

PROGRAM COMMENT FOR PLANNED CONSTRUCTION OF POSITIVE TRAIN
CONTROL FACILITIES WITHIN THE RAILROAD BED

SECTION 106 SCOPING DOCUMENT
FOR
CONSULTATION WITH TRIBAL NATIONS

SEPTEMBER 27, 2013

The Federal Communications Commission (FCC) invites the consultation and input of federally recognized Tribal Nations, their Tribal Historic Preservation Officers (THPOs), and other Tribal cultural preservation officials in developing a proposed Program Comment, pursuant to Section 800.14(e) of the rules of the Advisory Council on Historic Preservation (ACHP), 36 C.F.R. Part 800, to facilitate the review process under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, for the infrastructure required for Positive Train Control (PTC). The FCC is the lead, or action, federal agency, because the construction of PTC facilities requires the use of radio spectrum that is licensed by the FCC. Our process for developing the Program Comment includes government-to-government consultation with federally recognized Indian Tribes in accordance with Sections 800.14(e)(4) and 800.14(f) of the ACHP rules and in accordance with the trust relationship we share with sovereign Tribal Nations as outlined in the FCC's *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* (16 FCC Rcd 4078, 4081 (2000)).

The purpose of this scoping document is to specifically inform and engage Tribal Nations in this important process. With the release of this document the FCC wishes to begin a more formalized consultation process upon the development of the proposed Program Comment. The FCC will also release a document substantively identical to this document inviting the participation of State Historic Preservation Officers (SHPOs) and other stakeholders, including the railroad companies, in the proposed Program Comment process. This document provides a statement of purpose, background on PTC, an overview of PTC infrastructure, an explanation of compliance with Section 106 for PTC infrastructure, a discussion of ideas for the proposed Program Comment, a description of next steps, and FCC contact information.

I. Purpose

PTC will enable the railroads to improve the safety of freight and passenger train operations by preventing derailments, incursions into work zones, and collisions. The FCC's goal, through Tribal consultation and engagement with the ACHP, SHPOs and stakeholders, is 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.

Congress mandated that the railroads complete PTC deployment by December 31, 2015. To meet this statutory mandate, the railroads are preparing to install more than 20,000 wayside poles nationwide within the existing railroad bed alongside existing tracks. The

freight railroads intend to install wayside poles approximately one to two miles apart along their tracks and at certain switch points and other operational sites. Nearly all of the wayside poles are expected to be between 25 and 65 feet in height, including the antenna. The depth of the poles' foundations will vary from 5 to 10 feet or in some instances up to 15 feet, depending on site conditions. The foundation holes will be created by drilling and will vary from 12 to 15 inches in diameter.

Until recently, the FCC understood that most of the wayside PTC antennas would be installed on existing infrastructure. By May 2013, however, it became clear that most of the wayside facilities, with some exceptions mainly in urban areas, would require new poles. Due to the impending statutory deadline, the railroads have stated that they must begin general deployment of these facilities by early 2014. Accordingly, the FCC seeks the cooperation of all interested parties to develop a Program Comment on an expedited basis. Our goal is to deliver a draft Program Comment to the ACHP for approval in accordance with its procedures by mid-December 2013.

Some of the railroads have also requested to begin deployment of PTC poles along specific segments of track during 2013, prior to development of a draft Program Comment. The FCC believes that by conducting early, focused reviews in limited geographic areas, we can gain valuable experience that will provide useful information for the proposed Program Comment. These early reviews will also help illuminate the extent to which PTC installations have the potential to cause adverse effects. As a central feature of these early reviews, we have scheduled consultative meetings with Tribal Nations that have an interest in the relevant geographic areas in Tulsa, Oklahoma, on October 9-10, 2013, and in Rapid City, South Dakota, on November 5-6, 2013. These meetings will enable the FCC and Tribal Nations to share and hear each others' perspectives while working through the issues together in an actual, real world context. In addition to working sessions in which the railroads are expected to participate, these meetings will include government-to-government consultation sessions directly between the FCC and Tribal Nations. The FCC will also schedule appropriate opportunities for SHPOs and other interested parties to participate in the demonstration reviews. We anticipate this process will inform all stakeholders of the important issues involved in the critically important aspects of deploying of PTC, complying with the Section 106 process, and promulgating the proposed Program Comment.

