

**RESPONSES OF THE PENNSYLVANIA MUNICIPAL LEAGUE,
THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS,
THE PENNSYLVANIA STATE ASSOCIATION OF BOROUGHES, AND
THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP COMMISSIONERS
TO THE PUBLIC UTILITY COMMISSION'S QUESTIONS REGARDING
CERTIFICATION OF DISTRIBUTED ANTENNAE SYSTEMS**

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The following comments are respectfully submitted to the Pennsylvania Public Utilities Commission, in response to Document Number M-2016-2517831, on behalf of the following municipal associations: the Pennsylvania Municipal League, the Pennsylvania State Association of Township Supervisors, the Pennsylvania State Association of Township Commissioners, and the Pennsylvania State Association of Boroughs.

The Pennsylvania Municipal League (“PML”) is a non-profit, non-partisan municipal association that has been assisting local governments throughout the Commonwealth for over 110 years. PML represents cities, boroughs, townships, and home rule municipalities by acting as an agent for cooperation and communication between local governments and the Commonwealth, and voicing common concerns before the legislative, executive, and judicial branches of federal and state governments. PML’s 75-member municipalities comprise more than one-third of Pennsylvania’s total population.

The Pennsylvania State Association of Township Supervisors (“PSATS”) is a non-profit association that has been providing training, educational, and other member services to officials from over 1,400 townships of the second class throughout the Commonwealth since 1921. PSATS also advocates for its members before the legislative, executive, and judicial branches at the federal and state levels on matters of importance to townships and issues relating to the ability of township officials to perform their duties.

The Pennsylvania State Association of Boroughs (“PSAB”) is a non-profit association that has been servicing and advocating the interests of Pennsylvania’s 958 Boroughs since 1911. PSAB provides a unified voice on matters of public concern at the state and federal levels. It assists more than 16,000 elected and appointed borough officials across the Commonwealth with providing effective local government for both residents and taxpayers.

The Pennsylvania State Association of Township Commissioners (“PSATC”) is a non-profit association comprised of townships of the first class. PSATC has been in existence for 88 years and currently has 68 members. PSATC advances the interests of first class townships—and home rule municipal corporations that were formerly first class townships—by promoting uniform, economical, and efficient methods of administering the affairs of their local governments.

Together, the above-described associations represent nearly all of the 2,600 municipalities in the Commonwealth of Pennsylvania. As the Commission is aware, Pennsylvania municipalities

are charged by state law with the oversight and maintenance of the health, safety, and welfare of their residents. This includes the maintenance of perhaps the most important physical asset of every municipality, namely the public rights-of-way. Municipalities actively manage the public rights-of-way in a manner that promotes public safety and preserves the character of their communities. Pennsylvania municipalities have an immediate and direct interest in which entities the Commission decides to certificate to install facilities in those rights-of-way.

By way of the following comments, the aforementioned municipal associations respectfully request that the Commission rule that DAS providers are not entitled to public utility status in the Commonwealth. First, DAS providers clearly do not satisfy the definition of “public utility” according to the Public Utility Code and Commission precedent. Second, the Commission is preempted by a comprehensive regime of federal laws and regulations from certificating DAS providers. Third, DAS providers do not need public utility status to install their facilities and are fully protected by such federal laws and regulations. Fourth and finally, certificating DAS providers as public utilities undermines the ability of municipalities to adequately manage their public rights-of-way.

1. What is Distributed Antenna System (DAS) service?

A Distributed Antenna System (“DAS”) is a network of antennae that are spatially dispersed and strategically located to provide wireless services such as cellular, Wi-Fi, and two-way radio communications to a targeted coverage area. DAS is principally a repeater system that extends or boosts a provider’s radio frequency (“RF”) signals or spectrum from their network to the edge in order to support end user mobile and stationary devices in areas where their signal coverage and capacity are lacking. A few retransmitted wireless services include: cellular services (voice, text, and data), Wi-Fi, and public safety.

These services dictate the type of DAS which can, by and large, be categorized into two systems: Commercial DAS and Public Safety DAS. Commercial DAS supports signals from cellular and Wi-Fi wireless service providers, such as AT&T Mobility, Verizon Wireless, Sprint, and T-Mobile. Public Safety DAS supports broadcast and two-way radio communications for first responders and military functions. Unlike Wi-Fi, which operates in unlicensed frequency bands, the other wireless service providers and public safety systems operate in licensed frequency bands and require greater coordination, testing, legal agreements and other required specifications for the DAS to be installed and commissioned.

Outdoor DAS focuses on bringing coverage to an outdoor area where the existing network cannot provide adequate coverage or capacity (e.g. a rural area where the signals cannot reach or a dense urban area where the network cannot provide sufficient capacity). It creates capacity boosts where there is a weak signal. Installation of outdoor DAS is more challenging than indoor DAS, because of the outdoor weather elements creating the need for sufficient structure to support wind-load and secure closets for equipment.

a. Explain what DAS service is, including the following: (i) the network components used to provide DAS service; (ii) the demarcation point between a DAS provider's network and the provider's network that it serves, as determined in legal agreements or otherwise; and (iii) how traffic is collected, transported, and delivered over a DAS network, including any protocol conversions that occur along the transmission path of the traffic.

(i) DAS is generally composed of three primary elements; head-end electronics, remote electronics, and infrastructure. The head-end electronics interfaces with the signal source and conditions the signal(s) to be transported to and from the remote electronics. The signal(s) at this point are usually in the form of RF at different power levels; however, as technologies have advanced, these signals can also be in the form of optics in order to simplify the transmission process and expand a provider's capabilities. In most cases, connection between the head-end and remote electronics is in the form of fiber optics because of the distances between them, but there are some DAS manufacturers who utilize common twisted-pair "Ethernet" cabling or traditional cable coaxial cable as a media to connect remotes to their head-end. These are primarily found in smaller, indoor DAS applications.

When fiber is used to distribute the signal(s) to remote locations, the head-end electronics are also responsible for converting the RF signal(s) to optics for transport and reverse the process for the return path of those signals. The remote electronics are located in close proximity to the coverage areas and are responsible for converting the received optical transmission from the head-end electronics back to a RF state for broadcast. The RF signals are then amplified and transmitted out to the attached coaxial cables and/or antennas. This process is repeated in the opposite direction for the return path communication. The DAS infrastructure is essentially the transportation media(s) used for signals, within the system, and consists mainly of optical fiber to carry the signals; directional couplers and splitters that combine and divide the signals; and antennas that radiate and receive the wireless signals.

(ii) The point of demarcation for a DAS is highly dependent on the type of signal source and DAS used as well as their ownership. The signal source is part of the specific service provider's network equipment that creates the signal to be repeated by the DAS. It is responsible for introducing the wireless signals into the DAS and simultaneously receives the signals coming back through the DAS and transports it back to the provider's network. A signal source is typically co-located with or near the DAS head-end equipment and its connection to the DAS is the usual point of demarcation. An exception to this would be where a service provider extends its network to include the DAS electronics and therefore never really establishes a point of demarcation. A few examples of commonly deployed signal sources include Bi-Directional Amplifiers ("BDA"), Base Transmission Stations ("BTS"), and Small Cells. The type of signal source used is determined by multiple factors, including but not limited to, venue type, capacity requirements, coverage needs, financials and wireless service provider requirements.

