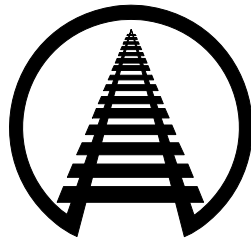


TESTIMONY OF
EDWARD R. HAMBERGER
PRESIDENT & CHIEF EXECUTIVE OFFICER
ASSOCIATION OF AMERICAN RAILROADS



BEFORE THE
UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
HEARING ON ENHANCING OUR RAIL SAFETY: CURRENT CHALLENGES
FOR PASSENGER AND FREIGHT RAIL
MARCH 6, 2014

On behalf of the members of the Association of American Railroads, thank you for the opportunity to discuss the current state of rail safety and specifically the transportation of crude oil by rail. AAR freight railroad members account for the vast majority of freight railroad mileage, employees, and traffic (including crude oil) in Canada, Mexico, and the United States.

The development of shale oil represents a tremendous opportunity for our nation to move closer to energy independence. The widespread benefits this would entail include reduced reliance on oil imports from unstable countries whose interests do not necessarily match up well with our own; increased economic development all over the country; thousands of new well-paying jobs; tens of billions in savings in our nation's trade deficit every year; and substantial amounts of new tax revenue for governments at all levels. Rail has a critical role in delivering these crucial benefits to our country.

Let me make clear at the outset that, for our nation's freight railroads, pursuing safe operations is not an option, it's a business imperative. Most importantly, it's the right thing to do. Railroads are not just faceless corporations from somewhere far away. Rather, your neighbors are our neighbors. No matter where you live, chances are good that current or former rail industry employees live close by. We have an obligation to operate safely for their benefit and for the benefit of all members of the communities we serve.

Unfortunately, several recent serious rail accidents in Canada and the United States have led some to question railroads' ability to operate safely. We are committed to restoring their confidence and demonstrating that nothing is more important to railroads than the safety of their employees, their customers, and the communities in which they operate.

Railroads share the deep concern of members of this committee and the public at large regarding the safe transport of crude oil. From 2000 through 2013, a period during which U.S.

railroads originated approximately 832,000 carloads of crude oil, more than 99.98 percent of those carloads arrived at their destination without a release caused by an accident. That said, railroads continue to look for ways to be safer. As the tragic accident last year in Quebec showed, and as reinforced by recent oil spills in North Dakota and Alabama, more work must be done to ensure public confidence in the transportation of crude oil by rail.

Working cooperatively with government agencies, our customers, our employees, and our suppliers, we're applying what we've learned over the past few years as rail crude oil traffic has surged to help ensure that our nation is able to safely and reliably utilize the tremendous national asset that domestic crude oil represents. This will be a true team effort involving shared responsibility among everyone involved in crude oil production, delivery, and consumption.

Railroads have long been doing their part — including taking actions that go beyond what legislation and regulations require — to maximize safety, and the industry will continue to take steps to further improve safety. As explained later in this testimony, these actions fall into three broad categories:

Accident Prevention

- Railroads are continuing to reinvest record amounts — their own funds, not taxpayer funds — back into their infrastructure and equipment. Despite a weak economy, railroads have invested far more back into their networks over the past five years — approximately \$115 billion — than in any five-year period in history. This year, we project that railroads will invest more than \$26 billion in their networks, more than ever before. One of the major aims of these investments is to make the rail network more robust, so that the industry's decades-long record of declining accident rates continues.
- Railroads have voluntarily agreed to institute speed restrictions, additional inspections, and other operational modifications for trains carrying large amounts of crude oil.
- By July 1, 2014, railroads will begin using a sophisticated statistical routing model that takes into account a variety of variables, including population density, rail traffic volume, track conditions, and availability of alternative tracks, so that trains with large amounts of crude oil can move on routes that pose the least overall safety and security risk.

Consequence Mitigation

- In 2011, the rail industry voluntarily adopted industry standards requiring new tank cars that carry crude oil to be built with additional safety features to reduce the probability of release should an accident occur. This year, railroads have called for even more robust new tank car standards for crude oil.
- Railroads have also called for an aggressive retrofit and phase out program for existing tank cars used to carry crude oil.

Emergency Response

- Railroads help communities develop and evaluate emergency response plans, and they train tens of thousands of emergency responders each year. The industry has agreed to spend several million dollars this year to develop an emergency response training program at the Transportation Technology Center in Pueblo, Colorado specifically geared to crude oil spills and to provide tuition assistance for some 1,500 emergency responders from across the country to attend that training.