II. Background

PTC is mandated by the Rail Safety Improvement Act of 2008, P.L. 110-432, which requires all of the major freight and passenger railroads to deploy PTC systems along most segments of their track by December 31, 2015. Congress enacted the PTC requirement following an accident in Chatsworth, California that resulted in 25 deaths and injuries to more than 135 passengers. Utilizing radio signals between the locomotive and a land-based network, PTC is capable of remotely controlling or stopping a train that is traveling at an unsafe speed or is approaching danger. PTC will thus safeguard human life and property by preventing injuries, hazardous material spills, and property damage caused by preventable train collisions and over-speed derailments.

PTC involves the construction of facilities in order to use radio spectrum that is licensed by the FCC. Therefore, the FCC considers the installation of PTC infrastructure to be an FCC undertaking under the NHPA. As such, the FCC is required to take into account the potential impacts of PTC facilities on historic properties. To meet that obligation, we are developing this Program Comment pursuant to ACHP procedures.

III. PTC Infrastructure

In many respects, the wayside poles are similar in height, diameter, and depth of foundation to utility poles used to support electric, telephone, and broadband cables. In general, the wayside structures will be specialized metal poles affixed to a concrete or metal foundation at ground level. Many of the wayside poles contain a pivot point that will permit small crews to swing the pole down for maintenance and repairs, thus avoiding the need for crews to climb the poles. At some installations, the communications gear will be affixed to the pole and a small platform will be placed at the base for staging. In other cases, this equipment will be placed in a new or existing small shelter which will be connected to the pole using power and fiber cable connections buried in a shallow trench. The railroads intend to use existing equipment shelters where possible to reduce the fiscal and environmental impacts of PTC.

The wayside poles will be installed in holes typically 5 to 10 feet in depth, although they may be up to 15 feet deep in certain limited situations. The depth of foundation for each pole will depend on the pole's height, soil conditions, and local safety regulations. The holes will be bored by a mechanical arm extending from equipment traveling on the railroad or an existing access road. Many of the foundations will be installed using a helical method through which the pole is screwed directly into the ground with minimal excavation of soil. In other cases, the hole may be excavated using an auger method before the foundation is inserted. Installation will require no ground disturbance other than the foundation hole, a concrete pad for the equipment shelter (where needed) or staging platform, and a shallow trench to connect the wayside pole to an equipment shelter or other wayside facility. Virtually all of the poles will be placed in the ballasted roadbed of the railway on ground that has been disturbed by railroad construction and ongoing maintenance. However, in some cases, the depth of the foundation hole may exceed the depth of the previous disturbance.

The railroads have already determined proposed sites for most of their PTC facilities based on the technical requirements of PTC. Due to the system's technical requirements, the railroads state, there is typically little flexibility in these locations. The railroads have told the FCC that there might be opportunities to move some of the wayside poles over short distances. However, those determinations will have to be site-specific based on the technical requirements for the entire system.

In addition to the wayside poles, the railroads will need to install between 3,000 and 4,000 antennas, typically at heights of 100 to 150 feet, to serve as base stations. These base stations will typically be located farther away from the track. While some of the base station antennas will require new tower construction, the railroads have projected that the majority will be collocated on existing structures. The FCC intends that Section 106 review of the new base station structures, as well as collocations to the extent

required will be conducted under existing FCC regulations and procedures. Thus, we do not intend for the proposed Program Comment to cover these base station facilities.

