

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Comment Sought on Scoping Document for)	DA 13-1980
Development of a Proposed Program Comment)	WT Docket No. 13-240
To Govern Review of Positive Train Control)	
Facilities Under Section 106 of the National)	
Historic Preservation Act)	

**COMMENTS OF
THE METROPOLITAN TRANSPORTION AUTHORITY**

The Metropolitan Transportation Authority (“MTA”), through counsel and pursuant to Section 1.415 and 1.419 of the Commission’s Rules, hereby submits its Comments in the above-captioned proceeding:¹

I. INTRODUCTION

A. The Metropolitan Transportation Authority

The MTA is a public benefit corporation responsible for public transportation in twelve (12) counties in southeastern New York, along with two (2) counties in southwestern Connecticut. The MTA carries over 11 million passengers on an average weekday system wide, and over 800,000 vehicles on its nine toll bridges and tunnels per weekday.

MTA Long Island Rail Road (“LIRR”) and MTA Metro-North Railroad (“Metro-North”) (collectively, “MTA Railroads”) are the two largest and busiest commuter railroads in the United States. Together, the two railroads, which share track with Amtrak and freight carriers, provide a critical link between New York City’s Central Business Districts and cities, towns and villages

¹ 78 FR 65308 (Oct. 31, 2013).

east, west and north of the City. They carry nearly 600,000 customers on an average weekday on over 2,000 rail cars that travel over nearly 1,500 miles of track.

1. The Long Island Rail Road

The LIRR carried 82 million customers last year, with more than 300,000 passengers traveling each weekday on 735 daily trains. Chartered on April 24, 1834, it is also the oldest railroad in the U.S. still operating under its original name. The LIRR is comprised of over 700 miles of track on 11 different branches, stretching from Montauk, on the eastern tip of Long Island to Penn Station in the heart of Manhattan, approximately 120 miles away. The LIRR service territory covers five counties in New York State - Nassau, Suffolk, Queens, Brooklyn and New York - and extends from three major New York City terminals, Penn Station in Manhattan, Atlantic Terminal in Brooklyn and Hunters Point Avenue in Queens, through a major transfer hub in Jamaica, Queens to the easternmost tip of Long Island. Along these extensive routes, LIRR services passengers at 124 stations over 319 route miles and 289 highway-rail and 6 pedestrian grade crossings.

2. The Metro-North Railroad

Metro-North carried 83 million customers last year, providing more than 275,000 customer trips each weekday. Metro-North was established in 1983 to operate service formerly provided by Conrail and its various predecessor railroads. Metro-North has 795 miles of track in nine counties. Metro-North serves 120 stations over 380 route miles and 98 highway-rail and pedestrian grade crossings in New York, Bronx, Westchester, Putnam, Dutchess, Orange and Rockland counties in New York, and Fairfield and New Haven counties in Connecticut.

The three lines east of the Hudson River -- the Hudson, Harlem, and New Haven, each terminate at Grand Central Terminal, which has 44 platform tracks and 33 miles of track on two

levels within its 49 acres. Each day more than 750,000 people pass through the landmarked, historic Terminal.

New Haven Line service, including the Main Line service and three branch lines in Connecticut, is operated pursuant to an agreement with the Connecticut Department of Transportation. Two West-of-Hudson Lines terminating in Hoboken, New Jersey are operated by New Jersey Transit under agreement with Metro-North.

B. The Positive Train Control Mandate

PTC encompasses technologies designed to automatically stop or slow a train before certain incidents occur. In particular, PTC is designed to prevent train-to-train collisions, derailments caused by excessive speed, unauthorized incursions by trains onto sections of track where repairs are being made, and movement of a train through a track switch left in the wrong position. Additionally, temporary speed restrictions are required to be applied for highway-rail grade crossing malfunctions.

A fully functional PTC system should be able to determine the location and speed of trains, warn train operators of potential problems, and take action if the operator does not respond to a warning. For example, if a train operator fails to stop a train at a stop signal, the PTC system would apply the brakes automatically to stop the train before passing the stop signal. In addition, temporary speed restrictions (slow orders) must be enforced with PTC in the event of a malfunction at a highway-rail grade crossing to ensure the proper train speed as a train passes over the crossing. To give a sense of the order of magnitude of the grade crossing traffic, in 1998, the last time a formal count was conducted, the LIRR had a vehicle Average Annual Daily Traffic (“AADT”) count of 2,028,861 over its 289 highway-rail grade crossings.