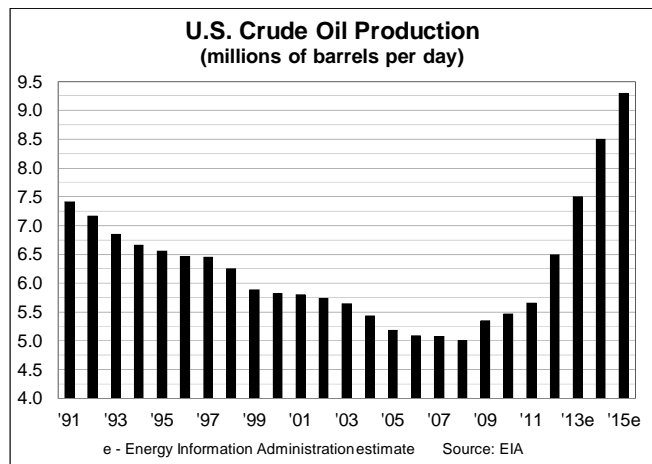
Crude by Rail Meets Crude Oil Production Demand

The huge increase in rail crude oil volume is a function of the massive, salutary development of North American oil resources in recent years, especially “shale oil.” U.S. crude oil production peaked in 1970 at 9.6 million barrels per day, but by 2008 it had fallen to 5.0 million barrels per day as depletion of older fields outpaced new production. Over the past couple of years, however, technological advances in the extraction of shale oil, along with relatively high crude oil prices, have led to sharply higher U.S. crude oil production. The Energy Information

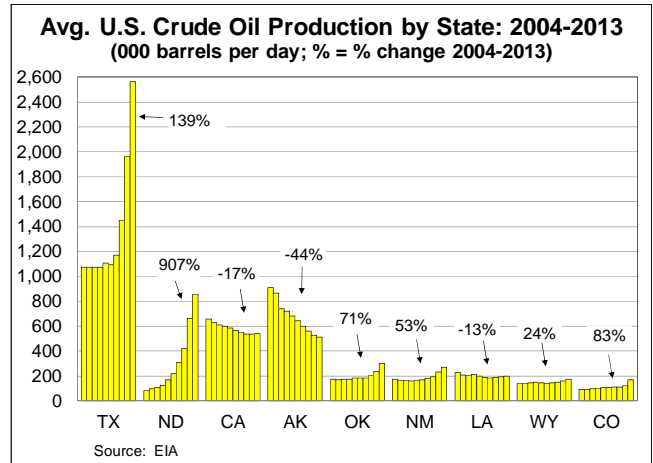
Administration (EIA) states that production rose to an average of 6.5 million barrels per day in 2012 and 7.5 million barrels per day in 2013.

Barring unforeseen circumstances, deposits of crude oil in shale formations across the country will continue to be developed. As a result, the EIA projects that U.S. crude oil production will

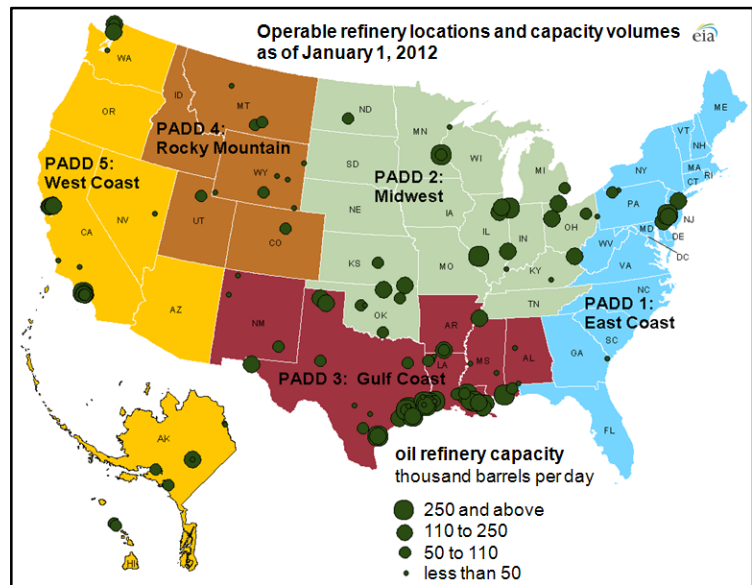
increase to 8.5 million barrels per day in 2014 and 9.3 billion barrels per day in 2015.