(iii) Because DAS is an edge RF repeater system, it does not collect traffic as it pertains to the content in which it is broadcasting and receiving. The actual voice, data, text traffic has already been encoded and modulated by other elements and user equipment not directly associated with

the DAS. As discussed previously, RF frequencies are converted to optics when needed and then back to RF for transmission over the DAS. Some DAS manufacturers employ various transmission techniques between their head-end and remote electronics, but these techniques are primarily to improve efficiencies and latencies through their products.

2. Whether a DAS provider is a "public utility" as defined by Pennsylvania law that can be certificated by the Commission.

a. Does a DAS provider meet the definition of "public utility" under Section 102(1)(vi) of the Public Utility Code (Code) or is a DAS provider expressly excluded from the definition of "public utility" under Section 102(2)(iv) of the Code?

Pursuant to Pennsylvania law, a DAS provider does not meet the definition of a public utility under Section 102(1)(vi) of the Public Utility Code (the "Code") and is further excluded from such definition by virtue of Section 102(2)(iv) of the Code. Section 102 of the Code provides a definition that enumerates the various service areas that may be categorized as public utilities. Specifically, Section 102(1)(iv) includes as a "public utility"

[a]ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for

...

Conveying or transmitting messages or communications, except as set forth in paragraph (2)(iv), by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.

Section 102(2)(iv) goes on to exclude from the definition of public utility, "[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service." The PUC has not promulgated regulations to further define the scope of "mobile domestic cellular radio service" (most likely because, as discussed below, such regulations would be preempted by federal law). However, providers of mobile domestic cellular radio telecommunications service, also referred to as commercial radio service providers ("CMRS"), are defined under federal law and regulation. As discussed below, DAS providers are CMRS; therefore, they are excepted from the definition of public utility under Pennsylvania law.

Mobile cellular service providers such as Verizon Wireless, AT&T Mobility, Sprint, and T-Mobile are traditional CMRS. Entities that facilitate traditional CMRS in providing cellular services, for example by increasing capacity or by providing additional coverage, could also qualify as CMRS. DAS providers do just that, as their sole function is to support mobile broadband services, not to promote landline services that are traditionally regulated by the Commission.

Pursuant to Section 332 of the federal Communications Act of 1934, as well as regulation 47 CFR 24 promulgated by the FCC, a DAS provider qualifies as a CMRS. Section 332 of the Communications Act broadly defines CMRS as "any mobile service that is (i) provided for profit;

and (ii) makes interconnected service available to the public or to a substantial portion of the public.” DAS providers meet both of these requirements. Their service is clearly “provided for profit,” as they are for-profit companies. They assist in making interconnected service available to the general public by increasing broadband capacity for wireless data in order for consumers to utilize “smart” technology (i.e., smart phones and digital tablets). FCC regulation 47 CFR 20.9, entitled *Commercial Mobile Radio Service*, further clarifies the language in the Communications Act by providing that certain

[M]obile services shall be treated as common carriage services and regulated as commercial mobile radio services (**including any such service offered as a hybrid service or offered on an excess capacity basis to the extent it meets the definition of commercial mobile radio service, or offered as an auxiliary or ancillary service**), pursuant to Section 332 of the Communications Act, 47 U.S.C. 332 [those services are]:

...

(11) Personal Communications Services (part 24 of this Chapter), except as provided in Paragraph B of this section . . .

(emphasis added)

DAS facilities convey and/or transmit communications on behalf of traditional CMRS for the purpose of boosting the traditional providers’ broadband capacity to end users of their service (i.e., the general public as wireless broadband consumers). A DAS facility owner leases capacity to a traditional retail CMRS (i.e., Verizon Wireless), which is then used by that traditional CMRS to create more broadband capacity for mobile internet usage and other types of data services. Essentially, a DAS facility acts as a type of conduit for broadband consumption, but only for the lessee of the DAS facility.

Any entity that qualifies as a CMRS (including PCS pursuant to 40 CFR 20.9 and discussed below) falls outside of the PUC’s purview due to federal preemption. In *Altria Group v. Good*, 555 U.S. 70 (2008), the United States Supreme Court recognized and reaffirmed the federal preemption of state laws and agency rules. As a baseline standard, the Court noted that its “inquiry into the scope of a statute’s pre-emptive effect is guided by the rule that ‘[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.” *Id.* at 70 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Furthermore, the Court opined that preemption need not result *solely* from conflict between state statute and federal statute; rather, “Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose” and “pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field.” *Id.* (emphasis added). (See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

Not only do DAS providers constitute CMRS, but DAS providers also fall into a category of broadband personal communications service (“PCS”) providers as defined in 47 CFR 24.5. That

section notes that broadband PCS “encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks.” PCS, like CMRS, is exclusively regulated by the FCC and, therefore, not subject to PUC jurisdiction. Had Congress intended that states participate in the regulation of PCS and/or CMRS, it would have specifically reserved the right to such regulation via statute. Because DAS facilities provide mobile domestic cellular radio telecommunications service by facilitating mobile domestic capacity and coverage telecommunications services, and DAS providers are regulated by the FCC, DAS facilities are exempted from the definition of “public utility” under Section 102(2)(iv).

b. Is granting public utility status to DAS providers consistent with Commission precedent, including Commission certification of carriers that provide wholesale intrastate telecommunications service in Pennsylvania to retail Internet Service Providers and retail Voice over Internet Protocol Providers?¹²

Granting public utility status to DAS providers is not consistent with Commission precedent and does not align with the Commission’s past Certificate of Public Convenience and Necessity (“CPC”) issuances. In the past, the Commission has appropriately granted certification to carriers that provide wholesale intrastate telecommunications service to retail Internet Service Providers (“ISP”), and Voice over Internet Protocol (“VOIP”) Providers.

Pennsylvania courts have upheld the Commission’s decision to certificate ISPs and VOIP providers for very specific, fact-based reasons that relate to the provision of wire-based services (either telephone or internet) within the Commission’s jurisdiction. Critically, none of these reasons apply to DAS providers, as the type of service being offered by ISPs and VOIP providers is readily distinguishable from that being tendered by DAS providers; the former offer facilities-based CLEC services over a wired system to assist in the transfer and connection of landline-based telephone calls, while the latter leases capacity on a wireless system to be used for mobile broadband and cellular telephone services.

Historically, the Commission has granted CPCs to ISPs and VOIP providers on the basis that such providers assist and/or facilitate in the provision of internet dial-up calls within a local access and transport area (“LATA”). While such a telephone call is internet-based, it is considered a local telephone call over which the Commission has exclusive jurisdiction, irrespective of the location of the calling party and the calling party's local calling area.

