

**Draft Program Comment to Tailor the Federal Communications Commission's
Section 106 Review for Undertakings Involving the Construction of
Positive Train Control Wayside Facilities**

I. Introduction

The Federal Communications Commission (FCC) licenses and registers communications facilities that require review and consultation pursuant to Section 106 of the National Historic Preservation Act (Section 106), 16 U.S.C. 470f, to assess whether the proposed facility may have an adverse effect on historic properties. The regulations implementing Section 106, developed by the Advisory Council on Historic Preservation (Council) and codified at 36 CFR Pt 800, describe the procedures Federal agencies must follow to meet this obligation. Alternate compliance procedures, provided for under the Section 106 regulations, allow agencies to meet these Section 106 obligations using a process that is tailored to their mission and needs. Under 36 CFR § 800.14(e), an agency may request a "Program Comment" from the Council in lieu of case-by-case review. The benefit of a Program Comment is that it allows a Federal agency to comply with Section 106 in an efficient and targeted manner for a specific category of undertakings.

At the FCC's request, the Council issues the following Program Comment in accordance with 36 CFR § 800.14(e) in order to establish a tailored process for consideration, under Section 106, of the effects of wayside poles constructed by the Nation's freight and passenger railroads to deploy Positive Train Control (PTC) systems.¹ In lieu of the process set forth in subpart B of the Council's regulations, the FCC currently conducts Section 106 review of wireless tower and antenna undertakings in accordance with the Council's procedures, 36 C.F.R. Pt 800, as modified and supplemented by two Nationwide Programmatic Agreements (NPAs) negotiated and executed in accordance with 36 CFR § 800.14(b). These Nationwide Programmatic Agreements are codified in the FCC's rules at 47 CFR Pt 1, Apps. B (Nationwide Collocation Agreement) and C (FCC NPA).

This Program Comment provides an optional alternative process to certain procedures set forth in the Nationwide Programmatic Agreements for the category of undertakings covered herein. Applicants electing not to utilize the alternate procedures specified herein for undertakings covered by the Program Comment will be subject to the applicable procedures set forth in the Nationwide Programmatic Agreements. Applicants that elect to utilize this Program Comment must continue to follow the Council's procedures, as modified or supplemented by the NPAs, to the extent the Program Comment does not establish alternative procedures.

¹ In general terms, a wayside pole consists of a metal pole largely resembling a utility pole, with an associated equipment cabinet, used for mounting antennas along the way of the railroad track.

This Program Comment does not waive Section 106 compliance for any category of undertakings, nor does it waive requirements to consult with Federally recognized Tribal Nations under Section 101(d)(6) of the National Historic Preservation Act (NHPA) or any other source of law. The obligation to consult on a government-to-government basis with Tribal Nations pursuant to the Federal government's trust responsibility rests with the FCC as a Federal agency and cannot be delegated to any party. All communications from railroads to Tribal Nations authorized under this Program Comment shall be made in a manner that is respectful of Tribal sovereignty.

II. Background

PTC system implementation is a complex undertaking reaching almost every element of affected railroad operations. PTC systems generally use radio signals between trains and a land-based network to prevent certain railroad accidents. When installed, PTC systems will be capable of controlling or stopping a train when a train operator is unavailable or unresponsive and action is required to avoid a derailment, incursion into a work zone, certain train-to-train collisions, or movement through a switch left in the wrong position.²

In response to a 2008 railroad accident in Chatsworth, California that claimed 25 lives and caused over 100 injuries, Congress enacted the Rail Safety Improvement Act of 2008 (P.L. 110-432) (RSIA) that requires freight and passenger railroads to deploy interoperable PTC systems by December 31, 2015. More specifically, RSIA requires PTC system implementation on all Class 1 railroad lines that carry poison- or toxic-by-inhalation hazardous (PIH or TIH) materials and five million gross tons or more of annual traffic, and on any railroad's main line tracks over which intercity or commuter rail passenger train service is regularly provided. In addition, RSIA provides the Federal Railroad Administration (FRA) with the authority to require PTC system implementation on any other line.

According to FRA, railroads required to implement PTC must do so on over 60,000 of approximately 160,000 miles of track nationwide. In addition, FRA has reported that railroads must design, produce, and install more than 20 major PTC components, such as data radios for locomotive communication, locomotive management computers, and back office servers as part of the PTC implementation.

² Deborah Hersman, Chairman of the National Transportation Safety Board (NTSB), has stated that while railroad crashes occur for a variety of reasons, the "biggest safety challenge" is human error, and "although human error cannot be eradicated, PTC technology is capable of supplementing the human operation of trains." (Source: Testimony of the Honorable Deborah Hersman, NTSB Chairman, before the Senate Commerce Committee, June 19, 2013). In fact, the NTSB estimates that each of the 16 railroad crashes it has investigated since 2005 could have been "prevented or mitigated" with PTC systems.

FRA promulgated regulations to implement the requirements of RSIA. The regulations do not require the railroads to use a specific technology or install a specific type of infrastructure as long as the system is designed to meet certain performance objectives.