Much of the recent increase in crude oil production has occurred in North Dakota, where crude oil production rose from an average of 81,000 barrels per day in 2003 to 940,000 barrels per day by the fall of 2013, making North Dakota the second-largest oil producing state.

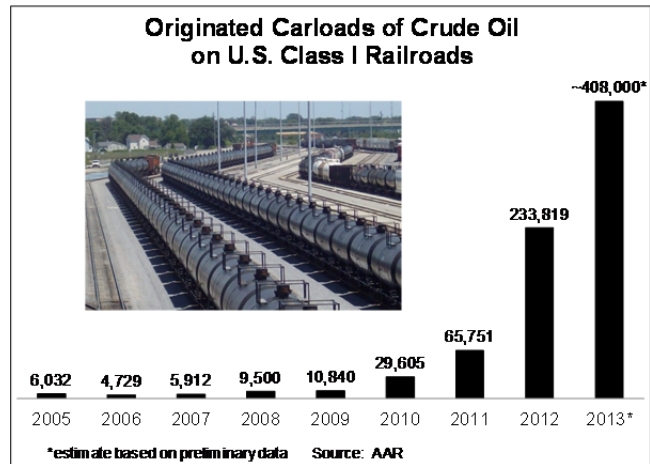


Of course, crude oil has little value unless it can be transported to refineries, but most U.S. refineries are located in traditional crude oil production areas (Texas, Oklahoma) or on the coasts where crude oil transported by tanker is readily accessible (California, Washington, New England, Gulf of Mexico). In part because of the long process required to obtain permits to build new refineries, it's unlikely that new refineries will come on line quickly near the new production areas.



Historically, most crude oil has moved from production areas to refineries by pipeline. However, in many of the new shale oil production areas, the existing pipeline network lacks the capacity to handle the higher volumes. Pipelines also lack the flexibility and geographic reach to serve many potential markets. Railroads, though, have the capacity and flexibility to fill this gap. In fact, the ability of a railroad to serve a refinery can make the difference between the refinery continuing to operate or closing down.

Railroads have seen dramatic recent increases in demand to transport crude. In 2008, U.S. Class I railroads originated 9,500 carloads of crude oil. By 2012, carloads had surged to nearly 234,000. Final numbers for 2013 aren't in yet, but we estimate that crude oil originations on Class I railroads in 2013 were around 408,000 carloads and terminations were around 434,000 carloads.¹ In 2013, crude oil accounted for about 1.4 percent of total originated carloads on Class I railroads, up from just 0.03 percent in 2008.



Assuming for simplicity that a rail tank car holds about 30,000 gallons (714 barrels) of crude oil, the approximately 408,000 carloads of crude oil originated by Class I railroads in 2013 equal around 800,000 barrels per day, or about 11 percent of U.S. crude oil production.

Advantages to Our Nation of Transporting Crude Oil by Rail

Looking ahead, both pipelines and railroads will be needed to provide safe, reliable crude oil transportation for our nation. In addition to the critical fact that railroads provide transportation capacity in many areas where pipeline capacity is insufficient, railroads offer a number of other advantages for transporting crude oil:

- **Geographical Flexibility.** By serving almost every refinery in the United States and Canada, railroads offer market participants enormous flexibility to shift product quickly to different places in response to market needs.
- **Responsiveness.** Rail facilities can almost always be built or expanded much more quickly than pipelines and refineries can be. Essentially, railroads are the only transportation mode that can invest in facilities quickly enough to keep up with

¹Originations do not exactly equal terminations because some crude oil that originates on U.S. Class I railroads might be delivered to U.S. short lines or to railroads in Canada for termination and because some crude oil that terminates on U.S. Class I railroads might originate on railroads in Canada or on U.S. short line railroads.

production growth in the emerging oil fields.

