 1258 (D.C. Cir. 1988) (holding agency “may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it”).

The Commission must, thus, make its own findings on effects to the Redfish Lake Lodge Complex, and in doing so must discuss the proposed mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *See Indian River Cty.*, 945 F.3d at 522 (D.C. Cir. 2019). Mr. Jackler, however, made no independent evaluation of the effects to the Lodge, with or without the mitigation measures proposed in the MOA.

The evidence shows that the MOA—whatever value it may have—does nothing to reduce the direct adverse impacts on the Redfish Lake Lodge Complex. The proposed MOA includes an architectural survey of Stanley, Idaho, as well as funding to help replace the roof of a cabin located in Stanley. *See AT&T Opposition*, p. 7. The proposed tower is not visible from Stanley. Nor is Stanley visible from the Redfish Lake Lodge Complex. The proposed MOA also includes a cultural landscape study to provide information on the area. *Id.*

The architectural study, the roof replacement, and the cultural landscape study do nothing to eliminate, reduce, or otherwise mitigate the direct adverse impacts the tower will have on the Redfish Lake Lodge Complex by marring the skyline view, and degrading the feeling and setting of this historical property, as SHPO determined it would. Thus, even if the MOA is adopted and

carried out, the tower still “may” have significant adverse effects to the Redfish Lake Lodge Complex, requiring preparation of an EA under either 47 C.F.R. § 1.1307(a)(4) or (c).

### **RESPECTS IN WHICH THE ACTION TAKEN SHOULD BE CHANGED**

Mr. Jackler’s action denying SIHA and ICL’s Petition for Review should be changed to grant the Petition for Environmental Review. In granting the Petition for Environmental Review, the Commission should find that AT&T’s tower is not eligible for categorical exclusion because: (1) the tower may have significant adverse effects on the natural, scenic, pastoral, recreational, and economic values of the Sawtooth NRA, the Sawtooth Scenic Byway, the Central Idaho Dark Sky Reserve, three nearby wilderness areas, and the historic Redfish Lake Lodge under 47 C.F.R. §§ 1.1307(c) and 40 C.F.R. 1501.6(a); and/or (2) SHPO found the tower would have adverse effects on the Redfish Lake Lodge, which is eligible for listing in the National Register of Historic Places, 47 C.F.R. § 1.1307(a)(4).

In granting the Petition for Environmental Review, the Commission should also direct that an EIS be prepared, or at least an EA, under NEPA before the FCC can act on AT&T’s application. *See American Bird Conservancy*, 516 F.3d at 1032–34.

### **RELIEF SOUGHT**

SIHA and ICL request that, as authorized under 47 C.F.R. § 1.115(g) & (h), the Commission grant the application for review, reverse Mr. Jackler’s decision, grant SIHA’s and ICL’s Petition for Environmental Review, and order the preparation of an environmental impact statement, or preparation of an environmental assessment, under NEPA and the Commission’s regulations at 47 C.F.R. § 1.1307.

Dated this January 27th, 2024.

Respectfully Submitted,

*/s/ Bryan Hurlbutt*

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### **CERTIFICATE OF SERVICE**

I hereby certify that on January 27, 2024, a true and correct copy of Petitioners’ Application for Review was served by email on the following:

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