The components necessary to implement PTC systems include more than 20,000 poles, known as “wayside poles,” to support fixed wireless antennas within the existing railroad right-of-way alongside existing tracks nationwide. While more than 10,000 of these poles have already been installed, up to 20,000 more remain to be placed. Although the precise system architecture varies somewhat depending on topography, the railroad’s existing communications systems, and other factors, most of the major railroads intend generally to install wayside poles approximately one to three miles apart along their tracks and at certain switch points and other operational sites. Nearly all of the wayside poles are between 25 and 65 feet in height, including the antenna, although in some instances the antenna may bring the total height to slightly more than 65 feet. Five of the seven Class 1 freight railroads are typically installing poles with foundations that vary from 5 to 10 feet or in some instances up to 15 feet in depth, depending on site conditions, and from 12 to 18 inches in diameter. These railroads generally install the foundations either by screwing the shaft directly into the ground or by auger drilling a hole up to 20 inches in diameter. However, some of these railroads have stated that they can use hand excavation methods where necessary in order to assist in ascertaining the presence of archeological resources. The other two Class 1 freight railroads are using precast foundations up to 30 inches square and up to 5.75 feet in depth. These foundations are generally installed using a backhoe to dig a hole up to 4 by 6 feet in surface area and up to 6 feet deep. At many sites, installation will also require using fill rock or dirt, either taken from the excavation hole or trucked in from elsewhere, in order to build up the area immediately adjacent to the track bed.

In addition to wayside poles, the railroads will need to install an estimated 3,000 to 4,000 additional antennas to serve as base stations. These base stations will in most instances be located farther away from the track and at greater heights above ground level, often 100 to 150 feet. While some of the base station antennas will require new tower construction, the railroads have predicted that the majority will be collocated on existing structures. Except in the limited instances where they fall within the criteria set forth in Section III of this Program Comment, the Program Comment does not apply to Section 106 review of base station construction, and such construction will continue to be reviewed under the Nationwide Collocation Agreement and the FCC NPA.

The FCC has determined that the construction of PTC transmission facilities and their supporting structures is a Federal undertaking under Section 106. These facilities transmit signals using radio spectrum that has been licensed (or in limited instances will be licensed) to the railroads or their affiliates by the FCC. Pursuant to sections 1.1307 and 1.1312 of the FCC’s rules, 47 CFR §§ 1.1307, 1.1312, the railroads are required to ascertain prior to construction the environmental impacts of facilities constructed

to transmit signals under these licenses, including Section 106 review under the relevant procedures set forth by the Council and the FCC.

According to the FRA, “PTC implementation, on the scale required by the RSIA, has never been attempted anywhere in the world.”³ The NTSB included PTC systems on its “Most Wanted list” every year from the list’s inception in 1990 until the enactment of RSIA in 2008, and has added it again in 2014.⁴ The NTSB remains concerned that more fatalities, injuries, and community evacuations due to hazardous materials releases are likely until PTC systems are implemented.⁵ An August 2013 report issued by the Government Accountability Office (GAO) concluded that there are significant obstacles to PTC deployment and there is significant risk that PTC will not be installed by the statutory deadline.⁶

In light of the public safety objectives of RSIA, and in recognition of the unique challenges posed by the rapid deployment of PTC technology on a national scale, the FCC has requested that the Council endorse special procedures that are tailored to PTC wayside poles. Accordingly, this Program Comment is intended to create an efficient, practical, and timely review process that ensures full consideration of the effects of PTC wayside poles on historic properties, including sites of religious and cultural significance to Tribal Nations, in a manner that allows the railroads to complete construction by the Congressional deadline.

In developing the Program Comment, the FCC consulted with the Council, State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs) and other Tribal cultural preservation officials, and representatives of federally recognized Tribal Nations. This consultation included government-to-government consultation with Tribal Nations in accordance with 36 CFR §§ 800.14(a)(1) and 800.14(f). The FCC also solicited public participation in accordance with 36 CFR §§ 800.14(a)(1) and 800.14(e)(2).⁷ Because PTC is not required to be deployed in Hawaii, no consultation with Native Hawaiian organizations was necessary. The FCC’s efforts included, among other things, solicitation of

³ “Positive Train Control Implementation Status, Issues, and Impacts,” Federal Railroad Administration Report to Congress, at 2 (Aug. 2012), www.fra.dot.gov/Elib/Document/2318.

⁴ Letter from Deborah A. P. Hersman, Chairman, National Transportation Safety Board, to Tom Wheeler, Chairman, Federal Communications Commission, WT Docket No. 13-240, at 2 (Nov. 19, 2013). *See* <http://www.nts.gov/safety/mwl.html>.

⁵ *Id.*

⁶ *See* “Positive Train Control: Additional Authorities Could Benefit Implementation,” GAO-13-720 (Aug. 16, 2013), <http://www.gao.gov/products/GAO-13-720>.

