



FEDERAL COMMUNICATIONS COMMISSION
Wireless Telecommunications Bureau
Competition and Infrastructure Policy Division
445 12th Street, SW
Washington, DC 20554

September 28, 2016

VIA FIRST CLASS MAIL AND EMAIL

Mr. Lance M. Fritz
President and CEO
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Re: VIOLATION OF FCC ENVIRONMENTAL RULES

Dear Mr. Fritz:

This letter pertains to our findings that Union Pacific Railroad (UP) failed to comply with the Commission's regulations implementing the National Environmental Policy Act of 1969 (NEPA) and other federal environmental statutes¹ and related licensing rules.² The Wireless Telecommunications Bureau has determined that UP violated Sections 1.923, 1.929, 1.947, 1.1307(a)(4), 1.1307(a)(6), 1.1308(a), 1.1311(a), 1.1312(b), and Part 1, Appendix C of the Commission's rules by constructing and operating a 120-foot tower in a floodplain, without first performing the required environmental and historic preservation review.³ By this letter, we apprise UP of the implications of failing to comply with Commission regulations in the future.

Regulatory Requirements

¹ See 47 C.F.R. §§ 1.1301 *et seq.*; see also 42 U.S.C. §§ 4321-4335. NEPA requires that federal agencies consider the environmental effects of their major federal actions before taking action, including issuing permits, licenses, or approvals.

² See 47 C.F.R. §§ 1.901 *et seq.*; see also 47 C.F.R. § 90.5(b) (requiring licensees in the Private Land Mobile Radio Services to comply with the environmental requirements in Part 1 prior to construction).

³ See 47 C.F.R. §§ 1.923, 1.929, 1.947, 1.1307, 1.1308, 1.1311, 1.1312; 47 C.F.R. Pt.1, App C.

Under the Commission's rules, an applicant must consider, prior to initiating construction or deployment, whether the facility it proposes to build or use may have a significant effect on the environment. If so, the applicant must prepare an EA in accordance with the Commission's rules.⁴ Specifically, an applicant must prepare an EA if the proposed facility meets any of several criteria specified in the Commission's rules,⁵ and it may not begin construction until the Commission's environmental processing is completed.⁶ Furthermore, if a facility that may have a significant environmental impact is to be constructed to provide service pursuant to a license in the wireless radio services, its construction is considered a major modification of the license, which must be approved by the Commission prior to construction and operation.⁷

Section 1.1307(a)(4) of the rules requires applicants to consider, prior to initiating construction or deployment, whether their proposed facilities would affect properties listed or eligible for listing in the National Register of Historic Places.⁸ In considering potential effects on these properties, Section 1.1307(a)(4) requires applicants to follow the prescribed procedures set forth in the rules of the Advisory Council on Historic Preservation (Advisory Council),⁹ as modified by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Collocation Agreement)¹⁰ and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NPA).¹¹

⁴ 47 C.F.R. §§ 1.1307, 1.1311(a).

⁵ See 47 C.F.R. § 1.1307(a) (specifying eight criteria that require preparation of an EA), 1.1307(b) (EA required if human exposure to radio frequency emissions will exceed certain limits), 1.1307(d) Note (processing bureau shall require an EA for new and certain modified antenna structures over 450 feet in height). In addition, the processing bureau shall require an EA if it determines, in response to an interested person's allegation or on its own motion, that an otherwise categorically excluded facility may have a significant environmental impact. 47 C.F.R. § 1.1307(c), (d).

⁶ 47 C.F.R. § 1.1312(b). The contents of an EA are described in 47 C.F.R. § 1.1311. See also 47 C.F.R. § 1.1308 (discussing the Commission's process for reviewing EAs).

⁷ See 47 C.F.R. §§ 1.929(a)(4) (classifying applications and amendments requesting authorization for a facility that may have a significant effect on the environment as major), 1.947(a) (requiring Commission approval for major modifications). See also 47 C.F.R. §§ 1.923(e) (requiring completion of environmental review prior to construction for any application in the wireless radio services proposing facilities that may have a significant environmental effect), 90.5(b) (requiring licensees in the Private Land Mobile Radio Services to comply with the environmental requirements in Part 1 prior to construction).

⁸ 47 C.F.R. § 1.1307(a)(4).

⁹ 36 C.F.R. Part 800.

¹⁰ 47 C.F.R. Pt. 1, App. B; see *Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with respect to Collocating Wireless Antennas on Existing Structures*, Public Notice, 16 FCC Rcd 5574 (WTB 2001), *recon. denied*, 20 FCC Rcd 4084 (WTB 2005).

