



*Robert Vitanza*  
General Attorney

AT&T Services, Inc.  
208 Akard Street NW, Rm 2014  
Dallas, Texas 75069  
Phone: 214.757.3357  
Fax: 214.746.2212  
E-mail: robert.vitanza@att.com

July 29, 2014

**VIA ELECTRONIC FILING**

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

**Ex Parte Communication**

Re: Acceleration of Broadband Deployment  
WC Docket No. 11-59; WT Docket Nos. 13-238, 13-32;

Dear Ms. Dortch:

In AT&T's June 17, 2013 *ex parte* letter and in comments filed in this Broadband Acceleration docket,<sup>1</sup> AT&T emphasized the extraordinary demand for wireless broadband service and that streamlining facility siting for low profile antennas and associated equipment ("small cells") would create incentives to expedite broadband deployment. AT&T explained that requiring National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") review of small cells is unnecessary, delays broadband deployment, and imposes unreasonable costs on Federal Communication Commission ("Commission") licensees and structure owners, who would otherwise invest those resources in enhancements to networks and facilities. To modernize Commission regulations to streamline small cell deployment, AT&T supports an amendment to Note 1 of Commission Rule Section 1.1306 to categorically exclude small cells from NEPA and NHPA review.

A categorical exclusion is warranted by the *de minimis* effect of small cells on the environment and historic properties and the significant public interest benefit from their use. The record in this docket is replete with information as to the low profile nature of small cells and the lack of an adverse impact on the environment and historic properties from their use. Further, small cell deployment benefits consumers, Commission licensees, and structure owners by facilitating the provision of broadband service in high traffic and hard to serve areas, with a minimal environmental footprint. For example, AT&T deployed the small cells displayed in Exhibits A and B attached hereto in a Georgia County after several years of failed efforts to deploy a macro site, both separately and jointly with other carriers, because of local planning, zoning and public

---

<sup>1</sup> See Comments of AT&T, Inc., WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, RM-11688 (Feb. 3, 2014) ("AT&T Comments"); Reply Comments of AT&T, Inc., WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, RM-11688 (Mar. 5, 2014).

rejection. The small cells allowed AT&T to close a coverage gap in a populated residential area.<sup>2</sup>

Despite the substantial public interest benefit and minimal impact of small cell deployments, many are subject to NEPA and NHPA review under current rules, often solely because the support structure is over 45 years of age. Although AT&T attempts to avoid support structures that would require NHPA review, AT&T estimates that without a categorical exclusion for small cells, nearly 50% of its small cell deployments (in other words, thousands) will require NHPA review, which could delay deployment by approximately 120 days if all tribes respond in a timely manner and by over 180 days if a single tribe does not timely respond to a request for review. Adopting a small cell categorical exclusion would minimize these delays and uncertainties. It would also benefit consumers by accelerating the pace of broadband deployment in high traffic and hard to serve areas and allow the Commission, wireless licensees, and structure owners to focus their resources on actions that present a real potential to impact the environment and historic properties.

The Commission has ample authority to categorically exclude small cell deployments from NEPA and NHPA review because of their *de minimis* impact on the environment and historic properties. The Commission's authority to adopt a categorical exclusion from NEPA review derives from the Council on Environmental Quality ("CEQ") regulations.<sup>3</sup> The CEQ regulations authorize federal agencies to reduce excessive paperwork burdens and delay by "[u]sing categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment."<sup>4</sup> The Commission has previously categorically excluded from NEPA review all activity that does not involve an action identified in Commission Rule Section 1.1307 and the placement of antennas on existing buildings and towers.<sup>5</sup> Extending this categorical exclusion from NEPA review to all small cell deployments on all existing structures would similarly fall within the Commission's jurisdiction.

The corresponding ACHP regulation provides similar authority for the Commission to categorically exclude small cell deployments from NHPA review. ACHP regulation Section 800.3(a)(1) authorizes a federal agency to meet its NHPA obligations by identifying undertakings that are "a type of activity that does not have the potential to cause effects on

---

<sup>2</sup> These pictures display one example of a small cell deployment. Small cell configurations vary, depending on many factors, such as the evolution of the technology, the needs in the area, the frequencies available, and the support structure and its location.

<sup>3</sup> 47 C.F.R. §1.1302.

<sup>4</sup> 40 C.F.R. §§1500.4(p), 1500.5(k). *See also* 40 C.F.R. §1508.4.