⁷ *See, e.g.*, <https://www.fcc.gov/document/input-sought-program-comment-positive-train-control-infrastructure>, <http://www.fcc.gov/document/erratum-input-sought-program-comment-positive-train-control>, and <https://www.fcc.gov/document/ptc-program-comments>.

comments on a Section 106 scoping document that was published in the *Federal Register*⁸ as well as sent specifically to leaders and cultural preservation officials of Tribal Nations, SHPOs, and other stakeholders; face-to-face meetings and teleconferences with THPOs and other Tribal preservation officials in various parts of the Nation, including both consultation meetings and demonstrations by the railroads; teleconferences with the SHPOs; and solicitation of Tribal, Federal agency, and other stakeholder views on a draft Program Comment. The FCC has documented in detail for the Council its consultation and public participation efforts as well as its consideration and disposition of views that it received during these processes. In addition, written comments are available for viewing through the FCC's Electronic Comment Filing System in Docket No. 13-240.⁹

III. Applicability

This Program Comment applies to wayside infrastructure that will be constructed within existing railroad rights-of-way for use in the implementation and operation of PTC systems. Infrastructure eligible for the procedures of the Program Comment may support either wayside antennas or base stations, but must not be taller than 75 feet (including antenna) or be situated outside the railroad right-of-way.

Qualifying wayside poles that require a foundation hole no greater than 20 inches in diameter (or 24 inches in the case of manual excavation) and no deeper than 15 feet may benefit from all the provisions of this Program Comment. Wayside poles installed with precast foundations may also be reviewed under this Program Comment, subject to certain modifications discussed below, provided the foundation hole is no greater than 30 square feet in surface area and 6 feet in depth. Any use of fill dirt shall be in accordance with historic preservation best practices.

In all other cases, including collocations, Section 106 review will be conducted under the existing FCC regulations and procedures.

This Program Comment may be adopted by any Federal agency, with notice to the Council and the FCC, to satisfy its obligations under Section 106 with respect to PTC installations within the scope of this Program Comment. Unless adopted by the landholding agency, this Program Comment is inapplicable to PTC installations located on Federal land where the landholding agency has retained relevant legal authority over the railroad's right of use.

This Program Comment does not apply on "tribal lands," as defined under 36 CFR § 800.16(x) to apply to "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities," unless a Tribal Nation elects to adopt its provisions and in so doing follows the process set

⁸ 78 FR 65308 (Oct. 31, 2013) available at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-31/pdf/2013-26000.pdf>.

⁹ <http://apps.fcc.gov/ecfs/>.

forth in Section I.D of the FCC NPA. In the absence of such election, the procedures set forth in the Council's rules shall apply on Tribal lands.

IV. Exclusions

The exclusions in the NPAs continue to apply to PTC infrastructure that falls within the terms of those exclusions. Consistent with Sections III.F and VI.B of the FCC NPA, a SHPO may designate as excluded from review wayside poles within any geographic area where the SHPO determines that wayside poles have limited potential for direct or visual effects on historic properties. Tribal Nations are also encouraged to consider excluding wayside pole construction in designated geographic areas from their review. If a Tribal Nation does so, it should indicate the exclusion in an automated response in the FCC's Tower Construction Notification System (TCNS). Both SHPOs and Tribal Nations should notify the FCC of any excluded areas. Designation of excluded areas may promote efficiency by avoiding the need for individual submissions and reviews. In addition, the following exclusions are appropriate for PTC wayside poles beyond those specified in the NPAs.

1. *Exclusion for Certain Structures Within Existing Railroad Rights-of-Way.* Section III.E of the FCC NPA excludes from Section 106 SHPO review, subject to certain conditions, facilities to be constructed in or within 50 feet of a right-of-way designated for the location of communications towers or above-ground utility transmission or distribution lines and in active use for such purposes. Although not typically designated as communications or utility rights-of-way, railroad rights-of-way are functionally equivalent to communications or utility rights-of-way, and sometimes contain existing structures similar to utility or communications poles. Accordingly, in light of the exigent circumstances presented by the statutorily mandated PTC deployment, PTC wayside structures that are installed within existing railroad rights-of-way and are similar to structures that already exist in the same vicinity within the right-of-way can be conditionally excluded from Section 106 SHPO review. The PTC wayside structures subject to this exclusion are those that would not constitute a substantial increase in size (as defined under elements 1-3 of the definition in the Nationwide Collocation Agreement, including no more than the standard number of one new equipment cabinet per wayside pole) over existing poles or similar structures (used for whatever purpose) located in the railroad right-of-way within the vicinity, provided they will not be located within the boundaries of a historic property as identified by the applicant in preparing the submission packet for Tribal Nations described in the Appendix. Thus, a SHPO will review structures that are otherwise eligible for this exclusion only when the applicant identifies a known historic property that encompasses the proposed location. Similar to the existing exclusion for communications and utility rights-of-way, covered facilities remain subject to the process for participation of Tribal Nations described herein, which is based on Section IV of the FCC NPA.
2. *Exclusion for Certain Structures in Railroad Yards.* Section III.D of the FCC NPA excludes from Section 106 SHPO review facilities that are "less than 200 feet in overall height above ground level in an existing industrial park, commercial strip mall, or shopping center that occupies a total land area of 100,000 square feet or more, provided that the industrial park, strip mall, or shopping center is not located within the boundaries of or within 500 feet of a Historic

