

March 19, 2013

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Communication, WC Docket No. 11-59; GN Docket No. 12-354

Dear Ms. Dortch,

PCIA - The Wireless Infrastructure Association and The DAS Forum, a membership section of PCIA (together "PCIA"), submit this letter detailing administrative mechanisms for the Federal Communications Commission ("Commission" or "FCC") to streamline its environmental and historic preservation requirements to facilitate distributed antenna system ("DAS") and small cell deployments, as part of the Commission's planned proceeding to remove additional barriers to the deployment of wireless infrastructure.¹ PCIA's intention is to suggest an incisive course of action the FCC should take to streamline DAS and small cell deployment in the public rights-of-way—the addition of a categorical exclusion for DAS and small cell solutions to Note 1 of Section 1.1306 of the Commission's rules—while also discussing other viable solutions.

In addition, attached is a report authored by Amos J. Loveday, Ph.D., noted historian, researcher, and former Preservation Specialist for the FCC and State Historic Preservation Officer for the State of Ohio.² Dr. Loveday's report compares DAS and small cell solutions—technologies not contemplated when the Nationwide Programmatic Agreements were drafted—to the FCC's current environmental and historic preservation framework. Dr. Loveday's research is based on a review of preservation and FCC documents, as well as

¹ See News Release, *FCC Chairman Julius Genachowski Announces New Broadband Acceleration Initiative Actions* (Jan. 25, 2013) (announcing, among other things, "actions in the coming months to further streamline DAS and small cell deployment"). While the FCC is seeking comment in the 3.5 GHz proceeding (GN Docket No. 12-354) on whether "any tailoring or streamlining of our environmental requirements is appropriate in light of the physical characteristics of small cell facilities," see *Commercial Operations in the 3550-3650 MHz Band*, Notice of Proposed Rulemaking and Order, 27 FCC Rcd 15594, ¶ 143 (2012), a large portion of small cell and DAS facilities operate outside the 3.5 GHz band. Accordingly, PCIA urges the Commission to revise the environmental and historic preservation requirements applicable to DAS and small cells across all bands as part of its broader infrastructure initiative, consistent with the recommendations discussed herein. In that proceeding, the FCC should take into account the record established in the 3.5 GHz proceeding relevant to environmental streamlining.

² Amos J. Loveday, Ph.D., *DAS/Small Cells & Historic Preservation: An Analysis of the Impact of Historic Preservation Rules on Distributed Antenna Systems and Small Cell Deployment* (Feb. 27, 2013) ("DAS/Small Cell Report").

conversations with a variety of State Historic Preservation Offices (“SHPOs”) and individuals from the National Trust for Historic Preservation and the Advisory Council on Historic Preservation (“ACHP”).

DAS and small cell solutions are critical to the build out of wireless services, including mobile broadband. Today, consumers demand consistent wireless broadband coverage and capacity across every setting. To meet this demand, highly-localized service with adequate network capacity is crucial. DAS and small cell solutions are deployment-ready technologies that are perfectly positioned to timely and efficiently meet the goals of ubiquitous, high-speed wireless broadband networks. Further, these technologies are highly adaptable and can be modified to service future spectrum allocations and communications standards with minimal impact on surrounding areas.

To meet consumer demand and allow for increased investment and innovation, we proffer three distinct paths forward in descending order of viability.

1. The FCC Should Include DAS and Small Cell Solutions within the 1.1306 Note 1 List of Categorical Exclusions

The FCC should issue a rulemaking to add DAS and small cell solutions to the list of facilities that are categorically excluded from non-RF-related environmental processing in Note 1 to 47 C.F.R. § 1.1306. A rulemaking would provide an open discussion of the benefits of such an exclusion, including facilitating wireless broadband deployment and reducing unnecessary burdens on industry, the FCC and SHPOs—all while maintaining historic preservation goals.³ A rulemaking would also provide notice to the public and allow all stakeholders, including Indian tribes or Native Hawaiian organizations, the opportunity to comment. Such a rulemaking would be in line with Chairman Genachowski’s acknowledgement of “actions in the coming months to further streamline DAS and small cell deployment” and would be an additional hurdle cleared in the Commission’s march to ubiquitous mobile broadband.⁴

The Note 1 exclusion states, in pertinent part:

³ See DAS/Small Cell Report at 1-2, 5, 8.