The Federal Rail Safety Improvement Act of 2008 (“RSIA”), which became law in October 2008, requires railroads to install PTC systems on their tracks and on board train equipment on trains that carry passengers or toxic-by-inhalation (“TIH”) materials. Railroad PTC systems must be in place and fully functional by the end of 2015. Implementation of PTC for the MTA is estimated to cost at least \$670 million.

RSIA requires the installation and operation of PTC systems on all rail main lines, meaning all intercity and commuter lines--with limited exceptions--and on freight-only rail lines when they are part of a Class I railroad system, carrying at least 5 million gross tons of freight annually, and carrying any amount of poison or toxic-by-inhalation hazardous (PIH or TIH) materials. While the statute vests certain responsibilities with the Secretary of the U.S. Department of Transportation, the Secretary has since delegated those responsibilities to the Federal Railroad Administrator.²

Congressionally mandated Positive Train Control (“PTC”) systems will serve to make our nation’s passenger and freight rail operations safer by preventing derailments, incursions into work zones, and deadly collisions. Implementation of this vital safety program is, by law, to be completed by December 13, 2015. Given the need by the rail industry for installation of more than 20,000 wayside poles in order to implement PTC, the review process currently required under Section 106 of the National Historic Preservation Act (“NHPA”), 16 U.S.C. §470(f), for the placement of any FCC-regulated antenna facilities would not permit the rail industry to meet its aforementioned deadline.

II. COMMENTS

A. Section 106 Review Process

² See, 49 C.F.R. §1.49(o); 74 FR 26,981 (June 5, 2009); See also, 49 U.S.C. 103(g).

Any federal undertaking must undergo a review under Section 106 of the NHPA to determine whether such undertaking may affect historic properties that are listed or eligible for listing in the National Register for Historic Places, including steps to ensure that Tribal Nations have a full opportunity to participate in the review.³ Since PTC facilities involve the use of FCC-regulated radio spectrum, the construction of wayside poles necessary for PTC implementation is deemed a federal undertaking under the NHPA, and thus subject to Section 106 review.

The MTA is a supporter of both the NHPA, and the important work performed by the Advisory Council on Historic Preservation (“ACHP”) in promoting the preservation, enhancement and sustainable use of our nation’s diverse historic resources. The protection of our nation’s history and heritage are of extreme importance to MTA and its fellow members of the passenger and freight rail industries. Indeed, the rail lines have played a crucial role in the formation and settlement of our lands, and the historical impact of rail in the building this great nation cannot be overstated.

The Section 106 review process, as it stands currently, is too cumbersome and time-consuming to handle the flood of applications that would be required to complete work on the PTC system in time for the 2015 deadline⁴. The exceptions and accommodations to the current review process discussed herein would seek to develop an efficient, practical, and timely review process that ensures full consideration of the effects of PTC facilities on historic properties, including Tribal religious and cultural sites.

B. Batch Application Processing

³ See 36 C.F.R. §800.14(a), (e).

⁴ There has been significant acknowledgment from numerous sectors that railroads working to implement PTC face such a broad array of technical and operational challenges that the deadline should be extended beyond 2015. Even with an extension, the process currently required by Section 106 would significantly delay implementation.

The current procedure for obtaining project clearance under NHPA Section 106 review entails the filing of a new application for each proposed site. Numerous parties are involved in this review process, including: the federal agency initiating the “undertaking” (which in this case is the FCC), the applicant, the applicable State Historic Preservation Officer, any interested Tribal Historic Preservation Officer, other Indian tribes and Native Hawaiian Organizations, local government officials, the ACHP, the National Parks Service, and any other individuals or organizations with a demonstrated interest in the undertaking, including a legal or economic interest, or who are concerned with the undertaking’s effects on historic properties.

The involvement of so many “stakeholders” in the review process substantially increases the likelihood that not all parties will agree on a single path for accomplishing any given undertaking. By reducing the number of total applications under consideration, the stakeholders can have their concerns addressed in a more effective manner rather than rehashing the same issue every time it arises for a similarly situated undertaking.

The local notice provisions of the Section 106 process alone would necessitate the placement of several hundred advertisements in local newspapers inviting public comment on the placement of PTC facilities for the MTA. Allowing the MTA to file a single batch application for each county in which it operates would cut down on wasteful paperwork and expenses, while still permitting stakeholders the opportunity to fully participate in the review process.