Property, as identified by the Applicant after a preliminary search of relevant records.” Railroad yards, which are defined areas used by the railroads for train formation, storage, and related purposes, are developed to a similar extent as industrial parks, strip malls, and shopping centers, and new communications facilities within railroad yards have a similarly limited potential to affect historic properties. Accordingly, this Program Comment excludes PTC wayside structures located within the outer boundaries of a system of yard track occupying 100,000 square feet or more, as defined under FRA rules,¹⁰ from Section 106 SHPO review, subject to the same conditions applicable to industrial parks, strip malls, and shopping centers under Section III.D of the FCC NPA. Thus, a SHPO will review structures that are otherwise eligible for this exclusion only when the applicant, in the course of preparing the submission packet for Tribal Nations described in the Appendix, identifies a known historic property within 500 feet of the yard. As is the case for industrial parks, strip malls, and shopping centers, covered facilities remain subject to the process for participation of Tribal Nations described herein, which is based on Section IV of the FCC NPA.

3. *Exclusion from Review for Effects on Railroad Track and Track Beds.* The FCC and its applicants may exclude from Section 106 review the effects of PTC facilities covered by this Program Comment on the rails or the track bed themselves. The track bed consists of the ballast that supports the tracks as well as minor culverts and drainage devices. It does not include the soil beneath the ballast or any archeological resources within the ballast. As so defined, wayside poles covered by this Program Comment are unlikely to have significant or adverse effects upon nearby track and track beds. The FCC and its applicants must consider the effects of proposed PTC wayside facilities upon any railroad-related property types other than the rails and the track bed within the APE that are individually listed or have been determined eligible for listing on the National Register of Historic Places (National Register) under Section IV.D.1.a of the FCC NPA or that have been identified as contributing elements to a historic district, as well as any other historic properties, including properties of traditional cultural and religious significance to Tribal Nations and archeological resources within or underneath the track bed, within the APE.

¹⁰ Yard track is defined under 49 CFR § 245.5(o) as “a system of tracks within defined limits used for the making up or breaking up of trains, for the storing of cars, and for other related purposes, over which movements not authorized by timetable, or by train order may be made subject to prescribed signals, rules or other special instructions.” Although the FRA definition of yard track excludes sidings and main line track passing through the yard, the exclusion in this Program Comment applies to all locations within the yard limits.

V. Enhanced Submission Process

Because of the large number of wayside poles that must be installed before the December 31, 2015, RSIA statutory deadline, the following efficiencies will assist the SHPOs, Tribal Nations, and other stakeholders as they work with the FCC to complete quickly the Section 106 process.

1. *TCNS and E106.* The FCC uses two electronic systems to communicate with Tribal Nations and with SHPOs. TCNS and the E106 System were developed as single-project data systems. TCNS is used to notify Tribal Nations of proposed projects and E106 is used to transmit documentation to the SHPOs and other consulting parties that register with the E106 system.

TCNS uses geographic areas of interest provided by each Tribal Nation, typically by county, to notify the appropriate Tribal Nations of proposed tower projects. After an applicant submits the location and other characteristics of a proposed antenna structure into TCNS, TCNS generates a letter to Tribal Nations that have indicated an interest in the location where the antenna structure would be located. TCNS also informs the applicant as to which Tribal Nations have received this letter. The Tribal Nations may then use TCNS to respond regarding their interest in a site. TCNS is a secure system that protects the confidentiality of both applicants' and Tribal Nations' information from third parties.

Unless another method of communication and information sharing is agreed to by a Tribal Nation or Nations, with notice to the FCC as described in Section V.9 of this Program Comment, railroads shall use TCNS for their proposed wayside poles in order to utilize the alternative Section 106 procedures specified in this Program Comment. If a Tribal Nation and a railroad have agreed to an alternative communication and information sharing process, the railroad shall inform the FCC of such agreement and keep FCC staff apprised of ongoing communications with all Tribal Nations through such an alternative arrangement.

To achieve efficiencies in SHPO review and to facilitate FCC participation in the review process where necessary, the railroads shall also use E106 for all facilities subject to this Program Comment, except for proposed facilities that are exempt from SHPO review under either the FCC NPA or Section IV of this Program Comment. In the event a SHPO does not accept submissions through E106, the railroad shall submit FCC Form 620 or 621 by the means the SHPO prefers in addition to entering the information into E106. Use of E106 does not relieve an applicant of its obligation to provide notices and other documentation to consulting parties that are not registered with the E106 system under Section V.G of the FCC NPA, nor of its obligation to provide notice to local governments, the public, and any other groups the SHPO may designate under Sections V.A, V.B, and V.D of the FCC NPA.

2. *Batching of Submissions.* To reduce repetitive submissions and paperwork for all parties, the FCC has determined that it may be efficient for applicants using this Program Comment to batch information on PTC wayside infrastructure into single TCNS and E106 submissions for multiple installations within the same county. The FCC, in consultation and coordination with all parties,

will balance these efficiencies against any difficulties in tracking and responding separately for multiple installations within a single submission. The FCC has discretion to permit or require batching as it may determine to be appropriate in the light of experience, and it shall provide all parties to the Section 106 process with guidance as to what batching is required or permitted. This may include guidance as to the maximum number of proposed poles an individual railroad should submit within a given period of time. Poles installed in a deep hole up to 20 (or 24) inches in diameter shall not be included in the same batch with poles installed on a precast foundation in a hole covering greater surface area. Any batching of submissions is for administrative convenience and is not intended to affect the level of review.