⁴ See News Release, *supra* note 1; A National Strategy: The FCC’s Broadband Acceleration Initiative, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A2.pdf (last visited Mar. 19, 2013); see also Statement of Ajit Pai, Commissioner, FCC, Hearing Before the Committee on Commerce, Science, and Transportation of the United States Senate, “Oversight of the Federal Communications Commission,” at 8 (Mar. 12, 2013), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-319469A1.pdf (“[W]e should modernize our rules to exempt distributed antenna systems (DAS) from our environmental processing requirements, except for rules involving radiofrequency emissions. We can do this if a technology is ‘deemed to have no significant effect on the quality of the human environment.’ Given their small size and appearance, I believe that DAS meet this standard. We should similarly update our historic preservation regulations, yet another regulatory layer, to facilitate deployment of DAS and small cells that add capacity to networks.”).

The provisions of 1.1307(a)⁵ and (b)⁶ of this part do not encompass the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use, established by the applicant or others. The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged.⁷

Small cell solutions, including DAS, should be included in the types of facilities excluded from non-RF-related environmental processing under the FCC's rules. DAS and small cells are frequently deployed on existing utility poles and similar infrastructure within existing aerial corridors of prior or permitted use. A DAS installation, for example, has a series of small nodes connected with fiber optic or coaxial cables, usually along the public rights-of-way on utility poles.⁸ The FCC recognizes that the deployment of these wireless facilities within the public rights-of-way is often the functional equivalent of other telecommunications wire deployments, as indicated by the inclusion of these wireless facilities in the Commission's revised pole attachment rules.⁹ However, uncertainties surrounding the application of the FCC's historic preservation and environmental rules to these new technologies can thwart or make more difficult DAS and small cell deployment.¹⁰

DAS and small cell solutions were not widely used when the signatories entered into the 2001 Collocation Agreement¹¹ and the 2004 Nationwide Programmatic Agreement ("NPA"),¹² which largely focused macro site deployments, including towers.¹³ However, these newer technologies meet the intent of these agreements, as these smaller devices can be attached to existing physical structures and along and within previously permitted corridors—factors that the Collocation Agreement and the NPA promote.¹⁴ The Commission found as much when it

⁵ Subsection (a) lists eight areas or situations which are considered environmentally sensitive and require preparation of an environmental assessment prior to construction.

⁶ Subsection (b) requires an environmental assessment if the antenna transmitter would cause exposure of workers or the general public to levels of radiofrequency ("RF") radiation in excess of certain guidelines.

⁷ 47 C.F.R. § 1.1306, Note 1.

⁸ See DAS/Small Cell Report at 1-2, 5, 8.

⁹ See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, *Report and Order and Order on Reconsideration*, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, ¶¶ 1, 6 (2011) (reconciling disparate rental rates for utility poles between cable and telecommunications providers to encourage wireless broadband infrastructure investment, and "seek[ing] to eliminate unnecessary costs or burdens associated with pole attachments").

¹⁰ See DAS/Small Cell Report at 2-5.

¹¹ Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001) ("Collocation Agreement"), available at 47 C.F.R. Part 1, App. B.

¹² Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (2004) ("NPA"), available at 47 C.F.R. Part 1, App. C.

¹³ See DAS/Small Cell Report at 2.

¹⁴ See Collocation Agreement, § V (excluding the collocation of antennas on certain existing non-tower structures outside of historic districts); NPA, § III(E) (excluding certain facilities located in or near specified rights-of-way or

noted in Paragraph 63 of the 2004 NPA Report and Order that, “the likelihood of an incremental adverse impact on historic properties [from antennas on utility-type poles] is minimal,” and that “it promotes historic preservation to encourage construction of such minimally intrusive facilities rather than larger, potentially more damaging structures.”¹⁵ As Dr. Loveday concludes, “Because DAS and small cell antennas are smaller and the mounting poles lower than those the Commission was referring to in these findings, it follows that DAS and small cell effects are even more *de minimis* and even more unlikely to affect historic sites.”¹⁶

The Commission has ample authority to revise Note 1 to Section 1.1306 of its rules to add a categorical exclusion for DAS and small cells. The Commission’s environmental rules implement the National Environmental Policy Act (“NEPA”), the National Historic Preservation Act (“NHPA”), and other environmental statutes. In addition, the Council on Environmental Quality (“CEQ”) has issued regulations providing guidance on NEPA. The CEQ regulations provide for agency establishment of categorical exclusions, defined as those actions which “do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect.”¹⁷ CEQ has provided guidance on establishing categorical exclusions under NEPA, stating that actions that “are reasonably expected to have little impact . . . should not require extensive supporting information.”¹⁸ Given their *de minimis* and beneficial effects on historic properties, DAS and small cells more than meet these standards.

