



FEDERAL COMMUNICATIONS COMMISSION
Public Safety and Homeland Security Bureau
Policy and Licensing Division
445 12th Street, SW
Washington, DC 20554

May 22, 2017

VIA FIRST CLASS MAIL AND EMAIL

Mr. Dan Dykes
County Administrator
Madison County, Indiana
16 E. 9th St.
Anderson, IN 46016

Re: VIOLATION OF FCC ENVIRONMENTAL RULES

Dear Mr. Dykes:

This letter pertains to our findings that Madison County, Indiana failed to comply with the Commission's regulations implementing the National Environmental Policy Act of 1969 (NEPA) and other federal environmental statutes,¹ as well as related licensing rules and the rule requiring truthful and accurate statements.² The Public Safety and Homeland Security Bureau has determined that Madison County violated Sections 1.17, 1.1307(a)(4), 1.1312(a), 90.5, and 47 CFR Pt. 1, App C of the Commission's rules by constructing and operating from a public safety radio tower in Pendleton, Indiana, without first completing the required historic preservation review.³ By this letter, we apprise Madison County of the implications of failing to comply with Commission regulations in the future.

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.⁴ As part of this review, Section 1.1307(a)(4) of the rules requires applicants to consider, prior to initiating construction or deployment, whether

¹ See 47 CFR §§ 1.1301 *et seq.*; see also 42 USC §§ 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. See also the National Historic Preservation Act, 54 USC § 300101 *et seq.*

² See 47 CFR §§ 1.17(a)(2), 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 CFR §§ 1.17, 1.1307, 1.1312, 90.5; 47 CFR Pt. 1, App. C.

⁴ 47 CFR § 1.1312(a).

their proposed facilities would affect properties listed or eligible for listing in the National Register of Historic Places.⁵ 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),⁶ as modified by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Collocation Agreement)⁷ and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NPA).⁸ These agreements tailor and streamline the review and consultation procedures routinely required by the National Historic Preservation Act of 1966 (NHPA)⁹ and the implementing regulations issued by the Advisory Council.

Madison County's Conduct

Madison County has failed to comply with the Commission's environmental and licensing regulations.¹⁰ In 2015-16, it constructed a public safety radio tower in or near Pendleton in Madison County, Indiana, without first completing the required historic

⁵ 47 CFR § 1.1307(a)(4).

⁶ 36 CFR Part 800.

⁷ 47 CFR 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).

⁸ 47 CFR 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 USC § 304108 *et seq.*; 36 CFR § 800.14(b), (c).

⁹ 54 USC § 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 USC §§ 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 USC §§ 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 CFR § 1.1307(a)(4); *see also* 36 CFR § 800.2(a)(3); *NPA Report and Order*, 20 FCC Rcd at 1076-77 ¶ 5.

¹⁰ *See* 47 CFR §§ 1.1301 *et seq.*; 90.5(b); 47 CFR Pt. 1, App. C.

preservation review process.¹¹ In particular, it began construction on the tower before the Indiana Division of Historic Preservation and Archaeology (SHPO)¹² or the Eastern Shawnee Tribe of Oklahoma (Eastern Shawnee Tribe) had reviewed for adverse effects on historic properties at the site. Although the Eastern Shawnee Tribe ultimately found that no historic properties of cultural significance to it were likely impacted by the project, the Tribal Historic Preservation Officer (THPO) noted that relevant and necessary information, i.e., that construction had already begun on the project, was not provided when the archaeological report was submitted to the THPO on March 30, 2016.¹³ In particular, the THPO cited dated photographs that showed grading for an access road had already been performed. Indeed, these photographs showed that excavation had begun even before the SHPO had completed its review on October 21, 2015, further compromising both the SHPO and Tribal review processes.¹⁴ Madison County's environmental consultant subsequently confirmed the premature construction.¹⁵

In addition, on February 3, 2016, Madison County certified in its Antenna Structure Registration application on FCC Form 854 that the project would not have a significant environmental impact.¹⁶ In submitting this application, Madison County further certified that all statements therein were true, complete, correct, and made in good faith.¹⁷ Because it had not yet completed the required historic preservation review process at that time, Madison County could not have stated in good faith that the construction would have no significant environmental impact. Hence, its statement and certification constitute a material misstatement of fact without a reasonable basis for believing that the statement was correct and not misleading.¹⁸

Based on the information submitted to the FCC by Madison County, its consultant, and the Eastern Shawnee Tribe, we find that Madison County violated the Commission's regulations implementing NEPA and other environmental statutes, including the NHPA.

¹¹ See 47 CFR §§ 1.1307(a)(4), 1.1312(a); 47 CFR Pt. 1, App. C.

¹² The Indiana Division of Historic Preservation and Archaeology is the State Historic Preservation Officer for Indiana.

¹³ See letter dated May 31, 2016, from Robin Dushane, Tribal Historic Preservation Officer, and Jennifer Sigler, Tribal Archaeologist, to Todd Durnil, Pyramid Architects/Engineers.

¹⁴ *Id.*

¹⁵ Phone call between Erica Rosenberg, Assistant Chief, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau and Todd Durnil, Pyramid Architects/Engineers, January 18, 2017. Mr. Durnil stated that he had previously asked the contractor whether he had begun construction and the contractor had mistakenly said no, as he had not recalled that he had done grading ("scooped the sod") for a driveway. Because grading constitutes construction, grading pre-authorization constitutes a rule violation. Upon becoming aware of the premature construction, the consultant spoke with the THPO and had his archaeology team review the site.

¹⁶ Application No. A0972026 (A1041801 as modified July 9, 2016). Registration was granted on February 3, 2016. ASR 1298244.

¹⁷ See FCC Form 854, Certification Statement No. 1.

¹⁸ See 47 CFR § 1.17(a)(2).

Future violations may result in additional action, including the imposition of monetary penalties, pursuant to the Public Safety and Homeland Security Bureau's authority under 47 CFR § 0.111(a)(11) or via referral to the Commission's Enforcement Bureau. Furthermore, Madison County'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 John Adams (john.adams@fcc.gov, (202) 418-0394).

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael J. Wilhelm". The signature is fluid and cursive, with a large initial "M" and "W".

Michael J. Wilhelm
Acting Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

cc: Mr. Todd Durnil
Pyramid Architects/Engineers
203 South Good Ave.
Indianapolis, IN 46219