In the event Section 106 review is completed for some but not all wayside poles within a batched submission, the wayside poles for which review has been completed may be constructed without awaiting completion of the Section 106 review process for the remaining wayside poles, provided the applicant has satisfied all other FCC regulatory requirements.

3. *Initial Submission.* Ordinarily, applicants are not required to provide reports or maps as part of their TCNS submissions. Nevertheless, Tribal Nations often request a cultural resource report upon receipt of an application via TCNS. To avoid delay in achieving the statutorily mandated public safety benefits of PTC, and in recognition that the large number of PTC wayside poles will impose unusual strains on Tribal Nations in reviewing proposed constructions, applicants using this Program Comment must submit a cultural resources report covering the batched submission or county, prepared by a professional who meets the relevant standards in *The Secretary of the Interior's Professional Qualifications Standards*. If a Tribal Nation contributes professional expertise or written materials to the cultural resources report, that professional support should be provided by someone approved by the Tribal Nation's historic preservation or cultural resource office. The contents of this report are identified in the Appendix to this Program Comment. Except where all poles in an application are exempt from SHPO review, applicants shall also provide this report to the SHPO as part of their E106 submissions.

Maps are an important part of the Section 106 process as they enable the reviewer to locate the proposed undertaking in the context of its landscape and proximity to any historic property within the APE that may be affected. Although U.S. Geological Survey maps are sufficient for many individual tower projects, in the context of a batched submission, effective, expeditious review will typically require a more interactive view of the overall railroad right-of-way covered as well as the individual installations. Accordingly, batched submissions under this Program Comment shall include a Google Earth overlay map as specified in the Appendix.

Batched submissions in E106 shall include the information required on FCC Form 620 or 621, which is substantially similar to the information specified in the Appendix, for each pole that is included in the batch. This information may be presented in a summary manner if it is the same for multiple poles. A batched E106 submission shall also include a Google Earth overlay map as specified in the Appendix.

Requests for additional information by SHPOs and Tribal Nations are addressed in Section V.6.

4. *Area of Potential Effects (APE). Visual Effects.* Given that all structures subject to this Program Comment will be 75 feet or less in height and narrow in profile, the ½-mile presumed APE for visual effects specified in the FCC NPA for towers less than 200 feet is reduced to ¼ mile for installations covered by this Program Comment. While we recommend that the APE be measured in a linear manner along the entire segment of track in order to avoid delay should relocation need to be explored, railroads may elect to measure the APE using a radius from each point. If a linear APE is used, it should extend ¼ mile from each edge of the right-of-way to ensure that it encompasses a ¼-mile radius from every pole site.

An alternative APE may be established where appropriate in accordance with the procedures specified in Section VI.C.5-6 of the FCC NPA. For example, a SHPO may propose a larger APE in rural or pristine settings.

Direct Effects. Consistent with Section VI.C.2 of the FCC NPA, the APE for direct effects is limited to the area of ground disturbance and any property, or portion thereof, that will be physically altered or destroyed by the PTC facility.

5. *Compensation for Professional Services.* The Council has stated that a Tribal cultural resource office is justified in requesting payment for its services when an agency or applicant “essentially asks the tribe to fulfill the role of a consultant or contractor” by providing “specific information and documentation regarding the location, nature, and condition of individual sites” or by conducting a survey, in order “to identify historic properties that may be significant to an Indian tribe.” Memorandum from John M. Fowler, Executive Director, ACHP (July 6, 2001).

Consistent with this directive, Tribal Nations may seek recovery of expenses necessary to complete their review of PTC facility locations. Given the extraordinary burden that reviewing PTC facilities in an expedited fashion in addition to their other ongoing work may impose on Tribal cultural resource staff, such expenses may include those necessary to retain additional human resources in order to process the railroads’ submissions. Activities necessary to identify historic properties significant to a Tribal Nation, for which a Tribal Nation may reasonably expect compensation, may also include a qualified Tribal representative’s presence during field survey work or to monitor construction, as described in Sections V.7 and V.8.

The FCC encourages Tribal cultural resource offices to set their compensation according to a uniform schedule available to the railroads at levels commensurate with their expenses and efforts incurred in connection with the projects subject to this Program Comment. Tribal cultural resource offices and applicants may also enter into arrangements to establish the appropriate fees. Such schedules and arrangements should be provided to the FCC as early as practicable.