In cases heard by Pennsylvania state courts relating to this issue, such as Rural Tel. Co. Coalition v. PUC, 941 A.2d 751, 758 (Pa. Comm. Ct. 2008), the party applying for utility certification (in Rural Tel Co., that company was Core Communications) operated a system over which “transmission path service originate[d] and terminate[d] dial-up calls to the internet by taking them from the rural carrier's service territory, using a tandem in the rural carrier's LATA, and then to Core's switch facilities located in Pennsylvania.” Essentially, Core accepted computer dial-up calls destined for the internet on behalf of retail ISPs, translated those calls to internet language protocols, and delivered them to the internet. It connected ISPs with the Pennsylvania Public Switched Telephone Network (“PSTN”). On appeal, the Commonwealth Court addressed

the issue of whether the Commission should consider Core a competitive local exchange carrier (“CLEC”) and certificate it as it would any other landline telephone carrier.

When evaluating the issue, the Court agreed with Core that “dial-up calls to a fixed point located outside a prescribed local calling area but within a LATA to constitute a local call so long as the NXX [area code] combination is properly rated as a local call.” Furthermore, the classification of the NXX, not its physical location, should be used as the basis for determining “if a call is local or long-distance. Thus, Core's placement of its NXXs within a LATA, but outside of the rural carrier's local calling area, would still be a local call” [subject to the Commission’s oversight]. Ultimately, the Court found Core to be an entity that “offer[s] the transmission of messages or communications that originate and terminate within a prescribed local calling area for a fee to the public,” meeting the statutory definition of “local exchange carrier” in the Chapter 30 of the Code. The Commission’s decision to certificate Core, although not a telephone carrier in the traditional sense, was upheld.

The Commonwealth Court’s reasoning behind issuing a CPC in Rural Tel. Co. cannot be extended to DAS providers because of several distinguishing factors. First and foremost, ISPs and VOIP providers eventually connect their services to a PTSN when they utilize internet services to provide landline-based telephone service to Commonwealth residents. In doing so, they place NXX area codes within a LATA, obtain telephone numbers from a national administrator, and operate switching elements and Point of Presences. Conversely, DAS networks do not connect to PSTNs at all. DAS services do not establish NXX area codes, obtain telephone numbers from a national administrator, or operate switch points. The services that DAS providers deliver are purely in their role as a telecommunications CMRS, and it falls squarely within the purview of the FCC and federal law.

3. Whether the operations of a DAS provider can be certificated in Pennsylvania.

a. Is DAS service in Pennsylvania interstate service, intrastate service or both?

DAS service is primarily interstate by virtue of the fact that it is utilized by national carriers and its effects can cross state lines. Arguably, DAS service can be classified as intrastate service in some circumstances, as well, because each DAS system’s mobile broadband boosts can be experienced on a local basis. The physical DAS networks that are located in the public rights-of-way of hundreds of municipalities in the Commonwealth are intrastate in that they are physically sited within Pennsylvania. Furthermore, as far as the services furnished by the DAS providers, DAS networks use groups of “nodes” to create capacity boosts in areas where wireless broadband has a weak signal; that is, local capacity boosts created in Pennsylvania municipalities only can be experienced by “smart” technology users in the immediate area of the boost. For example, the wireless broadband connection of a Verizon iPhone user in Washington, DC is not in the slightest bit affected by a capacity boost created in Erie, PA, unless he is physically in Erie, PA, using the wireless broadband there.

The manner in which such systems may be considered interstate is that they are grouped with other DAS systems to create a patchwork infrastructure for a larger national wireless communications network, providing backend support for existing cellular service providers that

are clearly within the CMRS definition.¹ For example, AT&T Mobility leases capacity from DAS providers in various states throughout the nation to create its 4G LTE Wireless Network. As AT&T is headquartered in just one state, but provides service nationally, it is engaged in interstate commerce and provides interstate service to its end-users. However, AT&T's "network" comprises thousands of leased DAS systems from different DAS providers. In many areas, the capacity boost created by individual DAS network could easily cross state lines. Additionally, the majority of DAS providers own facilities, as well as conduct business with different CMRS and operate individual DAS systems, in various states.

b. What is the legal and/or factual basis, if any, for the Commission to certificate a DAS provider in Pennsylvania that is engaged in the provision of interstate services only?

There is no legal or factual basis for the Commission to certificate a DAS provider in Pennsylvania that is engaged in the provision of interstate services only. Federally, the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3) gives Congress the power "to regulate commerce with foreign nations, and among the several states." The Pennsylvania Supreme Court has interpreted the Clause, and related case law, to mean that

Congress' commerce power 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'

MCI Worldcom v. PUC, 844 A.2d 1239, 1250 (Pa. 2004) (quoting Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., et. al., 452 U.S. 264, 281 (1981)) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)). While DAS providers do engage in intrastate service, such service is offered in furtherance of interstate commerce and interstate service, as the primary purpose of a DAS system is to fill in capacity or coverage gaps in a wireless broadband provider's national network. As such, DAS service falls under the Commerce Clause and the Pennsylvania Supreme Court's interpretation must be applied to any evaluation of the characteristics the constitute a DAS network.

Additionally, Section 152(a) of the Communications Act of 1934 provides that the provisions of the Act apply to "all interstate . . . communication by wire or radio and all interstate . . . transmission of energy by radio, which originates and/or is received within the United States." As previously mentioned, the Communications Act of 1934 is a federal act that it primarily enforced and interpreted by the FCC. The language in Section 152(a) indicates a clear federal interest in entities that support or facilitate interstate communications, such as interstate DAS

¹ This is where the real value of DAS systems lies. The construction and operation of DAS systems effectively infills nationwide broadband "gaps" in capacity and/or coverage. The services that they provide fulfill the FCC's stated goal of accelerating broadband service throughout the nation. See FCC-14-153A1 ¶¶ 1-3 for an in depth description of the FCC's intent regarding the importance of wireless infrastructure, the continuity of broadband mobile service throughout the nation, and the advancement of technology as a priority.

providers. As DAS providers facilitate communication services that fall under the Communications Act, they are subject to federal, rather than state, regulation.

At the state level, the Pennsylvania Public Utilities Code prohibits Commonwealth oversight of interstate services in 66 Pa.C.S. §104. That Section states that

[t]he provisions of this part [of the Code], except when specifically so provided, shall not apply, or be construed to apply, to commerce...among the several states, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

This Section of the Code is an acknowledgement of the federal Commerce Clause, as described above, and a recognition that the Commission should not apply any of its own rules and or regulations to entities that are engaged in interstate service, such as DAS providers. In the case of DAS providers, requiring a CPC would amount to an additional barrier imposed by the Commonwealth in an area where the federal government has expressly stated that it has exclusive authority.

c. In reference to 3.b., please address the statutory definition of a "public utility" under Section 102(1) of the Code ("Any person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for:..") in conjunction with Sections 102(1)(vi), 102(2)(iv), and 3012 ("[t]elecommunications service") of the Code and whether these sources provide a basis for Commission certification.