Thus, similar to past proceedings where the Commission has added exclusions under Note 1,¹⁹ here the FCC should commence a rulemaking which would seek comment on an amendment to add DAS and small cells to the list of exclusions within Note 1. For example, a sentence could be

utility corridors); *see also* DAS/Small Cell Report at 2-5 (discussing why these exclusions are limited in their practical application for DAS and small cells).

¹⁵ “We do, however, adopt a limited exclusion . . . for certain construction in or near communications and utility rights-of-way. Due to the increasing usage of wireless services and advances in technology, providers of certain types of service are increasingly finding it feasible to utilize antennas mounted on short structures, often 50 feet or less in height, that resemble telephone or utility poles. Where such structures will be located near existing similar poles, we find that the likelihood of an incremental adverse impact on historic properties is minimal. Moreover, it promotes historic preservation to encourage construction of such minimally intrusive facilities rather than larger, potentially more damaging structures. Therefore, the [NPA] excludes from Section 106 review facilities located in or within 50 feet of a right-of-way designated for communications towers or above-ground utility transmission or distribution lines, where the facility would not constitute a substantial increase in size over existing structures in the right-of-way in the vicinity of the proposed construction.” Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, *Report and Order*, 20 FCC Rcd 1073, ¶ 63 (2004) (“2004 NPA Report and Order”).

¹⁶ DAS/Small Cell Report at 7.

¹⁷ 40 C.F.R. § 1508.4.

¹⁸ 75 Fed. Reg. 75628, 75633 (Dec. 6, 2010).

¹⁹ *See Amendment of Environmental Rules*, Second Report and Order, 6 FCC Rcd 1716 (1991) (amending Section 1.1306, Note 1 to exclude proposed aerial or underground routes that will utilize established aerial or underground corridors); *1998 Biennial Regulatory Review*, Report and Order, 14 FCC Rcd 4909, 4938 (1999) (modifying the categorical exclusions in Note 1 to exclude the construction of submarine cable systems).

added stating: “The provisions of §1.1307(a) do not encompass distributed antenna systems or small cell installations where they are deployed in or on existing buildings, towers or other structures or along or within existing aerial or underground corridors.”

Such a change to the FCC’s rules via rulemaking would also satisfy the FCC’s obligations under the NHPA and the ACHP’s rules. Section 800.3(a)(1) of the ACHP’s rules provides that if “the undertaking is a type of activity that does not have the potential to cause effects on historic properties,” then the Commission “has no further obligations under section 106 or [the ACHP rules].”²⁰ This rule provides a “categorical exclusion from the consultation process” where “there is no potential adverse effect” or the environmental effects are “*de minimis*.”²¹ Thus, a finding via rulemaking that DAS and small cells would have a most a *de minimis* effect on historic properties would satisfy the FCC’s obligations under the ACHP rules and allow it to exclude DAS and small cell installations from undergoing a Section 106 analysis.

2. If the FCC Does Not Utilize the Method Outlined Above, the FCC Should Utilize the ACHP’s Exempted Category Procedure

In the alternative, the FCC could ask the ACHP to invoke the “exempted category” provision of the ACHP’s rules. This provision allows for exemptions from Section 106 when “[t]he potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse.”²² Examples of previously exempted categories include the Federal Highway Interstate Exemption²³ and the Natural Gas Pipeline Exemption,²⁴ large infrastructure projects not dissimilar to the National Broadband Plan. DAS installations would almost certainly qualify given their foreseeable minimal effects, as described above.

While the ACHP Exempted Category procedure is a possible solution in the DAS and small cells space,²⁵ such a procedure is both more time-consuming and complex. It entails a separate protocol prescribed by the ACHP rules, including the review and approval of the ACHP²⁶ and public notice and consultation²⁷—and a rulemaking would still be needed to incorporate the

²⁰ 36 C.F.R. § 800.3(a)(1).

²¹ *Save Our Heritage, Inc., et al., v. FAA*, 269 F.3d 49, 58, 62-63 (1st Cir. 2001).

²² 36 C.F.R. § 800.14(c).

²³ Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System (Mar. 10, 2005), <http://www.achp.gov/progalt/FHWA%20Interstate%20Exemption.pdf>.

