



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

June 16, 2016

DA 16-680

VIA FIRST CLASS MAIL AND EMAIL

Mr. Claude Mongeau
President and CEO
Canadian National Railroad
935 de La Gauchetière Street West
Montreal, Quebec
H3B 2M9
Canada

Re: VIOLATION OF FCC ENVIRONMENTAL RULES

Dear Mr. Mongeau:

This letter pertains to self-reported admissions that Canadian National Railroad and its operating subsidiaries (collectively, CN) 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 CN violated Sections 1.1307, 1.1312, and 90.5 of the Commission's rules³ by constructing and operating fourteen towers for Private Land Mobile Radio (PLMR) operations, and then engaging in PLMR operations from those towers, without first performing the required environmental and historic preservation review. In addition, CN violated Sections 1.923, 1.929, 1.947, and 1.1311 of the Commission's rules⁴ by constructing and operating service from one of these towers, which is located in a floodplain, without filing the requisite environmental assessment (EA) and license application, and prior to the Commission's ruling on such submission. By this letter, we apprise CN of the implications of failing to comply with Commission regulations in the future.

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. §§ 1.1307, 1.1312, 90.5.

⁴ See 47 C.F.R. §§ 1.923, 1.929, 1.947, 1.1311.

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Regulatory Requirements

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.⁵ Specifically, an applicant must prepare an EA if the proposed facility meets any of several criteria specified in the Commission's rules,⁶ and it may not begin construction until the Commission's environmental processing is completed.⁷ 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.⁸

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.⁹ In considering 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),¹⁰ as modified by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Collocation Agreement)¹¹ and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NPA).¹² These agreements tailor and

⁵ 47 C.F.R. §§ 1.1307, 1.1311(a).

⁶ 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).

⁷ 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).

⁸ 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).

⁹ 47 C.F.R. § 1.1307(a)(4).

¹⁰ 36 C.F.R. Part 800.

¹¹ 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).

¹² 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

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streamline the review and consultation procedures routinely required by the National Historic Preservation Act of 1966 (NHPA)¹³ and the implementing regulations issued by the Advisory Council.

Pursuant to the Collocation Agreement, most collocations of antennas on existing structures are excluded from Section 106 review. However, collocations on towers constructed after March 16, 2001 are not excluded from review if the underlying tower did not previously undergo Section 106 review, or if the tower has been found to have an adverse or potentially adverse effect on historic properties that has not been resolved.

CN's Conduct

CN has failed to comply with the Commission's environmental and licensing regulations.¹⁴ Specifically, by its own admission, it constructed fourteen towers in the Midwest and South without performing the required environmental and historic preservation review. CN also failed to file an EA for Commission processing on one of these towers, located in Foxworth, Mississippi, even though the tower had a potentially significant effect on the environment due to its location in a floodplain.¹⁵ In addition, because CN uses the towers for radio transmissions subject to licensing pursuant to the Commission's rules governing PLMR operations, its construction of and operation from the Foxworth tower constituted a major modification of its license.¹⁶ Therefore, CN's construction of and operation from this facility without Commission approval constituted a violation of the licensing rules.¹⁷

In early 2014, CN notified the Commission that it wanted to collocate antennas on these towers that had not gone through our historic preservation and environmental review process. In

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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; 36 C.F.R. § 800.14(b), (c).

¹³ 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; 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.

¹⁴ See 47 C.F.R. §§ 1.1301 *et seq.*, 1.901 *et seq.*

¹⁵ See 47 C.F.R. § 1.1307(a)(6).

¹⁶ See 47 C.F.R. § 1.929(a)(4).

¹⁷ See 47 C.F.R. § 1.947(a); see also 47 C.F.R. §§ 1.923(e), 90.5(b).

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accordance with our procedures implementing the Collocation Agreement, CN, under the guidance of Commission staff, performed post-construction NHPA and environmental reviews for these towers. The Spectrum and Competition Policy Division cleared 13 of the 14 towers for collocation in a letter dated December 30, 2014, and it cleared the remaining tower in a letter dated January 28, 2015.¹⁸ While these letters permitted collocation on the subject towers, they did not purport to address any violation of the Commission's rules due to the failure to perform pre-construction review or obtain major modification authorization.

Based on the information CN provided, we find that CN violated the Commission's regulations implementing NEPA and other environmental statutes, including the NHPA, as well as related licensing requirements. Future violations by Illinois Central, CN, or their affiliates 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, CN'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,

Jeffrey S. Steinberg
Deputy Chief
Competition and Infrastructure Policy Division
Wireless Telecommunications Bureau

cc: Mr. Theodore K. Kalick, Senior U.S. Regulatory Counsel
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¹⁸ On May 12, 2015, the division was renamed the Competition and Infrastructure Policy Division.