Section 102(1) of the Code provides a definition that enumerates the various service areas that may be categorized as public utilities. That Section includes as a public utility “[a]ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for . . . [c]onveying or transmitting messages or communications, except as set forth in paragraph (2)(iv).” Section 102(2)(iv) exempts from the definition of public utility, “[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.” The PUC has not promulgated regulations to further define the scope of “mobile domestic cellular radio service.” However, as discussed in response to the above question 2, CMRS are defined under federal law and regulation. DAS providers are CMRS; therefore, DAS providers are excepted from the definition of public utility under Pennsylvania law.

Even when read in conjunction with the definition of “telecommunications service” in Section 3012 of the Code, DAS providers should still be considered CMRS and therefore denied certification by the Commission. Section 3012 defines “telecommunications service” as “the offering of the transmission of messages or communications for a fee to the public.” While this definition is quite broad, it has surprisingly not been subject to extensive interpretation by Pennsylvania courts. When it has been examined by courts, the issue has concerned traditional telephone companies, rather than wireless companies such as DAS providers. (This is likely because state courts do not usually hear cases that fall under federal jurisdiction, such as TA-96 or the Communications Act of 1934).

The only case law somewhat pertinent to DAS providers, which is non-binding due to Third Circuit Appellate rules, may be found in the Third Circuit Court of Appeal’s decision in Verizon Pa., Inc. v. Pa. PUC, 2012 U.S. App. LEXIS 11292 (3d Cir. 2012). The question on appeal was “whether a particular type of collocation arrangement satisfied the definition in 47 C.F.R. § 51.5 and could therefore be included in the fiber-based collocater count that determined if an ILEC was relieved of its unbundling obligation.” Id. at 1. While the specifics of the Court’s determination are not relevant to the issue at hand, the logic that the Court employed to arrive at its decision is crucial.

When deciding whether to use a definition offered by the Commission or an interpretation offered by the FCC, the Court decided in favor of the latter approach. The Court deferred to the interpretation offered by the FCC, because it was consistent with the federal regulation, “comport[ed] with the regulatory scheme and [was therefore] entitled to deference.” Id. at 19. That is, the Court deferred to a federal regulatory body when the issue in the case concerned the interpretation of federal guidelines.

The same approach should be utilized by the Commission with respect to the classification of DAS providers. Under federal law, DAS providers can be designated as either CMRS or PCS, both of which fall outside of the Commission’s regulatory jurisdiction. To place such providers into the category of “telecommunications service” for the purpose of a “public utility” designation would be to ignore the FCC’s October 2014 Report and Order that specifically recognizes DAS providers as PCS and subject to FCC authority. (See FCC-14-153A1 ¶¶ 22, 243-250).

d. Is the Commission preempted from certificating a DAS provider engaged in the provision of interstate service only under Section 104 of the Code and applicable federal law, including Section 152(a) of the Communications Act of 1934¹³ and related case law?

Pursuant to applicable federal and state law, the Commission is preempted from certificating a DAS provider that is engaged in interstate service. As previously noted, such preemption specifically occurs under Section 104 of the Code and Section 152(a) of the Communications Act of 1934, as the federal government enjoys exclusive regulation of interstate communications systems. Section 104 of the Code expressly prohibits PUC regulation of “commerce...among the several states... except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.” Neither Congress nor the U.S. Constitution provide the Commonwealth with the direct authority to regulate DAS facilities.

Likewise, Section 152(a) of the Communications Act explicitly gives the FCC definitive authority over interstate communications activity. Third Circuit Courts have consistently recognized the FCC’s preemption in cases such as AT&T Corp. v. Core Communications, Inc., 806 F.3d 715, 727 (3d Cir. 2015). In AT&T, the Third Circuit Court of Appeals observed that “[p]urely interstate traffic is exclusively committed to the FCC.” The Court further noted:

That is to say . . . where the interstate and intrastate components are inseparable, state jurisdiction over mixed use services such as ISP-bound local traffic is tied to conflict preemption [and the state is]

lacking jurisdiction to regulate [such] traffic if and only if the state regulation conflicts with federal law.

Id. In the case of a DAS system, the capacity boost or coverage patch created in the provider's local network cannot be separated from the capacity boost or coverage patch as it relates to the CMRS network as a whole. That is, DAS services are part of a larger CMRS network, providing backend support for existing cellular service providers that are inarguably within the definition of "CMRS." DAS providers should not be severed from the systems they support simply to garner public utility status.

Should the Commission decide to certificate DAS providers, any standards imposed on the providers would likely conflict or be inconsistent with federal law enacted by Congress, applicable federal case law in the Third Circuit, and/or federal regulations promulgated by the FCC. Over the past several years, a breadth of case law has developed relating to small cell technologies and other types of newer wireless facilities (i.e., DAS). Also, the FCC issued its 2009 Shot Clock Ruling that established reasonable timeframes for municipal response to a wireless siting application, as well as a comprehensive Report and Order in October 2014 implementing standards specifically applicable to DAS facilities. The Spectrum Act was passed by Congress in 2012 and the Telecommunications Act of 1996 (hereinafter "TA-96") still applies to all types of wireless facilities. DAS providers are affected by each set of the aforementioned regulations when they decide to place, construct, or modify their facilities or equipment. Further Commission rules or regulations would likely conflict with the extensive federal regulatory framework that already applies to DAS providers.

Furthermore, Section 332(c)(7) of TA-96 preserves local zoning authority over the placement, modification, and construction of wireless facilities, such as cellular towers and DAS systems. See 47 U.S.C. 332, et seq. When read in conjunction with Section 152(a) of the Communications Act, it is clear that neither Congress nor the FCC intended that any type of wireless facility would fall under the purview of the Commission. The issuance of a CPC could create a potential barrier to entry into the market by delaying installation and construction. As such, CPCs are inconsistent with federal law and policy aimed at strengthening and hastening the expansion of broadband services throughout the nation. (See the FCC's October 2014 Report and Order, FCC-14-153A1 for a discussion on the acceleration of broadband deployment.)

Given the federal government's grant of authority to the FCC in Section 152(a) of the Communications Act, the lack of any reservation of authority for the Commonwealth under federal law, and the zoning preservation language in Section 332(c)(7) of TA-96, the Commission is preempted from certificating an interstate DAS provider.

4. Whether the Commission is required by federal law to certificate a DAS provider seeking a Certificate of Public Convenience (CPC) in Pennsylvania.

a. Does denying a CPC to a DAS provider prohibit or have the effect of prohibiting DAS service in Pennsylvania in violation of Section 253(a) of the Telecommunications Act of 1996 (TA-96)?