²⁴ Exemption Regarding Historic Preservation Review Process for Projects Involving Historic Natural Gas Pipelines (Apr. 5, 2002), http://www.achp.gov/progalt/pipeline%20final_exemption_FR.pdf.

²⁵ See DAS/Small Cell Report at 7.

²⁶ 36 C.F.R. § 800.14(c)(5).

²⁷ 36 C.F.R. § 800.14(c)(2)-(4).

final exemption into the FCC's rules.²⁸ By comparison, the rulemaking approach recommended above to amend Note 1 to Section 1.1306 of the FCC's rules would still involve all interested parties, including the ACHP, but all of the comments would be consolidated into a single proceeding—saving time and resources for all concerned and speeding, rather than delaying, broadband deployment through the use of DAS and small cell solutions.

PCIA cautions that notwithstanding the Exempted Category's procedural similarities to the Program Comment process, the Program Comment process is not an appropriate vehicle for the issue of DAS and small cells.²⁹ As Dr. Loveday notes, the Exempted Category procedure is well suited to deal with these issues.³⁰

3. The FCC May Find that DAS and Small Cell Solutions Are Not Federal Undertakings

A third option is to exclude DAS and small cell solutions from the definition of Section 106 undertakings under the NPA.³¹ Under Section I(B) of the NPA, "The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA."³² An undertaking is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval."³³ The federal government does not assist in the funding of DAS and small cells deployment, nor does the government provide licensing or approval, or other assistance.³⁴ Accordingly, given the lack of federal involvement with DAS and small cell installations, the

²⁸ The Administrative Procedure Act specifies that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated. See 5 U.S.C. § 553; *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). Substantive rules include those that "recognize[] an exemption or relieve[] a restriction." See 5 U.S.C. § 553(d)(1); cf. 47 C.F.R. § 1.1304(a)(4) (incorporating by reference the 2001 Collocation Agreement and the 2004 NPA); 2004 NPA Report and Order, 20 FCC Rcd at 1134 ¶¶ 168-69 (amending the language of Section 1.1307(a)(4) to incorporate both agreements into the Commission's rules).

²⁹ As Dr. Loveday explains, "Exempted categories" under Section 300.14(c) of the ACHP rules and "program comments" under Section 300.14(e) share procedural similarities, but the two are distinct. . . Exemptions are intended to remove from Section 106 compliance undertakings that have foreseeable effects on historic properties *which are likely to be minimal*, which makes them appropriate for DAS and small cells. By contrast, program comments are intended to give the ACHP the flexibility to issue comments on a particular class of undertakings, but are not appropriate to handle Section 106 compliance requirements for categories of actions like DAS and small cell installations that only may affect *few* historic properties. See DAS/Small Cell Report at 7 n.32.

³⁰ See *id.* In addition to not being the correct vehicle to resolve this matter, it will also pose challenges if this and another unrelated Program Comment request were paired together in a single proceeding.

³¹ See DAS/Small Cell Report at 6.

³² NPA, § I(B).

³³ 36 C.F.R. § 800.16(y).

³⁴ As discussed in Dr. Loveday's report, the installation of DAS and small cells is readily distinguishable from traditional macro site tower construction, which the D.C. Circuit has recognized is a federal undertaking. See *CTIA - The Wireless Ass'n v. FCC*, 466 F.3d 105, 112-15 (D.C. Cir. 2006); DAS/Small Cell Report at 6.

Commission may conclude they are not “undertaking[s]” and thus fall outside the scope of NHPA.

The FCC could seek comment in a Notice of Proposed Rulemaking on the issue of whether it should find that DAS and small cell solutions are not federal undertakings. This rulemaking would provide an opportunity for the public, preservationists, and other interested parties to comment on the proposed finding.

While the FCC may, pursuant to Section I(B) of the NPA, make the determination that the installation and operation of a class of telecommunications services is not an undertaking, PCIA notes that the procedure has not been used previously. As such, it may take longer than the other two options and be more vulnerable to protracted procedural and substantive challenges.

Conclusion

DAS and small cell deployments have minimal impact on the environment and, as the attached report shows, are well received by the preservation community. PCIA believes these solutions, especially the 1.1306 Note 1 categorical exclusion procedure, will aid in streamlining deployment of the DAS and small cells and assist in keeping pace with consumer demand for wireless broadband services.

Pursuant to Section 1.1206 of the Commission’s rules, this letter is being filed via ECFS. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/

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