



July 24, 2014

VIA ELECTRONIC FILING

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

Re: Ex Parte Communication: WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59

Dear Ms. Dortch:

On July 22, 2014, D. Zachary Champ and the undersigned of PCIA – The Wireless Infrastructure Association, together with Craig Gilmore of Wilkinson Barker Knauer, LLP, counsel for PCIA (collectively, “PCIA”) met with Lee Martin and Aliza Katz of the FCC’s Office of General Counsel. Consistent with its recommendations in the Broadband Acceleration docket,¹ PCIA reiterated that the FCC should amend its rules to categorically exclude DAS and small cell deployments from environmental and historic review.²

Specifically, PCIA requested that the Commission streamline its environmental and historic review process for DAS and small cells by amending Note 1 to Section 1.1306 to categorically exclude facilities that meet a technology-neutral, volume-based definition.³ Because these facilities have, at most, a *de minimis* effect on the environment, PCIA explained that the FCC has authority under Council of Environmental Quality (“CEQ”) regulations⁴ and Advisory Council

¹ *In re* Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations, *Notice of Proposed Rulemaking*, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, RM-11688, FCC 13-122 (rel. Sept. 26, 2013) (“NPRM”).

² See Comments of PCIA – The Wireless Infrastructure Association, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, RM-11688 (Feb. 3, 2014) (“PCIA Comments”); Reply Comments of PCIA – The Wireless Infrastructure Association, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, RM-11688 (Mar. 5, 2014) (“PCIA Reply Comments”).

³ PCIA Comments at 6-9.

⁴ *Id.* at 9-11; see 40 C.F.R. §§ 1500.4, 1500.5, 1508.4 (requiring agencies to reduce paperwork and delay by using categorical exclusions for actions which do not have a “significant effect” on the environment); Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75,628 (Dec. 6, 2010) (requiring agencies to consult with CEQ and give public notice and opportunity to comment on the proposed exclusion, and encouraging agency to engage

on Historic Preservation (“ACHP”) rules⁵ to propose the exclusion. In particular, PCIA emphasized that the FCC has a solid legal foundation to adopt a National Historic Preservation Act (“NHPA”)-based exclusion for DAS and small cells, consistent with (1) ACHP rules implementing the NHPA; (2) case precedent; (3) well-established general administrative law principles; and (4) the record in this proceeding.

First, Section 800.3(a)(1) of the ACHP rules provides the FCC with discretion to exempt types of activities, like DAS and small cells. Section 800.3(a)(1) provides that if “the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present” then the Commission “has no further obligations under section 106 or [the ACHP rules].”⁶ This provision has been described as a “categorical exemption,”⁷ similar to a categorical exclusion under NEPA.⁸

Importantly, when Section 800.3(a)(1) was added as part of 1999 ACHP rule replacements,⁹ the ACHP declined to provide guidance on how to interpret it: “One comment noted that the regulation provided no guidance as to how a Federal agency determines if an undertaking ‘has the potential to affect historic properties.’ . . . The [ACHP] decided that due to the broad differences among undertakings which would make such guidance too lengthy, this issue will be more appropriately addressed in supplementary guidance material to Federal agencies.”¹⁰ PCIA is unaware of any such guidance having been issued,¹¹ and pointed out that this leaves room for FCC discretion to interpret the rule.

In addition, PCIA explained that the ACHP revised the rule in 2000 to make clear that it applies to “type[s] of activit[ies]” that “generic[ally]” do not have the potential to effect historic properties, “assuming such properties would be present.”¹² PCIA noted that the exclusion proposed here would similarly exempt a type of activity generally—the installation of DAS and small cells that meet a technology-neutral, volume-based definition.

Second, case precedent interpreting Section 800.3(a)(1) supports excluding undertakings like DAS and small cells that have the potential to cause at most de minimis effects. In *Save Our Heritage v. FAA*, the FAA relied on Section 800.3(a)(1) to “categorical[ly] exempt[]” from the ACHP’s consultation procedures the authorization of additional flights from a general aviation airport.¹³ The First Circuit upheld the FAA’s finding that the *de minimis* impact of the undertaking placed it squarely under Section 800.3(a)(1)—which therefore meant the agency was

interested parties, but noting that actions expected to have little impact do not require extensive support). The FCC has already begun CEQ outreach, *see* NPRM at ¶ 13 & n.17.

⁵ *See* 36 C.F.R. § 800.3(a)(1).

⁶ *See id.*

⁷ *Save Our Heritage v. FAA*, 269 F.3d 49, 62-63 (1st Cir. 2001).

⁸ *See* 40 C.F.R. § 1508.4; *see also Escalante Wilderness Project, et al. v. BLM*, 176 IBLA 300, 313 (Interior Bd. of Land Appeals 2009).

⁹ 64 Fed. Reg. 27,044 (1999).

¹⁰ *Id.* at 27,053.

¹¹ *See, e.g., Escalante*, 176 IBLA at 314.

¹² 65 Fed. Reg. 77,698, 77,700, 77,703 (2000).