Denying a CPC to a DAS provider would neither prohibit, nor have the effect of prohibiting, DAS service throughout the Commonwealth, which would in effect violate Section 253(a) of TA-96. In fact, allowing a DAS provider to forgo the CPC process would ease the administrative and regulatory burdens of having to comply with Commission standards, rules, and regulations. It would create a regulatory environment fostering the acceleration of broadband deployment under the guidelines and rules established and promulgated by the FCC in its 2009 Shot Clock Ruling and its October 2014 Report and Order.²

Because federal law provides sufficient protection against undue regulation by local zoning authorities, a CPC is not necessary. Under Section 253(a) of TA-96, if a wireless provider, such as those that utilize DAS systems as a part of their CMRS, can demonstrate a need for its proposed facility, that provider cannot be blocked from installing and operating such facilities by the local zoning authority. By virtue of the fact that DAS systems are typically constructed to infill specific existing capacity and coverage gaps, the DAS provider need only demonstrate the need for such facilities to the local zoning authority and comply with reasonable standards to gain approval for construction, modification and/or placement of facilities in the public rights-of-way.³

Any municipal rejection of such warranted and necessary placement of DAS facilities would be tantamount to a prohibition of wireless service under Section 253(a). As such, even if the DAS provider is subject to local zoning regulations pursuant to Section 332(c)(7) of TA-96, the local zoning authority must allow the DAS provider to locate its facilities within the jurisdictional limits of the local zoning authority. Even without a CPC in hand, DAS providers can easily locate their facilities both in the public rights-of-way and on private property to infill capacity and coverages gaps (so long as such location is not prohibited by the local zoning authority).

Finally, in October 2014, the FCC issued a Report and Order establishing guidelines for the application and installation proposed wireless facilities, such as DAS systems, and regulating the planned acceleration of broadband services. Unlike federal directives promulgated in the past, the October 2014 Report and Order specifically addresses the placement of certain collocated facilities in the public rights-of-way. Because of its federal nature, all provisions relating to eligible collocated DAS facilities preempt regulations enacted by both the Commission and any local zoning authority relating to the placement and/or attachment of proposed wireless facilities in the rights-of-way.

² Both of these FCC rulings established specific guidelines and regulations that preempt state authority over the standards applied to DAS facilities and other types of new wireless technologies. Specifically, the FCC sought to accelerate broadband deployment by allowing certain types of facility application to circumvent the local zoning process by establishing presumptively reasonable timeframes for municipal response. Many DAS facility applications fall under the purview of these FCC regulations, making it easier for DAS providers to build and grow their networks.

³ Local zoning authorities have the ability to regulate the placement of DAS facilities provided that local zoning ordinances do not conflict with federal law.

b. Does denying a CPC to a DAS provider violate Section 253(b) of TA-96, which preserves state authority to impose requirements, on a competitively-neutral basis, related to intrastate telecommunications services?

Denying a CPC to a DAS provider does not violate Section 253(b) of TA-96, because any regulations imposed by the Commission would be preempted by the FCC's recent wireless Orders. Section 253(b) states that

nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [of TA-96], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Of course, there is nothing in Section 253(b) that requires states to impose wireless regulations and certainly not the issuance of CPC's. Moreover, technology has changed so dramatically in the past twenty years since the enactment of TA-96 that the FCC has issued requirements that refine those preserved for states in Section 253(b). That is to say, wireless-based facilities are now governed by newer federal regulations that were intentionally crafted to apply to the latest types of wireless technologies, and which encroach further on the regulating authority of the Commonwealth and local zoning authorities.

The FCC's October 2014 Order and Report was specifically fashioned "to promote the deployment of wireless infrastructure, recognizing that it is the physical foundation that supports all wireless communications." (FCC-14-153A1, ¶ 1). In it, the FCC recognized that "distributed antenna system (DAS) networks and other small-cell systems use components that are a fraction of the size of macrocell [traditional] deployments, and can be installed—with little or no impact—on utility poles, buildings, and other existing structures." (FCC-14-153A1, ¶ 3). In order to reflect this advancement in technology, the FCC revised its rules, with the primary goal being for the federal government

[T]o take concrete steps to facilitate the deployment of the infrastructure necessary to support surging demand, expand broadband access, support innovation and wireless opportunity, and enhance public safety—all to the benefit of consumers and the communities in which they live.

(FCC-14-153A1, ¶ 2.)

The FCC's 2014 Report and Order makes clear that the FCC regulates DAS providers. It specifically addresses all areas that TA-96 sought to preserve for states in Section 253(b) with respect to DAS. Its provisions promote public safety and welfare; they preserve and encourage the expansion of service for all wireless providers; they ensure the continued provision of wireless services through detailed regulation of DAS systems; and they promote improved broadband and cellular service for all wireless consumers. Because the FCC's exclusive regulation of DAS

systems and other small cell deployments is highly regulated and very specific, there is no compelling reason for the Commission or the Commonwealth to implement any additional rules or regulations by certificating DAS providers.

c. Does denying a CPC to a DAS provider violate any other federal statutory provision, any decision of the Federal Communications Commission, and/or any federal court decision?

Denying a CPC to a DAS provider does not violate any federal statutory provision, decision of the FCC, or federal court decision. There is no existing requirement, either federal or state, that compels the Commission to certificate DAS providers. Because a DAS provider can easily utilize federal laws and regulations- enacted by Congress or promulgated by the FCC- to site, modify, and/or construct its facilities in municipalities throughout the Commonwealth, there is no need for the Commission to issue a CPC.

In fact, denying public utility status to DAS providers is in line with Pennsylvania case law as applicable to all wireless service providers. In Crown Castle v. Fox Chapel Authority, 705 A.2d 427 (Pa. 1997), the Supreme Court heard a case in which Crown Castle attempted to gain a CPC in order to exempt itself from local zoning regulations when installing a traditional macrocellular tower. In ruling against Crown Castle, the Court examined the characteristics that define a “public utility” and observed that

the term [“public utility”] shall be understood to mean any business activity regulated by a government agency in which the business is required by law to: 1) serve all members of the public upon reasonable request; 2) charge just and reasonable rates subject to review by a regulatory body; 3) file tariffs specifying all of its charges; and 4) modify or discontinue its service only with the approval of the regulatory agency.

Crown Castle, 705 A.2d at 431-424.

Applying the definition crafted by Pennsylvania’s highest court, it is obvious that DAS providers cannot be considered public utilities under state law. DAS providers do not serve all members of the public; their rates are not subjects to review by a regulatory body; they do not file tariffs with the Commission; and their service can be discontinued at any point, pursuant to private underlying service agreements with various CMRS. Granting a CPC to DAS providers would directly contravene the Pennsylvania Supreme Court’s decision in Crown Castle.

5. Separation of DAS provider operations.

a. If the antenna equipment of a DAS provider used to collect wireless traffic is owned and/or operated by a separate legal entity (e.g., a subsidiary or affiliate) than the owner and/or operator of the wireline facilities/equipment used to perform the transport function, how, if at all, would this impact whether the owner and operator of the wireline transport function is a "public utility" under Pennsylvania law? Would such an arrangement facilitate the Commission's certification process for such providers?

