National Trust *for* Historic Preservation
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March 15, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WT Docket No. 17-79, Wireless Infrastructure Streamlining
Second Report and Order, issued March 1, 2018

Dear Ms. Dortch:

These comments are filed on behalf of the National Trust for Historic Preservation,[1] in response to the Report and Order issued by the Federal Communications Commission (FCC) on March 1, 2018. The National Trust has previously filed comments with the FCC in this docket on June 15 and December 7, 2017, and February 8 and 9, 2018.

I. The Proposed Rule Fails to Comply with the National Historic Preservation Act (NHPA).

A. Issuance of a Federal license or approval is sufficient federal jurisdiction to render the "project, activity, or program" an "undertaking" pursuant to the NHPA.

The statutory language of the NHPA explicitly defines the term "undertaking" to include: "a project, activity, or program funded in whole or in part under the *direct or indirect jurisdiction* of a Federal agency, including . . . those requiring a Federal permit, *license*, or approval . . . ." 54 U.S.C. § 300320 (emphasis added). Thus, any project activity, or program subject to the regulatory jurisdiction of the FCC or requiring an FCC license constitutes an

[1] The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949 to "facilitate public participation" in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 54 U.S.C. § 312102(a). With more than one million members and supporters around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition, the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, which is responsible for working with federal agencies to implement compliance with Section 106 of the National Historic Preservation Act. *Id.* §§ 304101(8), 304108(a). The National Trust was also an active member of the Telecommunications Working Group that consulted with the FCC for many years to develop both the 2001 Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation PA"), and the 2004/2005 Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Reviewed by the FCC ("Nationwide PA").

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"undertaking." The Section 106 regulations also incorporate and confirm this definition of "undertaking." 36 C.F.R. § 800.16(y). The FCC cannot simply override this statutory and regulatory definition by a unilateral pronouncement, as it attempts to do here. *See* 54 U.S.C. § 306102 (each federal agency must "ensure" that its "procedures for compliance with section [106] . . . are *consistent with* regulations promulgated by the [ACHP]") (emphasis added).

The FCC has no legal authority to unilaterally pronounce that its actions are not undertakings, in a way that is inconsistent on its face with the statutory and regulatory definitions under Section 106. Thus the following FCC statement is directly contradicted by the law: "We conclude that the Commission's issuance of a license that authorizes provision of wireless service in a geographic area does not create sufficient Commission involvement in the deployment of particular wireless facilities in connection with that license for the deployment to constitute an undertaking for purposes of NHPA." FCC Report & Order at p.28. (We note that the only authority cited by the FCC for this legal proposition consists of industry comment letters. *Id.* at n. 143.)

The FCC has two basic rationales for its proposed order – first, industry is complaining that the review process is too slow and expensive; and second, the new technology is going to be much smaller anyway.

- The first argument speaks to the FCC's inadequate management or enforcement of the existing review process.
- The second argument relates to effects, not whether the FCC's regulatory authority is an undertaking in the first instance. This suggests that the FCC should be working with ACHP to develop exemptions (and categorical exclusions under NEPA), or streamlined review procedures. The FCC has done so in the past and there is no reason why it can't do so again.

B. The FCC does not have the legal authority to unilaterally adopt "exemptions" from Section 106, in the absence of consultation with the ACHP, and compliance with regulatory procedures, neither of which has occurred here.

The FCC's attempt to declare that its regulatory jurisdiction doesn't amount to an "undertaking" is essentially an effort to create a de facto "exemption" of its activities from compliance with Section 106. However, the statutory language of the NHPA gives the authority to regulate "exemptions" from Section 106 exclusively to the ACHP and the Secretary of the Interior (i.e., the Director of the National Park Service[2])—not to other agencies such as the FCC:

> (c) EXEMPTION FOR FEDERAL PROGRAMS OR UNDERTAKINGS.—The [*ACHP*], with the concurrence of the *Secretary [of the Interior*], shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this

[2] *See* 54 U.S.C. §§ 100102(1), 300316.

> division *when the exemption is determined to be consistent with the purposes of this division, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic property*.

54 U.S.C. § 304108(c) (emphasis added). Thus the FCC has no legal authority to pronounce itself exempt from any part of the NHPA unless it has complied with the regulations issued pursuant to this statute. Those regulations spell out a detailed process that includes public participation, tribal consultation, detailed criteria, and requires *approval* by the ACHP. *See* 36 C.F.R. § 800.14(c). The FCC has not even begun to initiate that process.

C. The FCC's assumption that Section 106 and NEPA have the same threshold is legally wrong.

The FCC continues to assert that the definition of "undertaking" under the NHPA and "major federal action" under NEPA are "largely equivalent." (e.g., Report & Order at p.15). Even though the ACHP explicitly pointed out this erroneous interpretation in the ACHP's comments submitted on June 15, 2017, the FCC has failed to correct this error. *See Indiana Coal Council v. Lujan*, 774 F. Supp. 1385 (D.D.C. 1991) (footnote 13).

D. The FCC must comply with Section 106 of the NHPA "prior to" the issuance of any license.

The explicit statutory language of Section 106 requires that effects of federally licensed undertakings be taken into account "prior to" issuance of the license. 54 U.S.C. § 306108. The proposed rule would not ensure compliance with that legal requirement.

The ACHP explicitly objected to the FCC's proposed exemptions and redefinition of the term "undertaking," in the ACHP's comments submitted to the FCC in this docket on June 15, 2017. And in the ACHP's comments submitted on March 15, 2018 (today), the ACHP reiterated that the FCC's proposed order remains "inconsistent" with the ACHP's interpretation of the FCC's Section 106 responsibilities. Congress has assigned to the ACHP primacy in interpreting Section 106 of the NHPA. 54 U.S.C. § 304108(a). Therefore, the FCC's failure to adhere to the ACHP's interpretation does not comply with Section 106.

