

August 7, 2014

VIA ELECTRONIC FILING

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

Re: *Ex Parte* Presentation, Acceleration of Broadband Deployment by Improving Wireless Siting Policies, WT Docket Nos. 13-238, 13-32; WC Docket 11-59

Dear Ms. Dortch:

CTIA–The Wireless Association® takes this opportunity to explain in more detail the need for, and benefits of, establishing a categorical exclusion for distributed antenna systems (DAS) and small cells from environmental and historic preservation review.¹

As the Commission observed in the Notice of Proposed Rulemaking (NPRM), the regulations of the Council on Environmental Quality (CEQ) encourage an agency to adopt categorical exclusions from environmental review for actions that the agency determines “do not individually or cumulatively have a significant effect on the human environment . . . and for which . . . neither an environmental assessment nor an environmental impact statement is required.”² Thus, the CEQ urges agencies to determine whether a particular activity is one that “normally does not require” further review because it “is not expected to have significant individual or cumulative environmental effects.”³ Accordingly, the Commission has, over the years, adopted a number of categorical exclusions, which are found in Section 1.1306 of its rules.

Under the CEQ’s guidelines for establishing categorical exclusions,⁴ this rulemaking proceeding is the appropriate means to ask for and obtain public input concerning the adoption of a categorical exclusion. In an effort to obtain meaningful feedback, the NPRM provided a proposed definition of a categorical exclusion for DAS and small cells that had been submitted by PCIA–The Wireless Infrastructure Association and the HetNet Forum (PCIA), and sought comment on it.⁵ Subsequently, PCIA and others supplemented the record by submitting proposed refinements to the definitional language in comments and reply comments. In addition,

¹ See CTIA Comments at 22 (filed Feb. 3, 2014); CTIA Reply Comments at 10-11 (filed Mar. 5, 2014).

² *Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14247 ¶ 20 (2013) (NPRM) (quoting 40 C.F.R. § 1508.4).

³ CEQ, *Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act*, 75 Fed. Reg. 75628, 75631, 75632 (Dec. 6, 2010).

⁴ *Id.* at 75631.

⁵ NPRM, 28 FCC Rcd at 14255-56 ¶¶ 46-49 & n.99.

before adopting a final Report and Order and codifying the categorical exclusion, the Commission will coordinate with CEQ concerning the text of the categorical exclusion.⁶

Categorical exclusions from environmental review can apply equally to the Commission's consideration of the potential impact on historic properties. In the NPRM, the Commission observes that one portion of Section 1.1306 (specifically, the second sentence of Note 1) excludes the installation of wire or cable in existing underground or aerial corridors "from environmental processing, including review for historic preservation effects."⁷ While the Advisory Council on Historic Preservation does not use the term "categorical exclusion," its regulations contain the functional equivalent—it provides that if "the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such properties were present," the agency need not engage in historical preservation consultation.⁸ The First Circuit described this regulation as establishing a "categorical exemption" in *Save Our Heritage, Inc. v. FAA*.⁹ The court also held that an agency satisfies the criteria for exemption when it determines that the "possible negative effects" of a type of action on historic properties are "*de minimis*."¹⁰

The First Circuit's pragmatic recognition that agencies must be able to categorically exempt potential *de minimis* effects from triggering the historic preservation consultative process review is but one example of the well-established principle of administrative law that agencies may create exceptions for undertakings that would have insignificant or *de minimis* effects. The D.C. Circuit summed up this principle in *Alabama Power Co. v. Costle*:

Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*. It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort.¹¹

⁶ See *id.* at 14243 ¶ 13; see also 75 Fed. Reg. at 75634-35.

⁷ *Id.* at 14248 ¶ 24.

⁸ 36 C.F.R. § 800.3(a)(1).

⁹ 269 F.3d 49, 58, 62 (1st Cir. 2001). See also 36 C.F.R. § 800.14, which provides several program alternatives to the Section 106 process, including program comments and an exempted categories procedure.

¹⁰ *Id.* at 62; see *id.* at 63.