There are both engineering and legal reasons why DAS facilities owned by one entity that is separate from the entity that owns the wireline transport facilities would not impact the regulatory classification of the wireline facilities owner—either as a public utility or not as a public utility. As described in detail in response to Question #1 above, DAS provides capacity boosts to a larger network. It extends or boosts a providers’ RF signals where such signals are weak and does not collect traffic as it pertains to the content in which it is receiving and broadcasting. As a wireless booster service, DAS performs a separate function from the larger wireline transport network and should not impact the regulatory classification of the larger network.

In addition, the DAS provider and the wireline transport provider are separate legal entities. They have separate Boards, shareholders, by-law, and other accouterments of their corporate structures. As a corporate legal matter, therefore, the regulatory classification of the wireline transport provider as a public utility (or as a non-PUC certificated entity) is separate and distinct from the classification of the DAS provider.

b. What are the potential advantages and disadvantages with such an approach?

As discussed in more detail above, the advantage of such an approach is that it eases the regulatory burden on the DAS provider and promotes the primary objective of the FCC in the wireless arena, which is to accelerate the deployment of wireless broadband services. In addition, a decision not to grant CPC’s to DAS, separate from the wireline transport provider, also recognizes and supports the express authority of local governments to “manage the public rights-of-way...on a competitively neutral and non-discriminatory basis” as codified in Section 253(c) of TA-96.

6. Whether public utility status is needed for a DAS provider to site its facilities/equipment used to provide service in Pennsylvania.

a. Explain how, if at all, the following rights under federal and/or state law are impacted if a DAS provider is not a public utility under Pennsylvania law: (i) the right of a DAS provider to access public rights-of-way to install its own poles/structures in Pennsylvania, to attach its own facilities/equipment to poles/structures owned by other entities in Pennsylvania, or to access their conduits; (ii) the right of a DAS provider to attach its own facilities/equipment to poles/structures in Pennsylvania owned by other, non-governmental entities, including public utilities, and/or access their conduits; and (iii) the right of a DAS provider to attach facilities/equipment to state or local government-owned poles/structures in Pennsylvania.

(i) A DAS provider does not need public utility status to site its facilities and/or equipment to provide service in Pennsylvania. The right of a DAS provider to access the public rights-of-way to either install new poles, or to attach to existing infrastructure, is not diminished by the refusal to grant a CPC to that provider. First and foremost, a DAS provider still has the ability to locate its facilities on poles and other infrastructure in the public rights-of-way.⁴ At the present time, DAS providers routinely negotiate large scale lease agreements with the owners of existing poles (i.e., Duquesne Light or PECO) to utilize such poles as wireless support structures for DAS

⁴ Again, subject to local zoning that is consistent with federal law.

equipment and facilities. This process is standard in the wireless industry across the Commonwealth. If DAS providers did not enjoy the benefits of Commission certification, they would still be able to lease space in the public rights-of-way to provide service as they do now.

Additionally, as previously mentioned, Section 332(c)(7) of TA-96 preserves a municipality's zoning authority over the placement, construction, and modification of wireless facilities. Critically, that Section does not preclude a municipality from exercising this federally-supported zoning authority over facilities in the public rights-of-way. As it stands, municipalities still enjoy a limited amount of zoning authority over the placement of wireless facilities sited by DAS providers that hold CPC's. This would still be the case if DAS providers lacked utility status.

Finally, the Pennsylvania Wireless Broadband Collocation Act ("WBCA"), 53 P.S. §11702.1 et.seq., and the FCC's 2014 Report and Order have created procedures by which wireless broadband (i.e., DAS equipment and facilities) deployment is accelerated in certain circumstances and does not proceed through the zoning process. The majority of DAS facility placements in the public rights-of-way fall under one of these two laws.

In order to foster an environment that promotes wireless facility deployment, both the WBCA and FCC regulations require local zoning authorities to approve certain types of collocation applications, whether in the public rights-of-way or on private property. Eligible wireless facilities that are placed on structures that already act as wireless support structures (i.e., a light pole in the public right-of-way that already supports one antenna and is capable of supporting additional antennas, or a tower constructed to support wireless antennas) are subject to neither municipal zoning authority nor Commission oversight. The municipality in which the facility is being sited has only sixty days to approve an eligible approval before it is "deemed" approved by statute. (FCC-14-153A1, ¶ 20.) Whether or not a DAS provider is certificated by the Commission has no bearing on an application that falls under the provisions the WBCA or the FCC's October 2014 Report and Order.

(ii) A DAS provider does not need public utility status to site its facilities and/or equipment to provide service in Pennsylvania. Whether a DAS provider enjoys utility status has no actual bearing on whether it attaches its facilities to poles/structures owned by other, non-governmental entities. From a practical business standpoint, utilities that own poles in the rights-of-way routinely negotiate lease agreements for the placement of wireless facilities onto their structures. This practice occurs now across the Commonwealth and would assuredly continue in the event that DAS providers were not issued CPCs, as it is a steady stream of income for the utilities that own the poles.

(iii) A DAS provider does not need public utility status to site its facilities and/or equipment to provide service in Pennsylvania. Also, a DAS provider has no immediate right, under either state or federal law, to attach its facilities/equipment to state or local government-owned poles or structures in Pennsylvania. Structures and land owned by the state, or a municipality, are not subject to reduced rate leases or immediate, unregulated access for the purpose of wireless facilities placement.⁵ DAS providers wishing to utilize such property or infrastructure for their wireless

⁵ The rights conferred by the CPC are preempted by the FCC's recognition that municipalities have a federal right to negotiate leases for use of municipal property. FCC-14-153A1, ¶ 280.

facilities are subject to lease negotiations for the usage of state/municipal property, which are conducted on a routine basis.

In fact, many municipal zoning codes even require wireless facility applicants, including DAS providers, to first consider and examine municipal property for the place of proposed wireless facilities, such as antennas or towers. In its October 2014 Report and Order, the FCC recognized municipal property preference for the siting of wireless facilities and found “insufficient evidence . . . to make a determination that municipal property preferences are *per se* unreasonably discriminatory or otherwise unlawful.” (FCC-14-153A1, ¶ 278.) However, there is no relationship between whether DAS providers have a CPC from the Commission and the right to locate wireless facility or equipment on property owned by a local government or the state.

b. When DAS providers attach facilities/equipment to poles/structures or access conduits owned by non-governmental entities in Pennsylvania, including public utilities, is it the practice of the pole/structure owners to require the DAS provider to obtain a CPC from the Commission prior to allowing the attachment? If so, what is the legal basis for this practice?