¹¹ 47 C.F.R. Pt. 1, App. C; see *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004), *clarified*, 20 FCC Rcd 17995 (2005), *aff'd*, *CTIA-The Wireless Ass'n. v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (*NPA Report and Order*). Under the NHPA and the Advisory Council's implementing regulations, the Advisory Council may approve program alternatives that tailor a federal agency's historic preservation review and consultation procedures to the particular circumstances of the agency's program or that exempt from historic preservation review actions that are unlikely to affect historic properties. See 54 U.S.C. § 304108 *et seq.*; 36 C.F.R. § 800.14(b), (c).

These agreements tailor and streamline the review and consultation procedures routinely required by the National Historic Preservation Act of 1966 (NHPA)¹² and the implementing regulations issued by the Advisory Council.

UP's Conduct

UP has failed to comply with the Commission's environmental and licensing regulations because it constructed and operated from a tower at West Matoon Creek, Kansas, without first performing the required environmental and historic preservation review.¹³ Specifically, in early July 2015, UP began construction of a 120-foot tower in a floodplain without receiving the requisite Finding of No Significant Impact (FONSI).¹⁴ In addition, because UP uses the tower for radio transmissions subject to licensing pursuant to the Commission's rules governing Private Land Mobile Radio operations, its construction of and operation from the West Matoon Creek tower constituted a major modification of its license.¹⁵ Therefore, UP's construction of and operation from this facility without Commission approval constituted a violation of the licensing rules.¹⁶

In addition, UP failed to follow the Advisory Council's rules, as modified by the NPA.¹⁷ According to UP, the Osage Nation on June 3, 2015, had asked to monitor construction at West Matoon Creek in light of its concern over high potential for impacts to Tribal resources associated with two major trails: the Missouri River Trail and the Osage Trace. UP committed to accommodate a monitor to address the Osage Nation's concerns. Despite that commitment, construction proceeded without notice to the Osage Nation and

¹² 54 U.S.C. § 300101 *et seq.* The NHPA requires that a federal agency consider the effects of its federal undertakings, including actions that it authorizes or approves, on historic properties prior to issuing federal licenses, permits or approvals. *See* 54 U.S.C. §§ 306108, 300320. This review is commonly referred to as "Section 106 Review" because the provision requiring the review was originally enacted as Section 106 of the NHPA. In considering such effects, the NHPA further requires the federal agency to consider the views of expert agencies. Specifically, the NHPA requires the federal agency to consider the views of the Advisory Council, which is the federal agency responsible for implementing the NHPA; the appropriate State Historic Preservation Officer or Tribal Historic Preservation Officer; and, if historic properties of religious or cultural significance to federally recognized Tribal Nations or Native Hawaiian Organizations may be affected, their representatives. *See* 54 U.S.C. §§ 302104, 302706, 306108, 304101. As authorized by the Advisory Council, the Commission's environmental rules delegate to its licensees, permittees, and applicants initial responsibility for identifying historic properties and evaluating the effects that their proposed facilities may have on such properties, but the Commission remains ultimately responsible for ensuring that the Section 106 process occurs in accordance with applicable statutory and regulatory provisions, as well as for government-to-government consultation with federally recognized Tribal Nations. *See* 47 C.F.R. § 1.1307(a)(4); *see also* 36 C.F.R. § 800.2(a)(3); *NPA Report and Order*, 20 FCC Rcd at 1076-77 ¶ 5.

¹³ *See* 47 C.F.R. §§ 1.1301 *et seq.*, 1.901 *et seq.*; 47 C.F.R. Pt. 1, App C.

¹⁴ *See* 47 C.F.R. § 1.1307(a)(6). The Wireless Telecommunications Bureau subsequently granted a FONSI on February 10, 2016.

¹⁵ *See* 47 C.F.R. § 1.929(a)(4).

¹⁶ *See* 47 C.F.R. § 1.947(a); *see also* 47 C.F.R. §§ 1.923(e), 90.5(b).

¹⁷ *See* 47 C.F.R. § 1.1307(a)(4); 47 C.F.R. Pt.1, App C.

with no Tribal monitor present.¹⁸ Therefore, UP violated Section IV.G of the NPA by failing to abide by its monitoring agreement with the Osage Nation, which formed the predicate for the Osage Nation's agreement that government-to-government consultation was unnecessary.

Based on our investigation, we find that UP violated the Commission's regulations implementing NEPA and other environmental statutes, including the NHPA, as well as related licensing requirements. Future violations may result in additional action, including the imposition of monetary penalties, pursuant to the Wireless Telecommunications Bureau's authority under 47 C.F.R. § 0.111(a)(11) or via referral to the Commission's Enforcement Bureau. Furthermore, UP's conduct at issue in this letter may provide grounds for an upward adjustment in the amount of a penalty.

Please direct any questions regarding this letter to Erica Rosenberg (erica.rosenberg@fcc.gov, (202) 418-1343).

Sincerely,

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¹⁸ See UP's Construction Violation Summary, dated October 7, 2015.