6. *Requests for Additional Information.* Given the requirement to include a cultural resource report and maps within the TCNS and E106 submissions, it is anticipated that additional information

will rarely be necessary for review. Accordingly, and consistent with Section IV.F.3 of the FCC NPA, a SHPO or Tribal Nation shall explain with specificity why further review of a particular pole or additional information is necessary for it to evaluate whether historic properties may be adversely affected. Thus, a request for additional information that a Tribal Nation routinely makes for all communications structures through an automated response in TCNS is not valid for facilities subject to this Program Comment unless it is specifically reiterated by the Tribal Nation for one or more poles within a submission, either during the railroad's required follow up contact or through a separate communication. If the SHPO or Tribal Nation requests further review or additional information for more than one pole, the SHPO or Tribal Nation shall provide such explanation for each pole. The SHPO or Tribal Nation shall also address whether monitoring of construction may obviate the need for additional information.

Consistent with Section 304 of the NHPA and Section 800.11(c) of the Council's rules, the FCC shall not reveal information that may cause a significant invasion of privacy, risk harm to a historic resource, or impede the use of a traditional religious site by practitioners. Accordingly, where appropriate, a SHPO or Tribal Nation may provide evidence or arguments pertinent to its request for further information in confidence to the FCC.

Field Surveys. Where necessary to evaluate whether historic properties within the APE may be adversely affected, a SHPO or Tribal Nation may request an archeological field survey and/or an ethnographic study. A request for an archeological field survey should be supported by reasons to believe archeological historic properties may be present within the APE. Any field survey shall be performed by an individual with appropriate professional qualifications under *The Secretary of the Interior's Professional Qualifications Standards* or by an expert in traditional cultural and religious resources approved by a Tribal Nation's historic preservation or cultural resource office. A SHPO or Tribal Nation may request that a qualified representative who has completed federally mandated rail safety training be present during field survey work, and the railroad shall accommodate such requests consistent with rail safety. The FCC will work with the Tribal Nations and the railroads to facilitate voluntary arrangements under which Tribal Nations with similar interests and history may designate a single representative for this purpose, with the goal of minimizing to the greatest extent possible the number of observers at any site in the interest of rail safety. If a SHPO or Tribal representative is unable to appear at the agreed time for field survey work, the railroad is not expected to reschedule the work.

Wayside poles installed in a foundation hole up to 30 square feet in surface area may have a greater potential to affect archeological resources than those installed in narrower but deeper foundation holes, especially where a backhoe is used. Therefore, railroads using this installation method should consider performing an archeological survey and including its results in their initial submissions.

Ethnographic Studies. Some Tribal Nations request ethnographic studies when they review proposed communications structures. An ethnographic study is a literature search that provides information on the migration or other movement patterns of Tribal Nations and their use of their

ancestral territory. Tribal Nations should request additional ethnographic information only where necessary to evaluate whether historic properties of traditional cultural or religious significance may be adversely affected, and only for those areas or locations for which they lack such information.

Standards and procedures for the FCC to resolve disputes regarding requests for additional information are set forth in Section V.8.

7. *Excavation Methods and Construction Monitoring.* Where a SHPO or Tribal Nation has demonstrated a high probability that archeological historic properties may be present within the APE, an alternative method of excavation and/or monitoring of construction may be appropriate to ensure against adverse effects to such historic properties. Such alternatives may be agreed to either as an alternative to a field survey or where the results of a field survey indicate that such measures are necessary.

The most common methods of installing deep foundations for PTC wayside poles use a helical screw or an auger drill. Where a helical screw is used, the soil is compacted and no significant amount of material is removed from the hole. In the case of auger drilling, soil is removed from the hole during the boring process. Therefore, in the most sensitive locations, manual excavation may be necessary so that work may be promptly discontinued and effects addressed in the event archeological historic properties are discovered.

In cases where a precast foundation is placed in a hole up to 6 feet deep, the greatest potential to affect archeological resources may arise from use of a backhoe. Therefore, manual excavation may be an appropriate alternative in sensitive locations. All activities in connection with excavation or the construction of foundations shall be undertaken in a manner that is consistent with historic preservation best practices. Where a wayside installation requires buried cable or conduit to supply power, the potential for effects on archeological resources may be reduced by restricting excavation for the cable or conduit to a depth that is within the stone ballast.

Where necessary to evaluate whether historic properties may be adversely affected, SHPOs and Tribal Nations may also request the presence of a qualified representative who has received federally mandated rail safety training as a monitor during construction. Monitoring ordinarily will not be useful where a pole will be installed by helical screw due to the lack of removed soil to observe, but may be particularly appropriate in cases involving a pit excavation up to 30 square feet in surface area. Any monitor shall possess appropriate professional qualifications under *The Secretary of the Interior's Professional Qualifications Standards* or shall otherwise be approved by a Tribal Nation's historic preservation or cultural resource office. The FCC will work with the Tribal Nations and the railroads to facilitate voluntary arrangements under which Tribal Nations with similar interests and history may designate a single representative for this purpose, with the goal of minimizing to the greatest extent possible the number of observers at any site. The railroad shall provide the scheduled construction date to any agreed-upon monitor at least 15 days

in advance. If a SHPO or Tribal representative does not appear at the designated time for construction, the railroad is not expected to reschedule the work.

Standards and procedures for the FCC to resolve disputes regarding alternative excavation methods or construction monitoring are set forth in Section V.8.