We are not aware of a practice in which public utilities or other non-governmental entities that own poles or have access to conduits in the public rights-of-way require DAS providers to obtain a CPC from the Commission prior to attaching DAS antennae and other equipment. If such a practice exists, it is probably because the Commission currently issues CPC’s to DAS providers. If the Commission decided to change this policy, then no doubt the owners of poles and/or conduit would no longer require DAS providers to obtain CPC’s from the Commission.

c. Explain what impact, if any, conferring public utility status to DAS providers has on the property rights of state and/or local governments and/or private property owners in Pennsylvania.

Conferring public utility status to DAS providers has a detrimental effect on the property rights of state and local governments in Pennsylvania. DAS providers (or agents of such providers) armed with CPC’s often claim to municipalities that they have unfettered access to the public rights-of-way. With a CPC in hand, they often argue that they are not subject to any type of municipal regulation, including basic zoning requirements. Such claims directly contradict federal statutory law and the FCC’s recognition that a local zoning authority can provide for the placement, modification, and construction of its wireless facilities. Nevertheless, the granting of a CPC often results in municipalities being forced at the very least to educate DAS providers in the law or worse to assert their rights in court. To permit DAS providers to circumvent local zoning authority would directly contravene the preservation provisions in TA-96, as well as the FCC’s October 2014 Report and Order.⁶

Furthermore, DAS providers often argue that they are entitled to use their public utility status for access to municipal and state-owned property for the placement of facilities and equipment. In many instances, this has caused tension between the industry and local governments, especially considering the FCC’s newest ruling. In its 2014 Report and Order, the

⁶ See 47 U.S.C. § 332(c)(7) and FCC-14-152A1 ¶¶ 245-251.

FCC acknowledges a municipality's right to negotiate lease payments with wireless providers for the use of municipal property. (FCC-14-153A1, ¶ 280.) As it is recognized at the federal level, this right would likely preempt any state mandate regarding the public utility usage of municipal property at a reduced or nonexistent rate. Also, because of the Congress' and the FCC's recognition of municipal zoning authority over the placement, modification, and construction of wireless facilities, if a DAS provider attempted to use its CPC to locate facilities in the rights-of-way or on municipal property without complying with the municipality's lawful regulations, such location would amount to an unlawful taking pursuant to Pennsylvania law. Nevertheless, this potential for conflict between the 2,500 municipalities in the Commonwealth and the wireless industry could be greatly ameliorated by ending the practice of certifying DAS providers.

7. What is the business value of a CPC to a DAS provider?

Certification by the Commission is a privilege that has been enjoyed by DAS providers for the past several years. In many cases, it has allowed them to claim that they have unfettered access to the public rights-of-way and to install their wireless facilities without proceeding through the municipal zoning process or gaining any type of municipal approvals. On a regular basis, DAS providers use their "utility status" to place new facilities (often a combination of new poles and antennas on existing poles) in the public rights-of-way without complying with lawful municipal requirements. Another issue that arises with some frequency is that, with utility status in hand, DAS providers have easier access to private property. Though they are for-profit entities that do not serve the public interest in the same way as a traditional utility, DAS providers have used the Commission's certification to access private property without having to negotiate a lease or obtain a standard easement from the property owner.⁷ In doing so, DAS providers have attempted to circumvent any municipal zoning authority that is preserved by TA-96 and recognized by the FCC.

The current situation is challenging for several reasons and heavily favors the industry over Pennsylvania municipalities and residents. First, DAS systems provide wireless services which are governed by federal laws established by Congress and promulgated by the FCC; as such, the Commission is preempted from regulating DAS systems inasmuch as they are part of a nationwide wireless network. Second, most DAS providers can access the public rights-of-way via the WBCA or the applicable provisions of the FCC's October 2014 Report and Order. As such, it is not necessary for the Commission to certificate DAS providers, and is arguably preempted. Third, DAS providers often use their utility status to gain entry to municipal or private property for the placement of their wireless facilities. This is a clearly infringement on the rights of municipal and private property owners. Finally, DAS providers enjoy the benefit of having access to the public rights-of-way via CPCs, but are not subject to Commission regulations, tariffs or rate reviews. It goes without saying that there is an inherent unfairness in the manner in which DAS providers are treated when compared to other public utilities.

⁷ This is particularly troubling, because traditional wireless providers do not enjoy the benefits of DAS providers that hold CPCs.

a. Is it the practice of a customer or potential customer in Pennsylvania to require a DAS provider to obtain a CPC from the Commission prior to entering into a business relationship with the DAS provider? If so, what is the legal basis for this practice?

These comments are made on behalf of the Pennsylvania municipal associations, which do not have any business or customer relationships with DAS providers. As such, we have no direct or indirect knowledge to enable us to answer this question.

b. Even if not required by customers or potential customers, is having a CPC from the Commission something that wholesale or retail customers or potential customers in Pennsylvania prefer prior to entering into a business relationship with a DAS provider? If so, why?

These comments are made on behalf of the Pennsylvania municipal associations, which do not have any business or customer relationships with DAS providers. That being said, we cannot imagine a good reason for wholesale or retail customers to require a CPC from a DAS provider prior to entering a business relationship.

c. How do other state commissions deal with the applications and certifications of DAS providers?

We are in the process of researching the practice of other state commissions with respect to certifying or not certifying DAS providers and will respond to this question in our reply comments to the Commission.

8. DAS providers and wholesale interconnection/collocation.

a. Explain whether DAS providers interconnect with the Public Switched Telephone Network (PSTN).

The PSTN is an existing aggregation of circuit-switched telephone networks made up of numerous communication media including copper telephone lines, fiber optic cables, microwave links, satellite communication, and cellular networks. It is operated and maintained by national, regional, and local entities to provide global infrastructure and telecommunication services to the public. Switching centers throughout the world provide the interconnections allowing most telephones to communicate with each other. The original purpose of the PSTN was to provide Plain Old Telephone Service (POTS) for fixed-line analog telephone systems, but technology advances and ever increasing capacity demands have driven the PSTN to a more functional and robust digital core network to support mobile devices, as well as fixed landline telephones. Because the DAS, as described previously, is simply an extension of a service provider's network at the edge to supply accessibility for wireless devices, it does not interconnect with the PSTN.

b. To the extent DAS providers interconnect with the PSTN, explain whether they enter into wholesale interconnection and/or collocation agreements with Incumbent Local Exchange Carriers (ILECs) pursuant to Section 252 of TA-96 or obtain interconnection through commercial agreements with ILECs that are not approved by the Commission.

Given that these comments are made on behalf of the municipal associations, we do not have any direct or indirect knowledge as to the type of agreements, if any, that DAS providers enter into with ILEC's.

c. To the extent DAS providers interconnect with the PSTN, explain whether their wholesale interconnection and/or collocation agreements with ILECs utilize or potentially can utilize unbundled network elements or UNEs.

Given that these comments are made on behalf of the municipal associations, we do not have any direct or indirect knowledge as whether their agreements with ILEC's, if any, utilize or potentially utilize UNE's.

d. To the extent a DAS provider seeks to enter into a wholesale interconnection and/or collocation agreement with an ILEC that is subject to Commission approval, explain whether the failure to obtain a CPC from the Commission impedes or otherwise affects the commencement of negotiations with the ILEC for wholesale interconnection/collocation.