<sup>5</sup> 47 C.F.R. §1.1306 & Note 1. In its comments, AT&T also proposed extending the Note 1 categorical exclusion for collocations to all support structures. *See* AT&T Comments at 9-10.

historic properties.”<sup>6</sup> As AT&T observed in its comments in this docket, Section 800.3(a)(1) allows federal agencies to categorically exclude those types of activities that have a *de minimis* effect on historic properties. The few cases interpreting and applying Section 800.3(a)(1) support this view. In *Save Our Heritage, Inc. v. FAA*, the United States Court of Appeals for the First Circuit denied the petitioners’ request to set aside the FAA’s decision to exempt from NHPA review a project to expand the number of flights from an airport because of its *de minimis* impact.<sup>7</sup> After explaining that “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*,”<sup>8</sup> the First Circuit concluded that the FAA had met its NHPA obligation because it “did make specific findings that the effects . . . on historic properties . . . would be *de minimis*.”<sup>9</sup> In a similar 2008 case, *Town of Marshfield, MA v. FAA*, the First Circuit again reached the same conclusion.<sup>10</sup>

Moreover, excluding from NHPA review those types of activities that have a *de minimis* impact on historic properties is consistent with the spirit of the NHPA.<sup>11</sup> The Commission has observed that Section 214 of the NHPA is intended to “tak[e] into consideration the *magnitude* of the exempted undertaking or program and the likelihood of impairment of historic properties.”<sup>12</sup>

---

<sup>6</sup> 36 C.F.R. §800.3(a)(1).

<sup>7</sup> 269 F.3d 49 (1<sup>st</sup> Cir. 2001).

<sup>8</sup> *Id.* at 58.

<sup>9</sup> *Id.* at 63.

<sup>10</sup> 552 F.3d 1, 5 (1<sup>st</sup> Cir. 2008). *See also 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 (Dec. 27, 2011) (“[A]n incidental take authorization for the harassment of marine mammals is a type of undertaking that does not have the potential to cause effects to historic properties. The . . . 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).”).

<sup>11</sup> Categorically excluding from NHPA review those types of activities with only a *de minimis* impact on historic properties is also consistent with the principle advocated by PCIA in its recent *ex parte* filing that absent extraordinarily rigid statutory or regulatory language, which does not exist in this case, administrative law allows, “agencies to create unwritten exceptions to a statute or rule for ‘*de minimis*’ matters.” Letter from D. Van Fleet Bloys, Government Affairs Counsel, PCIA – The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, RM-11688 (July 24, 2014) (citing and quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) and *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 483, 490-91 (6th Cir. 2008)).

<sup>12</sup> 16 U.S.C. § 470v (emphasis added).

We interpret these provisions to mean that, in formulating exemptions and prescribing processes, the Council and the federal agency need not ensure that every possible effect on a historic property is individually considered in all circumstances, but that they should take into account the likelihood *and potential magnitude of effects* in categories of situations. Indeed, doing so should advance historic preservation in the long run, consistent with the intent of the NHPA, by enabling all parties to focus their limited resources on the cases where significant damage to historic properties is most likely.<sup>13</sup>

Indeed, categorically excluding small cell deployments from NHPA review is unlikely to adversely impact historic properties and would promote the public interest by facilitating the timely deployment of wireless broadband service, conserving Commission and historic preservation resources by focusing on real risks to historic properties, and providing incentives for Commission licensees to deploy small cell facilities, which will render effects on historic properties less likely.

Under PCIA's proposal, a small cell categorical exclusion would apply to deployments with equipment enclosures no greater than 17 cubic feet in volume, antenna enclosures no greater than three (3) cubic feet in volume, and associated infrastructure.<sup>14</sup> AT&T's small cell deployments, including those entered in the record in this letter and in AT&T's June 17, 2013 *ex parte* letter, would fit within this exclusion. In AT&T's experience, PCIA's proposed definition of small cell facilities categorically excluded from NHPA review is also flexible enough to cover the varied configurations of small cells that might be deployed, including deployments with one equipment enclosure, no equipment enclosure, and, as increasingly requested by landlords, multiple smaller enclosures. As demonstrated in the record, these small cells deployments have a *de minimis* impact on the environment and historic properties, and even less of an impact than the lights, power lines, and telephone lines with which they may share a support structure.

For all these reasons, the Commission can and should modify Note 1 to Rule Section 1.1306 to categorically exclude from NEPA and NHPA review those small cell deployments that fall

---

<sup>13</sup> Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1081-82 (2004) (emphasis added). *See also* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Order on Reconsideration*, 24 FCC Rcd 14841, 14849-50 (2009) (emphasis added) (“Categorically excluding from routine Section 106 review categories of undertakings that are *unlikely adversely to impact historic properties* promotes the public interest by facilitating the timely deployment of service, conserving historic preservation resources, and providing incentives for applicants to locate facilities in a manner that will render effects on historic properties less likely.”)

<sup>14</sup> Comments of PCIA - The Wireless Infrastructure Association and The HetNet Forum, WT Docket No. 13-238, at 17 (filed Feb. 3, 2014).

Ms. Marlene Dortch

July 29, 2014

Page 5

within the PCIA proposed preset cubic volume limits. Pursuant to Section 1.1206 of the Commission's rules, this notice will be filed via ECFS with your office. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Vitanza", with a long horizontal flourish extending to the right.

Robert Vitanza

**Exhibit A**