¹¹ 636 F.2d 323, 360 (D.C. Cir. 1979) (citations omitted) (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 687 n. 29 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *FPC v. Texaco, Inc.*, 417 U.S. 380, 399 (1974); *Volkswagenwerk, A.G. v. FMC*, 390 U.S. 261, 276-77 (1968); *Monsanto Company v. Kennedy*, 613 F.2d 947, 955 (D.C. Cir. 1979); *United Glass & Ceramic Workers v. Marshall*, 584 F.2d 398, 440 (D.C. Cir. 1978); *Marine Space Enclosures, Inc. v. FMC*, 420 F.2d 577, 584 (1969)); accord *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 483 (6th Cir. 2008).

The Court emphasized that the ability to create *de minimis* exceptions “from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design,” so as not to lead to “absurd or futile results.”¹²

The Commission, when it adopted the 2004 Nationwide Programmatic Agreement¹³ which contained several categorical exclusions, found that exclusions are appropriate and in the public interest:

In addition to facilitating the timely deployment of service, properly drafted exclusions can promote historic preservation both by conserving the Commission’s, SHPO’s/THPO’s and the Council’s resources to review more important cases, and by providing incentives for applicants to locate facilities in a manner that will render effects on historic properties less likely.¹⁴

In its Report and Order the Commission concluded “[T]he NHPA does not require perfection in evaluating the potential effects of an undertaking in every instance.”¹⁵

Thus, to establish a categorical exemption for historic preservation review, the Commission need not establish that the activity at issue can have no possible effects on historic properties, regardless of how minimal or benign. Accordingly, consistent with the case law, the Commission needs only to determine, based on the record, that a type of activity’s possible negative effects on historic properties, should they occur, will be minimal. If it finds that to be the case, the Commission can categorically exempt the identified activity from the Section 106 process and, pursuant to the ACHP regulations, the Commission “has no further obligations under section 106” with respect to such undertakings.¹⁶

The record reflects a substantial consensus among industry commenters and reply commenters in favor of a technology-neutral, volume-based definition for the DAS and small cell categorical exclusion along the lines proposed by PCIA.¹⁷ PCIA proposed a 17 cubic foot equipment volume and 3 cubic foot antenna volume standard. While a few commenters propose

¹² 636 F.2d at 360 & n.89 (quoting *United States v. American Trucking Associations*, 310 U.S 534, 543 (1939)).

¹³ *Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004); *rev. denied sub nom. CTIA-The Wireless Ass’n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006). The Order integrated both the 2001 NPA and the 2004 NPA into the FCC’s rules.

¹⁴ *Id.* at 1087 (citation omitted).

¹⁵ *Id.* (citation omitted).

¹⁶ 36 C.F.R. § 800.3(a)(1). The consultative process under Section 106 of the National Historic Preservation Act is intended to ensure that significant adverse effects on historic properties are identified and accounted for, and it is entirely consistent with this objective for the Commission to categorically exempt activities that will have, at most, a *de minimis* effect.

¹⁷ See PCIA Comments at 7-8 (filed Feb. 3, 2014); see also Ass’n of American Railroads Comments at 9-10 (filed Feb. 3, 2014); AT&T Comments at 14-17 (filed Feb. 3, 2014); Crown Castle Comments at 5 (filed Feb. 3, 2014); ExteNet Comments at 4 (filed Feb. 3, 2014); Sprint Comments at 3-4, 6 (filed Feb. 3, 2014); TIA Comments at 3-4 (filed Feb. 3, 2014); Towerstream Comments at 30 (filed Feb. 3, 2014); UTC Comments at 6 (filed Feb. 3, 2014); WISPA Comments at 15-16 (filed Feb. 3, 2014); Verizon Comments at 10 & n.17 (filed Feb. 3, 2014).

minor variants on PCIA's antenna volume proposal,¹⁸ the fact is that even with the largest variations proposed, the DAS and small cells that would qualify for the exemption would, due to the volume limitations that tailor the definition of the proposed categorical exclusion, be small.

Comparing a permissible DAS or small cell installation to structures currently found on a street brings matters into focus. The 17 cubic foot volume is comparable in size to the newspaper dispensers, mailboxes, and traffic signal controllers found on virtually every street corner across the land—and even the largest proposed antenna volume (6 cubic feet) is barely one-third of that. And the total volume of a DAS or small cell installation is dwarfed when compared to the size of the shelters used at macro cell sites, which range from several hundred to thousands of cubic feet.¹⁹ As AT&T has noted, “DAS and small cells have no more of an impact on historic property than any of the many other attachments placed on poles, including traffic cameras, wireless transmitters, and other devices installed by many local governments opposing a DAS and small cell exclusion.