As municipal associations, we do not have direct knowledge of the factors leading to the commencement of negotiations between DAS providers and ILEC's. That being said, we cannot imagine any good reason for the lack of a CPC by a DAS provider, given an environment in which the Commission has publicly decided not to issue CPC's to DAS providers, to impede the commencement of such negotiations.

e. To the extent a DAS provider seeks to enter into a wholesale interconnection and/or collocation agreement with an ILEC that is subject to Commission approval, explain whether failing to obtain a CPC from the Commission impedes or otherwise affects the ability of the provider to timely and effectively obtain wholesale interconnection/collocation and hence, amounts to a barrier to entry under Section 253(a) of TA-96.

Failing to obtain a CPC from the Commission does not amount to a barrier to entry under Section 253(a) of TA-96. As DAS systems are infrastructure expansions to larger systems and thus not public utilities, a CPC should not be required for DAS providers. By requiring a CPC, the Commission would be creating an unnecessary burden for the DAS provider to overcome. Certification would also necessitate the establishment of a comprehensive tariff policy and rate review process for each DAS provider; this, in turn, would further complicate a DAS provider's entry into the market.

Conversely, no longer subjecting DAS providers to the certification process would allow unhindered entry into the wireless market, subject only to appropriate federal regulation and private negotiations among providers, ILECs, and municipalities. Indeed, this is the type of

wireless environment that the FCC and Congress aimed to create via the October 2014 Report and Order, the 2009 Shot Clock Ruling, and the Telecommunications Act of 1996.

9. DAS providers and E911/911 Service.

a. Explain whether DAS providers transport or otherwise handle wireless 911/E911 call and data traffic where such traffic eventually needs to timely and reliably reach the appropriate public safety answering point or PSAP.

DAS providers neither transport, nor otherwise handle, wireless 911/E911 call and traffic data where such traffic eventually needs to timely and reliably reach the appropriate answering point or PSAP. DAS systems are constructed and operated with the objective of infilling gaps in a CMRS' existing mobile network. DAS providers lease existing wireless broadband capacity to, but are not involved with, the transportation or usage of such capacity. That is, once the lessee "takes possession" of the data, the lessee (i.e., CMRS) is responsible for any connections relating to a 911/E911 call.

10. Assuming DAS providers are public utilities under Pennsylvania law, what services and rate elements should be included in a DAS provider's intrastate tariff with the Commission?

As it stands, DAS providers are not subject to any intrastate tariffs for their services and/or rate elements, though they are certificated by the Commission. Their agreements with the CMRS that deliver broadband and mobile service to Pennsylvania residents are entirely private in their negotiation and enforcement. What this arrangement essentially amounts to is a private industry enjoying the benefits of certification, but not being subject to the same regulations or tariff standards to which the Commission subjects other CPC-holding entities.

If DAS providers were found to be public utilities under Pennsylvania law, the services that they provide to all CMRS connected to facilities within the Commonwealth, as well as varying rate elements, should be subject to intrastate tariffs with the Commission. Because DAS systems do not directly connect to a PSTN and do not offer traditional telephone services (i.e., call blocking and emergency services), tariffs should be based on the type of service provided and the volume of service (i.e., the amount of broadband capacity) utilized or leased by the CMRS at any given facility. Furthermore, as with all other public utilities in the Commonwealth, the Commission should establish, and periodically adjust, rates between DAS providers and their respective CMRS consumers.

Should the Commission continue to certificate DAS providers, yet refuse to impose tariffs on their services and regulate their rates, the residents of Pennsylvania would ultimately experience a disservice at the hands of the Commonwealth. It would amount to a continuation of the status quo regarding DAS providers and certification. To confer public utility status upon a company, and therefore provide that company with legal access to the public rights-of-way, without concurrent tariff regulations, would be to grant a valuable privilege without the responsibilities that accompany the privilege.

This is not a new topic to Pennsylvania courts. In Crown Castle, the Pennsylvania Supreme Court determined that Crown Castle (which now is the largest DAS provider in the nation) was not a public utility when it attempted to procure utility status from the Commission in order to bypass local zoning regulations. The Court noted that Crown Castle did not provide public services and observed that

Implicit in . . . [the term, “public utility”] is that a public utility provides essential services to the public at large, responding to any reasonable request for service without discrimination, and that it conducts its business under the watchful eye of government, which ensures that its rates will be reasonable and its provision of service responsible. No such requirements are made of non-regulated business activity.

Crown Castle, 705 A2d. at 431.

DAS does not provide services to the public and is not subject to the “watchful eye” of the Commission with respect to the reasonableness of its rates. A decision by the Commission to certificate DAS providers, but not impose any substantive regulations or tariffs, would permit the industry to establish and implement operational standards inconsistent with Commission objectives. Additionally, it would potentially encourage the industry raise its wireless service rates related to DAS, which would ultimately be passed on to end-user consumers by the applicable CMRS.

11. Assuming DAS providers are public utilities under Pennsylvania law, does the Commission have jurisdiction under Section 1501 of the Code or other applicable law to adjudicate informal and/or formal complaints filed at the Commission against DAS providers, including complaints involving the siting of DAS facilities/equipment?

Section 1501 of the Code, entitled Character of Service and Facilities, requires that each public utility operating and owning facilities within the Commonwealth

[F]urnish and maintain adequate, efficient, safe, and reasonable service and facilities, and . . . make all such repairs, changes, alteration, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary to property for the accommodation, convenience, and safety of its patrons . . . and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay.

While the health, safety and welfare of the general public, as well as a DAS provider’s continuity of service, are of tantamount importance, both of these issues are addressed by the FCC in its October 2014 Report and Order. (FCC-14-153A1, ¶¶ 1-3, 29-34.) As such, the Commission is preempted from regulating wireless facilities for safety standards, as well as service availability and consistency.

Assuming DAS providers are public utilities under PA law, however, they will be subject to the regulations of Chapter 66 of the Code. 66 Pa.C.S. § 701 gives the Commission the authority to hear and adjudicate both formal and informal complaints filed against all public utilities.

12. Provide non-proprietary physical network diagram(s) of typical DAS provider network(s). Such diagram(s) should include appropriate legends, explain any technical terminology abbreviations, depict traffic flows, and depict interconnection and/or collocation arrangements with other telecommunications carriers or communications providers.

Given that these comments are made on behalf of the municipal associations, we do not have in our possession any physical network diagrams of typical DAS provider networks.

This concludes the comments of the Pennsylvania state municipal associations, including the Pennsylvania Municipal League, the Pennsylvania State Association of Township Supervisors, the Pennsylvania Association of Township Commissioners, and the Pennsylvania State Association of Boroughs. Thank you for commencing this formal proceeding to examine the issues surrounding Commission certification of DAS providers and for the opportunity to submit these comments.

Respectfully submitted,

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