Regardless of the method used to install a foundation, and regardless of the presence or absence of a monitor, if a previously unidentified resource that may be a historic property is discovered during construction, the railroad shall immediately cease construction and follow the procedures in Section X of the FCC NPA.

8. *Timeframes.* Given the unique public safety considerations and statutory deadline for PTC system implementation, this Program Comment modifies and adds definition to the FCC's usual timeframes for project review by Tribal Nations.

Specifically, after an applicant submits the required enhanced documentation through TCNS as described above, Tribal Nations will have a total of approximately 40 days, subject to the procedures specified below, in which to identify specific wayside poles within a batched submission that may merit further review or closer examination. A Tribal Nation may also notify the applicant and the FCC within this time period that it requires further information or materials to process the submission, again subject to the procedures specified in Section V.6. This expedited review is made possible by the enhanced TCNS submission package, which should reduce the need for Tribal Nations to request additional information, as well as by the expectation that applicants will compensate Tribal Nations for the cost of retaining qualified personnel to perform the reviews. In addition, the railroads' support for Tribal monitoring of construction may reduce or eliminate the need for detailed pre-construction review.

If a Tribal Nation does not respond to a TCNS submission covered by this Program Comment within 20 days, and if the applicant has attempted at least one follow-up contact in a manner respectful of Tribal sovereignty during this 20-day period, the applicant may ask the FCC to send a letter and/or e-mail to the Tribal Nation's designated cultural resources representative seeking a response. The FCC will send this letter or e-mail within five business days. If the Tribal Nation does not respond within 15 days of the FCC's letter and/or e-mail, which the FCC will supplement with an attempted telephone contact unless the Tribal Nation has requested not to be contacted by telephone, it will be deemed to have no interest in review of the proposed facility. This is substantially the same process that the FCC follows for other submissions in TCNS, except that the time periods are shortened. For those Tribal Nations that have notified the FCC that they may generally be considered uninterested in TCNS submissions if they do not respond within a specific time period of 30 days or less, without any need for follow-up contact, the usual process applicable to those Tribal Nations shall apply.

Where a Tribal Nation requests additional information or materials, including compensation for professional services, at any time during the response period, the applicant and the Tribal Nation

will attempt to resolve any disputes regarding the request within 15 days. If the matter is not resolved within 15 days, either party may bring the disagreement before the FCC, which will resolve the dispute in accordance within the timeframe described below. In resolving such a disagreement, the FCC shall consider the Tribal Nation's stated need for the information, as well as any reasons advanced by the applicant why further information may not be necessary. The FCC shall consult with the Tribal Nation as appropriate before rendering its decision. Unless expressly authorized by the FCC, the applicant shall not proceed without satisfying the Tribal Nation's request. If the Tribal Nation does not respond as to its interest within 20 days after receiving requested additional information or materials, the applicant may request that the FCC give the Tribal Nation a final opportunity of 15 days to express its interest. The applicant shall provide the FCC with a brief narrative of events and a copy of the materials it provided to the Tribal Nation. Except as described above, in no instance shall an applicant consider a Tribal Nation to have no interest in a proposed construction without either the Tribal Nation's agreement or express authorization from the FCC.

The FCC shall consider any request by a Tribal Nation for additional time to review an application in the context of the circumstances surrounding such a request

Where a disagreement arises regarding a Tribal Nation's request under Section V.5, V.6, or V.7 or any other matter relating to proposed wayside facilities subject to this Program Comment, and that disagreement cannot be resolved swiftly by the parties, the Tribal Nation and the railroad are encouraged promptly to bring the matter to the attention of the FCC. The FCC on a priority basis will initiate dialogue among the parties, and consultation with the Tribal Nation as appropriate, in order to resolve the concern. The FCC will resolve all such matters within 30 days of their being brought to its attention, unless the FCC determines that additional time is necessary. Extensions will not exceed 30 days, and multiple extensions will be issued only in extraordinary circumstances. The FCC has full discretion to intervene in Section 106 review at any point in the process and full authority to render decisions after appropriate consultation.

SHPO review periods and procedures continue to be governed by Section VII of the FCC NPA.

9. *Alternative Arrangements to the Program Comment.* Consistent with FCC NPA Section IV.K, all parties are encouraged to consider entering into arrangements or agreements governing their contacts, including review of proposed facilities, provided such arrangements or agreements are otherwise consistent with Federal law and no modification is made in the roles of other parties to the Section 106 process without the other parties' consent. Such arrangements or agreements do not bind any party that is not part of the agreement. These alternative arrangements may include but are not limited to alternative uses of TCNS that may not require the enhanced submission. Documentation of such alternative arrangements or agreements should be filed with the FCC's Federal Preservation Officer. In addition, this Program Comment shall not be construed to limit SHPOs' authority to adopt flexible procedures under any provision of the FCC NPA. Due to the limited potential for PTC wayside facilities to affect historic properties, such flexible procedures may be especially appropriate for their review.

10. *Other Federal Agency Involvement.* Contemporaneously with or before submitting FCC Form 620 or 621 to the SHPO, applicants shall invite comment from any Federal agency with jurisdiction over land or historic properties within the APE of any proposed PTC wayside structure within a submission. Federal agencies shall respond to such requests within 30 days or will be deemed to have no interest in participating in the Section 106 process. Applicants are not required to invite Federal agency comment on a proposed structure that is exempt from SHPO review.