IV. Compliance with Section 106 for PTC Infrastructure

The FCC is committed to protecting historic properties under the NHPA, including properties that have religious and cultural significance for Tribal Nations. The FCC has an efficient and successful Section 106 review process. The FCC's rules require that applicants follow the ACHP's Section 106 regulations, as modified by two Nationwide Programmatic Agreements executed by the Commission with the ACHP and National Conference of State Historic Preservation Officers (47 C.F.R. Pt. 1, Apps. B and C), to ascertain whether proposed facilities may affect historic properties. Among other things, the FCC maintains an electronic system, the Tower Construction Notification System (TCNS) to ensure that federally recognized Indian Tribes receive timely notice of projects proposed in their geographic areas of concern and to engage them in the review. The FCC also maintains a companion system, E106, which may be used to transmit the required documentation to the SHPOs and other interested parties.

The mandated completion date for PTC and the volume of wayside poles required present challenges to all of those involved in the FCC's existing Section 106 process. In each of the past few years, the FCC and its preservation partners have completed the Section 106 process for between 10,000 and 12,000 projects. PTC will approximately double that number over each of the next two years, thereby straining the resources of all participants in the process. Moreover, due to the location and physical characteristics of the facilities, the potential for PTC wayside poles to cause adverse effects to historic properties is not likely to be the same as for typical communications towers. In recognition of these facts, the ACHP has recommended that the FCC work with the ACHP and its preservation partners to develop efficiencies that are tailored to the review of PTC wayside facilities, to be memorialized in a Program Comment.

A Program Comment, once adopted by the ACHP, would identify alternative Section 106 procedures for an applicant to follow in order to ascertain, as required by section 1.1307(a)(4) of the FCC's rules, whether proposed PTC wayside facilities 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 review. The Program Comment would not override the FCC's general obligation to consult with federally recognized Tribal Nations under the Section 106 process, absent the Tribe's consent that consultation is unneeded.

V. Program Comment

The FCC has identified several areas in which a Program Comment might appropriately tailor the Section 106 process to the review of PTC wayside facilities. Please note that the ideas set forth below are intended to scope issues at a pre-decisional and early point in the process to facilitate productive consultative dialogue, and do not represent decisions that the FCC has already made.

Submission Process. Both TCNS and E106 are designed to accept proposed constructions on a site-by-site basis. In recognition of the large number of wayside facilities and the linear nature of PTC deployment, the FCC is developing a process for each railroad to submit multiple adjacent sites through these systems in a single filing. This batching process is intended only to improve processing efficiency, not to affect substantively the Section 106 review of proposed sites submitted in a single filing. For TCNS, the sites will likely be batched by county to match the way that Tribal Nations typically identify their areas of interest. E106 and other SHPO submissions may also best be batched by county to facilitate functional efficiencies between the systems. We invite input on how the batching process may be made to work best for all parties participating in Section 106 review. In order to gain experience with this process, the FCC proposes to use batched submissions for the demonstration projects that will begin in 2013. We will soon be contacting the affected Tribal Nations and SHPOs to discuss the mechanics of this process that we propose for the demonstration projects.

Exclusions. The FCC's current regulations require that applicants follow ACHP procedures, as modified by the Nationwide Programmatic Agreements, to ascertain whether proposed facilities may affect historic properties. Those Agreements permit SHPOs, with the consent of Tribal Nations, to identify areas that might be excluded from Section 106 review for communications towers. The FCC believes it would be useful to explore procedures for establishing such exclusions in a more systematic manner for PTC facilities located along appropriate segments of track. For example, some SHPOs have told the FCC that they consider railroad lines to be industrial corridors and that they expect active construction and installations in disturbed areas within these corridors. In order to define excluded activities, SHPOs and Tribal Nations will need to identify circumstances, and geographic areas, if they exist, where adverse effects to historic properties are unlikely to occur. Factors to consider in defining exclusions may include the depth of previous soil disturbance relative to the depth of planned excavations in the area, the nature of any human presence prior to the railroad, and the proximity of sensitive historic sites. For example, we would not expect to exclude a segment of rail line that runs on top of a known village site or close to a religious or cultural site. We recognize that the potential for exclusions may vary by region depending on many factors. Nonetheless, PTC facilities in certain portions of the Nation's railway bed may be excludable from routine Section 106 review through this cooperative process.