¹³ *Save Our Heritage v. FAA*, 269 F.3d 49, 62-63 (1st Cir. 2001).

not subject to ACHP's "cumbersome" and "complex" consultation process.¹⁴ The court explained:

[T]he substantive obligation to 'take into account the effect' of the flights on historic properties is beside the point if there is no potential adverse effect. *See* 36 C.F.R. § 800.3(a)(1) (2000). To that extent, the question under . . . NHPA is . . . whether the FAA erred in finding that any impact of the newly authorized flights on the surrounding area was *de minimis*.¹⁵

The court credited the FAA's "specific findings" that "the effects on the environment and on historic properties . . . would be *de minimis*" and "would not adversely affect" historic sites "in any substantial way."¹⁶ It therefore found that the undertaking in question "had no such potential" to cause effects on historic properties and, under Section 800.3(a)(1), no consultation was required.¹⁷

An analogous case reached a similar result as *Save Our Heritage* under Section 800.3(a)(1), where the agency found the effect of the undertaking would be "negligible."¹⁸ In that case, the National Oceanic and Atmospheric Association issued an incidental take permit to conduct a survey in Nantucket Sound, an important cultural resource to a local tribe, in connection with a planned wind farm.¹⁹ The agency concluded:

[I]ssuance of an incidental take authorization . . . is a type of undertaking that does not have the potential to cause effects to historic properties. The authorized . . . harassment will have only a negligible impact on affected marine mammal species or stocks. Therefore, consultation under NHPA is not required (36 CFR 800.3(a)(1); *see Save Our Heritage, Inc. v. FAA*, 269 F.3d 49 (1st Cir. 2001) (consultation under NHPA not required where federal agency had found that effects of undertaking on environment and historic properties would be *de minimus* [sic])).²⁰

¹⁴ *Save Our Heritage*, 269 F.3d at 62.

¹⁵ *Id.* at 58.

¹⁶ *Id.* at 62-63.

¹⁷ *Id.* In this case, even though it was not required to do so, the FAA did "provisionally" consult with the SHPO. *Id.* at 54, 62. The FCC here can likewise seek feedback from interested stakeholders through the rulemaking process. *See* PCIA Comments at 11.

¹⁸ *Small Takes of Marine Mammals Incidental to Specified Activities; Cape Wind's High Resolution Survey in Nantucket Sound, MA*, Notice, 76 Fed. Reg. 80,891, 80,897 (2011).

¹⁹ *Id.* ("[National Marine Fisheries Service] recognizes the importance of Nantucket Sound to [the Wampanoag Tribe of Gay Head (Aquinnah)] as a Traditional Cultural Property, and that [Cape Wind Associates]'s long-term energy project was the subject of a consultation undertaken by [the Bureau of Ocean Energy Management, Regulation, and Enforcement] under section 106 of the NHPA.").

²⁰ 76 Fed. Reg. at 80,897.

PCIA explained that these cases make clear that agencies may apply Section 800.3(a)(1) to categorically exclude types of activities that would have, at most, *de minimis* effects on historic resources.

Third, the categorical exclusion is well supported by general administrative law principles that allow agencies to create exceptions to a statute or rule in de minimis situations. Under *Alabama Power Co. v. Costle*²¹ and *Kentucky Waterways Alliance v. Johnson*,²² it is well established that agencies can create unwritten exceptions to a statute or rule for insignificant or *de minimis* situations.

In *Alabama Power*, the D.C. Circuit was considering the EPA's implementation of the Clean Air Act amendments, which imposed detailed review and permit procedures for facilities emitting pollutants. The D.C. Circuit held that EPA's decision to expand an exemption in the statute went too far, but established principles to guide its actions on remand.²³ In particular, the court recognized that categorical exemptions are "permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*."²⁴ This stems from the idea that "[c]ourts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort."²⁵ While the court recognized that the determination of when matters are *de minimis* "will turn on the assessment of particular circumstances," it noted that "most regulatory statutes . . . permit such agency showings."²⁶ Indeed, "[u]nless Congress has been extraordinarily rigid, there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value."²⁷

In *Kentucky Waterways*, the Sixth Circuit applied the *Alabama Power* principles to Kentucky's regulatory implementation of an EPA rule (which itself implemented the Clean Water Act).²⁸ The court made clear the principles apply to exceptions to a statute or rule: "Unless a statute or regulation employs 'extraordinarily rigid' language, courts recognize an administrative law principle that allows agencies to create unwritten exceptions to a statute or rule for '*de minimis*' matters."²⁹

PCIA pointed out that this line of cases augments the FCC's discretion under Section 800.3(a)(1), as interpreted by the First Circuit in *Save Our Heritage*, to establish an NHPA-based exclusion for DAS and small cell installations that will have, at most, a *de minimis* effect on historic properties.

²¹ 636 F.2d 323, 360 (D.C. Cir. 1979).

²² 540 F.3d 466, 483, 490-91 (6th Cir. 2008).

²³ See *Alabama Power*, 636 F.2d at 357-61.

²⁴ *Id.* at 360-61.

²⁵ *Id.* at 360.

²⁶ *Id.*

²⁷ *Id.* at 360-61.

²⁸ See *Kentucky Waterways*, 540 F.3d at 468-70.

²⁹ *Id.* at 491.

Finally, the record in this proceeding supports the FCC's authority to adopt an NHPA-based exclusion under Section 800.3(a)(1). PCIA highlighted that parties addressing the issue unanimously agree that under 800.3(a)(1), undertakings that will have at most *de minimis* effects on historic properties do not require further historic review under the NHPA.³⁰

Pursuant to Section 1.1206 of the Commission's rules, this notice will be filed via ECFS with your office, and a copy will be provided via email to the attendees. Please do not hesitate to contact the undersigned with any questions.

Sincerely,



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CC: Lee Martin
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³⁰ See, e.g., Comments of Association of American Railroads at 15-17; AT&T at 13-14; Fibertech at 14-15; PCIA at 9-11; TowerStream at 32; Verizon at 12-13. PCIA also distinguished the exempted category program alternative under Section 800.14(c) of the ACHP's rules from the requested relief under Section 800.3(a)(1) of the rules. PCIA explained that the ACHP exempted category procedure involves a different standard and is a less-preferred alternative because it is both more time-consuming and complex than establishing a categorical exclusion. See PCIA Comments at 16.