C. Right-of-Way Construction

Construction within rail rights-of-way (“ROW”) entails special consideration. Local zoning authorities, for instance, are precluded from regulating the placement of facilities along rail ROWs as long as those facilities are intended to support rail operations. Rail ROWs, especially those used for commuter rail lines which tend to be located in metropolitan and urban

areas, have been repeatedly excavated over the years for various purposes. Between the construction of the tracks themselves and placement of underground utilities and above ground utility poles, the ground alongside commuter rail tracks are highly unlikely to contain artifacts of tribal significance that have not already been unearthed previously.

When it comes to the preservation of the character of above-ground historic sites, the placement of poles along rail ROWs are far less obtrusive, and less likely to cause any “adverse effects” than the preexisting presence of railroad tracks, and the regular traversing of rail cars along such tracks. Given the nature of rail traffic along active rail lines, the purpose of the NHPA would not be well served by requiring rail carriers and the various other stakeholders to engage in an expensive and time-consuming process to review undertakings that are in almost every case certain to be less obtrusive than the infrastructure and traffic already in place.

D. Exclusions Sought for Certain Wood Pole Placements

MTA will make every effort to collocate its PTC antenna facilities and equipment on existing rail and ROW infrastructure. To fill in coverage gaps in the PTC system where no collocation opportunities exist, the majority of new PTC facilities required by MTA will be placed on wooden poles of the variety commonly used to support above ground power and telephone lines. The only functional difference between a “utility” pole and a PTC pole is the lack of power and telephone lines strung across to the next pole for the PTC installations.

Rail ROWs contain so many of these utility-style poles currently, where such utility poles are not required to undergo a Section 106 Review, that it would be unfair and unduly burdensome to require such review where the impact on the ground would be identical to a utility pole, and the visual impact would be less than a typical utility pole. Therefore, the MTA

respectfully requests an exemption from Section 106 Review for all PTC-related wooden pole placements where the overall height of the pole does not exceed sixty feet (60’).

Additionally, the MTA rail lines have, on a regular basis and over time, engaged in the removal of hundreds of obsolete wooden utility ~~recently completed a project to remove approximately 100 wooden utility poles~~ from its ROWs. The removal process involved the cutting of the poles a few feet above ground level, leaving a wooden stub and the foundation of the previous pole undisturbed. MTA respectfully requests an exemption from Section 106 Review for those locations where it will be replacing the current pole stubs with new pole placements in the same locations. Neither the ground nor the visual impact on the surrounding area will be adversely impacted from the conditions that existed at each of the pole sites recently. Similarly, where the MTA chooses to remove any obsolete or unused infrastructure, it would be prudent to exempt from Section 106 Review any archeological component where the existing foundations are being reused for the placement of new PTC facilities.

E. Certain Sections of Rail Lines Should be Exempted from Section 106 Review

Certain sections of rail lines should be exempted from the Section 106 review process. As discussed above, much of the ROWs in urban and metropolitan areas have been well excavated, leaving little chance of uncovering any new evidence of tribal cultural significance. The MTA respectfully requests that any Program Comment resulting from this proceeding identify criteria that can be used to exempt from tribal review undertakings in certain sections of rail ROWs that are situated within some set distance from a given urban center, or located within heavily populated areas.

A significant portion of the MTA’s rail lines have been constructed using fill materials. An example is the construction of portions of the ROWs using material excavated from the

construction of Grand Central Terminal. The fact that the rail bed itself was established in this manner is evidenced by the fact that in some cases the ROWs cut through water bodies, creating marshes and making it clear that the rail beds were new construction from material placed purposely to create a platform for the tracks where none existed previously-. For the placement of any PTC facilities along ROWs that were built on fill material, there is no reason that any party should have to comment on MTA's planned excavations. For this reason, MTA respectfully requests that the Section 106 Review for any PTC facilities to be placed on "fill" sites be limited to a review of the above ground effects on historic properties, and be exempted from any scrutiny for the excavation or below ground portion of the undertaking.

III. CONCLUSION

As demonstrated herein, the need for exceptions and accommodations to the NHPA Section 106 review process to support PTC implementation by the MTA Railroads is urgent. WHEREFORE, the premises considered, it is requested that the Commission carefully consider the foregoing Comments when it engages the various stakeholders in the Section 106 process in an effort to make PTC implementation more efficient, practical and timely.

Respectfully submitted,

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