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COMMENT ON FEDERAL COMMUNICATIONS COMMISSION(FCC)
PROPOSED DRAFT PROGRAM COMMENT TO GOVERN REVIEW OF
POSITIVE TRAIN CONTROL FACILITIES UNDER SECTION 106 OF
THE NATIONAL HISTORIC PRESERVATION ACT (NHPA),
FCC Docket Number 13-240

The proposed program comment strikes me as bureaucratized beyond all reason. It is as though the FCC has become so bewildered by process that it has lost sight of Section 106's purpose. By seeking to address the effects of this undertaking by tinkering with the standard regulatory process – as further complicated by the FCC's unfortunate¹ nationwide programmatic agreements – FCC seems to me to be creating a system that will serve little purpose other than to enrich some consultants, delay the installation of important safety devices, and burden Indian tribes and others with useless exchanges of paperwork.

I suggest that FCC – and the Federal Railroad Administration (FRA), which seems to be a silent partner in this undertaking – back up and think about what the law (NHPA Sections 106 and 110(a)(2)(D) and (E)(ii)) in fact requires. Those statutory provisions require that agencies take into account the effects of their actions on historic properties, and they are to do so in consultation with interested parties, including but not limited to Indian tribes, State Historic Preservation Officers (SHPOs), local governments, and the affected public. They do not require specific exchanges of paper, specific findings, or specific kinds of studies.

So, what kinds of effects can be expected from the installation of antenna towers along existing railroad lines? While there may be some remote possibility that implanting such a tower could drill through, say, a historic or ancient grave, “remote” seems to be the operative word when considering work in an active railroad right-of-way, and it is unlikely that such a grave would be identified via the preparation, submission, review, and approval of “cultural resource reports.” The main realistically predictable impacts of the proposed undertaking are visual – the towers may interrupt someone's culturally valued viewscape.

As I have pointed out repeatedly over the last dozen years², visual impacts are in the eye of the beholder; it is fruitless to try to define them objectively, “professionally,” or with reference to such quantitative variables as different-sized areas of potential effect (APEs). The only way to define or deal with visual impacts is by consulting those whose valued views may be interrupted. That is what FCC should propose in lieu of all the tortuous procedures laid out in the draft program comment.

¹ And, I believe, illegal in that they privilege properties included in the National Register over those that are eligible for inclusion but have not been subjected to the process of nomination, violating both the explicit language of NHPA Section 106 and the direction provided by President Nixon in Executive Order 11593.

² Cf. Chapter 9 of *Thinking About Cultural Resource Management*, Altamira Press 2002

When Railroad X proposes to put in PTC systems along a given stretch of track, it should contact tribes and other potentially interested parties and simply ask them if they have concerns about visual impacts, providing them with graphics (e.g. marked-up satellite imagery) sufficient to allow them to know where the system components will be placed and the character of the surrounding topography. If someone has a concern, then consultation should aim at resolving it, unconstrained by arbitrary rules and standards, APEs of different sizes, preferences for “avoidance” (whatever that means) over “mitigation” and so on. Just TALK WITH PEOPLE, find out their concerns, and try to work them out. This should not be difficult, but FCC is proposing to make it difficult by imposing such a tortuous, nonsensical set of procedures on all involved.

With regard to the fact that some railroads have gone ahead and put in their systems without allowing FCC (or FRA?) to carry out Section 106 review, it seems to me that the question under Section 110(k) of NHPA is: did the railroads do this with the intent to avoid Section 106 review? Did they know there was such a thing as Section 106 review? Did FCC or FRA or anyone else tell them so? Yes, of course, they have their own lawyers, but it is not exactly intuitively obvious that erecting antennae along railroad lines has the potential to affect historic properties; even a seasoned lawyer might be excused from appreciating this perhaps debatable fact. Obviously FCC and/or FRA needs to give serious consideration to the possibility of Section 110(k) violations, in consultation with the ACHP, and the program comment perhaps should spell out how this consideration will be given.

Thank you for the opportunity to comment.

A handwritten signature in red ink, appearing to be "J. F. [unclear]", written in a cursive style.