Scope of Review. For those constructions that are not excluded from Section 106 review, the FCC anticipates that the scope of review would be generally similar to that specified under the existing Nationwide Programmatic Agreements. We invite ideas for efficiencies that may be appropriate for PTC wayside poles. For example, in light of the relatively short height and narrow profile of these poles, as well as their location near railroad tracks, are there circumstances where the Area of Potential Effects (APE) for visual effects should be less than the ½ mile radius specified in the Nationwide Programmatic Agreement for all towers less than 200 feet in height? Are there circumstances where it would be efficient for the railroads to consider a linear APE along the track rather than a separate APE for each pole? Is it necessary to assess effects where the only historic property within the APE is the track itself and there are no special features within the APE?

Review Process. The FCC recognizes that the process for reviewing the effects of proposed constructions on historic properties is unique to each construction and to each SHPO or Tribal Nation, and we are wary of unduly constraining their flexibility. However, we invite any ideas for efficiencies in the review process. In particular, we welcome thoughts on whether voluntary best practices or protocols might provide useful guidance on any aspects of review, including response times, identification of sites where monitoring of construction is necessary, and coordination where multiple parties request monitoring. Would voluntary best practices or protocols also be useful to help Tribal representatives determine appropriate compensation when acting in the capacity of a consultant, in accordance with ACHP guidance?

Avoidance and Mitigation. Based on experience with the construction of towers for communications carriers, the FCC anticipates that a small percentage of the wayside poles will have adverse effects on historic properties and Tribal sites of religious and cultural significance. When adverse effects are determined, ACHP rules require the action agency to consider avoidance, minimization, and mitigation. In the case of wayside poles, there will often be little potential for avoidance or minimization due to the limited flexibility to move the poles. We invite input as to whether it would be appropriate for the Program Comment to specify a simple protocol to quickly consider whether avoidance is possible at a particular site. Where avoidance is not possible, the FCC ordinarily works with the SHPO, affected Tribal Nations, and other consulting parties to find mitigation measures that provide a public benefit. We seek suggestions as to standard mitigation measures, either site-specific or programmatic, that might facilitate this negotiation process in appropriate cases.

VI. Next Steps and Contact Information

The FCC will follow with information regarding formal consultation meetings, webinars, or other structured opportunities for consultation and dialogue on the proposed Program Comment. We will also provide additional information about the upcoming related demonstration review meetings. In the meantime, we welcome ideas from Tribal Nations and all interested parties and are happy to meet or talk with you as we prepare for these important meetings. Please contact the following FCC officials:

- Geoffrey Blackwell, Chief of the FCC's Office of Native Affairs and Policy, at Geoffrey.Blackwell@fcc.gov or 202-418-3629; or
- Irene Flannery, Deputy Chief of the FCC's Office of Native Affairs and Policy, at Irene.Flannery@fcc.gov or 202-418-1307.
- Steve DelSordo, Federal Preservation Officer, at Stephen.Delsordo@fcc.gov or 202-418-1986;
- Jeffrey Steinberg, Deputy Chief of the Spectrum and Competition Policy Division, at Jeffrey.Steinberg@fcc.gov or 202-418-0896;

- Anne Marie Wypijewski, Senior Attorney, Spectrum and Competition Policy Division, at Annemarie.Wypijewski@fcc.gov or 717-338-2508;

We ask that if you reach out to any of these FCC points of contact, please also send an e-mail containing your full contact information and a reference to this PTC scoping document to native@fcc.gov so that the Office of Native Affairs and Policy and Spectrum and Competition Policy Division may most effectively coordinate on your responses to this scoping document and your involvement in our Tribal consultation efforts.