Consistent with Section VII.D.3 of the FCC NPA, where a proposed structure would have an adverse effect on a National Historic Landmark, the FCC shall request the Council to participate in consultation and shall invite participation by the Secretary of the Interior.

VI. Addressing Adverse Effects to Historic Properties

The Section 106 process requires that effects to historic properties be considered before construction. The Section 106 process does not prevent projects from being completed simply because there will be adverse effects to historic properties. If an adverse effect to a historic property cannot be avoided, then measures must be taken to minimize or mitigate the adverse effect.

In general, the process for addressing adverse effects of construction covered under this Program Comment shall be governed by Section VII.D of the FCC NPA. The following paragraphs offer additional guidance specific to PTC wayside structures.

1. *Avoidance.* Whenever possible, the preferred method to avoid adverse effects is to move or alter the project. Given the functional requirements of PTC, wayside poles cannot be moved outside the railroad right-of-way. In some instances, it may be possible to move a pole location along the track a sufficient distance to avoid adverse effects. However, depending on a number of factors, including topography, distance from other wayside poles, and relation to switches or other railroad equipment, the flexibility for such relocation may be very limited.
2. *Minimization.* Minimization is the preferred method to address adverse effects when relocation or other avoidance measures are not possible. Although applicants rarely will be able to reduce the height of PTC structures, they may find it possible to minimize the effects of ground disturbance in certain circumstances, for example by hand excavation of the site.
3. *Mitigation.* Mitigation measures are steps or actions that are taken to mitigate or lessen the adverse effects of an undertaking on historic properties. The mitigation measure must be related to the historic property that is affected. To the extent an adverse effect extends across multiple PTC sites, a single mitigation plan covering all of these sites may often be efficient. Among mitigation measures adopted in the past for other FCC undertakings have been cultural resource reports, nominations to the National Register of Historic Places, brochures, signage, and training programs and public presentations. For historic properties with an

archeological component, mitigation typically involves data recovery measures. The FCC will develop a template for Memoranda of Agreement to memorialize mitigation measures for PTC wayside poles, which it will make readily available to the railroads and other stakeholders. The FCC will work proactively with the parties to develop appropriate mitigation measures for specific undertakings.

VII. Previously Constructed Facilities

The railroads have acknowledged that prior to contacting the FCC about their PTC infrastructure buildout, they constructed many PTC facilities without completing Section 106 review. Section 106 review clearly should have been completed prior to construction, and it is important to the integrity of the Section 106 process that the effects of this construction be considered and addressed. Accordingly, the FCC will expeditiously establish a process for addressing PTC facilities that were constructed without Section 106 review, which will take into account Section 110(k) of the National Historic Preservation Act. Such process shall be consistent with Section X of the FCC NPA. In order to benefit from the efficiencies in this Program Comment for proposed PTC facilities, each railroad must provide complete responses to all information requests from the FCC regarding PTC facilities constructed without completing Section 106 review within the timeframes established by the FCC. The process for addressing constructed PTC facilities will include appropriate mitigation by the railroads for the effects of premature construction, supported by all necessary financial commitments, and may include programmatic mitigation. In developing and implementing a mitigation process, the FCC shall involve the SHPOs, Tribal Nations, railroads, the preservation community, and the Council.

Appendix
Material to Include in Submissions to Tribal Nations and SHPOs

- U.S. Geological Survey maps showing proposed wayside pole locations, as well as a Google Earth overlay with associated information regarding the height and foundation depth of each pole. The maps should show sufficient detail to provide the location of individual wayside poles as well as the spatial relationship among the wayside poles.
- Method of installation. If the method of installation will not be the same for every pole within a submission, the filing should distinguish which poles will use which method.
- A description of any other ground disturbance that may be associated with the installations, such as for equipment staging or the provision of power.
- Contact information for a responsible official at the railroad as well as a cultural resources professional.
- A cultural resources report that includes:
 - Information on Federal lands and Federally recognized Tribal lands along or under tracks;
 - Ownership of tracks on or near Federal lands, including direct ownership or lease arrangements;
 - Location and details on all listed or determined-eligible historic properties within the APE, as well as any historic properties and Tribal religious and cultural sites that have been identified by Tribal Nations;
 - Discussion of the known potential for below-ground cultural resources and historic properties, including background information on any predictive model used for analysis;
 - Results of any archeological or historical fieldwork undertaken;
 - A qualified professional's assessment of effects on historic properties and Tribal religious and cultural resources;
 - Photographs of historic properties within the APE and photographs looking at the proposed pole site from each historic property, as would be included in the FCC Form 620 or Form 621, when historic properties are present within the APE; and
 - Resumes of professional staff responsible for preparing the report sufficient to demonstrate that the report's authors and senior staff meet the relevant standards in *The Secretary of Interior's Professional Qualifications Standards*, or have been approved by a Tribal Nation's historic preservation or cultural resource office, for their respective areas of responsibility.