The Commission has the legal authority and, as the nation's sole telecommunications agency tasked with licensing wireless systems, the expertise to create a categorical exemption based on the record. The FCC would be justified in finding that a communications facility installation that is a small fraction of the size of a typical communications facility will have, at most, a *de minimis* effect on historic properties. Moreover, to the extent extraordinary circumstances exist in a particular case such that there is reason for concern that a given facility may have more than a minimal effect on a historic property, the Commission's rules (which incorporate the 2004 Nationwide Programmatic Agreement²⁰) provide a safety valve that permit the public to file objections to otherwise categorically exempt facilities.²¹ The volume-based categorical exemption proposed by PCIA and supported by the comments is sufficiently flexible and dynamic to cover a variety of communications facility installations and technology developments, yet narrow enough to limit the proposed exemption to those facilities that are not expected to have significant individual or cumulative effects. That is a beneficial feature of the proposal—it is forward-looking rather than based on particular technology. There is no requirement that a categorical exemption be technology-based or employ static and inflexible definitions. In fact, the categorical exemptions contained in Section 1.1306 include a variety of undefined terms. Moreover, the fact that the proposed definition includes a non-exclusive list of the types of items included is no obstacle. In *Florida Keys Citizens Coalition, Inc. v. United States Army Corps of Engineers*, the federal district court upheld an agency's use of a categorical exclusion that included a “non-exclusive list of the types of actions that may qualify,” subject to “administrative review and approval.”²² To the extent a facilities deployer wishes to determine how particular non-listed items should be treated for purposes of the categorical exemption, the Commission should encourage informal consultation with the staff to resolve any uncertainty.

¹⁸ See, e.g., Crown Castle Comments at 5-6 (5 cubic foot antenna volume); WISPA Comments at 15-16 (six cubic foot antenna volume); AT&T Comments at 15 (“modestly-sized” microwave backhaul antennas).

¹⁹ See, e.g., Telecom Product Profiles, LLP, *TP Pro Econ Shelter*, http://www.telepp.com/support/econ_shelter/econ_shelter.pdf; *New Used and Surplus Communication Equipment Shelters*, <http://www.telepp.com/bargains.html>.

²⁰ Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, 47 C.F.R. Part 1, App. C (2004 NPA).

²¹ See *id.* at § XI.

²² 374 F. Supp. 2d 1116, 1139 (S.D. Fla. 2005).

Earlier this year, the Commission’s legal authority to adopt the proposed categorical exclusion was further buttressed by the *Verizon v. FCC* case.²³ The D.C. Circuit has affirmed that the Commission has “affirmative authority” under Section 706 of the Telecommunications Act²⁴ “to enact measures encouraging the deployment of broadband infrastructure.”²⁵ A categorical exclusion for communications facilities is expressly targeted at encouraging broadband deployment—indeed, the very title of the docketed proceeding is “Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies.”

CTIA urges the Commission to move forward with a Report and Order adopting a categorical exemption for DAS and small cells consistent with the proposal that received support from a consensus of the wireless industry. There can be no doubt that the Commission has both the legal authority and the record to support the creation of the requested categorical exclusion. The buildout of wireless broadband infrastructure—both to provide more universal availability and to expand the bandwidth available to the public—cannot be accomplished in a timely manner unless the FCC streamlines its processes, wherever it can. CTIA believes that a significant amount of time, effort and capital can be saved, and FCC resources preserved, by the creation of a categorical exemption, without adversely affecting the FCC’s obligations under National Environment Protection Act and the National Historic Preservation Act.²⁶ Without the establishment of a categorical exclusion, time, effort and capital will be needlessly spent determining what we already know—that DAS and small cells will have at most a minimal impact, rather than allowing the FCC to focus its resources on undertakings that are likely to have a significant effect.

Respectfully submitted,

/s/ Brian M. Josef

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²³ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

²⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996), *codified at* 47 U.S.C. § 1302.

²⁵ *Verizon v. FCC*, 740 F.3d at 628; *see id.* at 637-38; *Preserving the Open Internet Order*, Report and Order, 25 FCC Rcd 17905, 17969-70 (2010).

²⁶ 42 U.S.C. § 4321 *et seq.*; 16 U.S.C. § 470f.