E. The FCC has Failed to Engage in Meaningful Consultation with the Public or with Indian Tribes.

In contrast to the FCC's development of its Nationwide PA and Collocation PA, the agency here released a 79-page order, with 449 footnotes, without publication in the Federal Register, and has allowed only 15 days for public comment. That is simply not adequate for meaningful public involvement, especially considering the explicit regulatory requirements for public participation and tribal consultation in the development of exemptions. The Tribes in particular have objected to the reliance on a few hastily scheduled conference calls as a substitute for meaningful tribal consultation.

F. The FCC's Proposed Rule Would Cause Enormous Uncertainty by Calling into Question Existing Nationwide Programmatic Agreements under Section 106.

The ACHP has formally approved allowing other federal agencies to rely on the FCC's Programmatic Agreements as the basis for their own compliance with Section 106 in connection with the implementation of broadband infrastructure. For example, in 2017, the ACHP adopted a program comment encouraging all federal land managing and property managing agencies to make use of the FCC's nationwide PA in order to deploy broadband infrastructure on federal land. 82 Fed. Reg. 23, 818 (May 24, 2017) (available at www.achp.gov/docs/broadband-program-comment.pdf). And in 2009, the ACHP adopted a program comment specifically allowing the USDA Rural Utilities Service (RUS) and the National Telecommunications and Information Administration (NTIA) to make use of the Nationwide PA. (*See* www.achp.gov/news091030.html.)

The FCC's proposed action would call into question the Section 106 compliance for all of these other federal agencies.

II. The Proposed Rule Fails to Comply with the National Environmental Policy Act (NEPA).

A. The FCC Has Failed to Engage in Any Meaningful Consultation or Public Involvement in Connection With This Order.

See discussion above under NHPA.

B. The FCC's Issuance of Licenses Constitutes a "Major Federal Action" Under NEPA.

Regulations issued by the Council on Environmental Quality (CEQ) implementing NEPA define "major federal action" to include "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18. The Supreme Court has held that the CEQ's NEPA regulations are mandatory and binding on all federal agencies. *Andrus v. Sierra Club,* 442 U.S. 347, 357 (1979). And the FCC's own NEPA regulations incorporate the CEQ regulations by reference. 47 C.F.R. § 1.1302. The courts have consistently held that the issuance of a license is a "major federal action." *See, e.g., New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 475 (D.C. Cir. 2012); *American Rivers v. FERC*, 201 F.3d 1186, 1192 (9th Cir. 2000); *Scientists Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

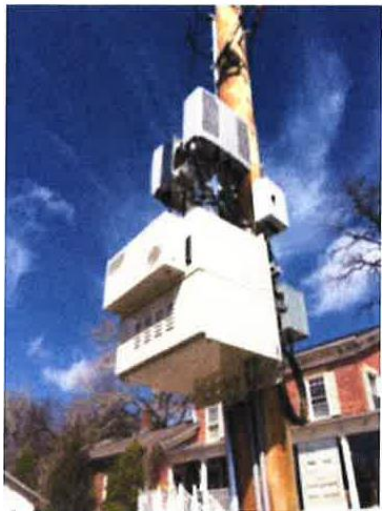
The FCC licenses the use of electromagnetic spectrum by all small wireless facilities. The Order states that most of these licenses are issued for a geographic area, without limitation regarding the density of antennas or transmitters within that geographic area. However, the FCC does not appear to have complied with NEPA (or the NHPA) prior to issuing these licenses. Given the mandate under NEPA (and the NHPA) to consider cumulative impacts, 40 C.F.R. § 1508.7, 36 C.F.R. 800.5(a)(a), these geographic licenses are in violation of those legal requirements.

III. The FCC's Order Misrepresents and Understates the Size and Potential Adverse Effects of the Infrastructure Connected with Small Cells and 5G Technology.

A. The Proposed Exclusion Far Exceeds the Claimed Size of the Small Cell Infrastructure.

The FCC and industry representatives repeatedly refer to small cell and 5G infrastructure as being comparable in size to "pizza boxes" and "backpacks." Yet the FCC's proposed exclusions are not limited to this size. Instead, the order would exclude review for all towers up to 50 feet high, regardless of whether those towers are existing or new, and regardless of whether they would be physically located within a historic site. (These could later be expanded by up to 10 percent.) The scope of the proposed exclusion is excessive and inappropriate.

We reviewed several public websites that shed light on the realities of this infrastructure, including, for example, "Top 10 Things the Wireless Industry Doesn't Tell You About Small Cells" (www.steelintheair.com/Blog/2017/04/top-10-things-the-wireless-industry-doesnt-tell-you-about-small-cells.html), and "10 Key Issues for California Cities & Counties on the Challenges of Small Cells & 'Not So Small Cells'" (https://medium.com/@omarmasry/10-key-issues-for-california-cities-counties-on-the-challenges-of-small-cells-not-so-small-c9e966f257a). Here are some of the images from the first-cited website above illustrating small cell infrastructure:



As is readily apparent, this infrastructure is not limited to pizza boxes.

IV. The Anecdotal Complaints from Industry Groups are Not Persuasive.

As many other commenters have noted, the industry arguments about their expenses and fees don't add up. Nor do they take into account the recent exemptions and streamlining measures adopted by the FCC relating to actions such as pole replacements.

Thank you for considering the comments of the National Trust for Historic Preservation.

Sincerely,

Elizabeth Merritt

Elizabeth S. Merritt
Deputy General Counsel

cc: Charlene Vaughn, Valerie Hauser, Reid Nelson, and Kelly Fanizzo,
Advisory Council on Historic Preservation
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