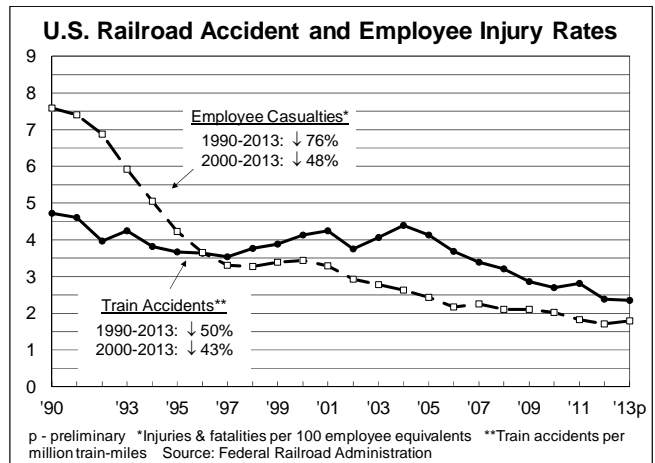
- Efficiency. As new rail facilities are developed, railroads are involved at every step, helping facility owners decide where to locate assets and how to lay out rail infrastructure to maximize safety and efficiency.
- Underlying Infrastructure and Equipment. Just over the past few years, railroads have invested tens of billions of dollars to replace and resurface tracks, buy new locomotives, build new terminals and track capacity, hire new employees, and take other steps to enhance their ability to transport crude oil.



Notwithstanding these attributes of rail, railroads recognize that if we are to continue down the path of energy independence, other transportation modes — including, of course, pipelines — have crucial roles to play.

Working to Prevent Rail Accidents

We all know that, unfortunately, rail accidents happen, despite railroads’ best efforts to prevent them, and some of those accidents have tragic consequences. Railroads take the challenge of moving the nation’s crude oil

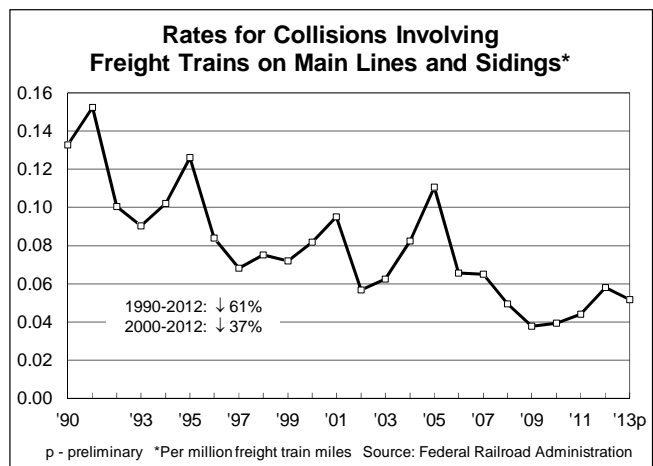
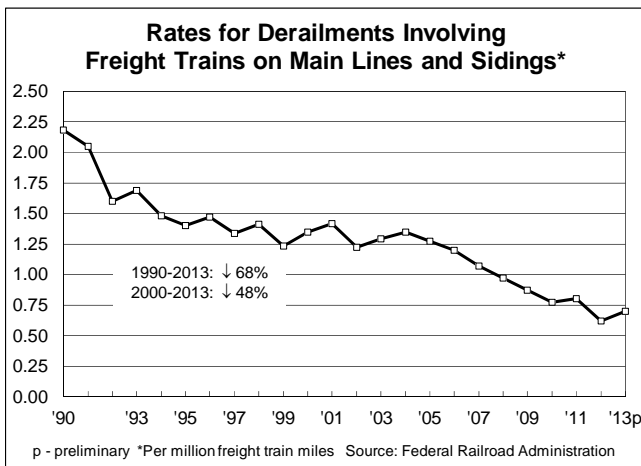


extremely seriously, and they recognize that improving safety is an ongoing process.

The industry’s commitment to safety is reflected in safety statistics from the Federal Railroad Administration (FRA). The three most common safety measures used by the FRA are train accident rates, employee injury rates, and grade crossing collision rates. From 2000 to 2013, the train accident rate fell 43 percent, with 2013 having the lowest rate ever, according to

preliminary FRA data. The rail employee injury rate fell 48 percent from 2000 to 2013, with 2013 having the second-lowest rate ever (behind 2012). The grade crossing collision rate fell 42 percent from 2000 to 2013, with 2013 having the second-lowest rate ever (behind 2012).

Collisions and derailments, two of the major categories that comprise the broader train accidents category, have fallen sharply over time as well. For example, according to FRA data, in 2000 there were 739 derailments involving freight trains on main lines or sidings, equivalent to 1.35 per million freight train miles.² In 2013, according to preliminary FRA data, there were 378 derailments (a 49 percent decline), equivalent to 0.70 per million freight train-miles (48 percent lower). In 2000, there were 45 collisions involving freight trains on main lines or sidings, equivalent to 0.08 per million train-miles. In 2013, the comparable figures were 28 collisions (down 38 percent) and 0.05 per million freight train-miles (down 37 percent).



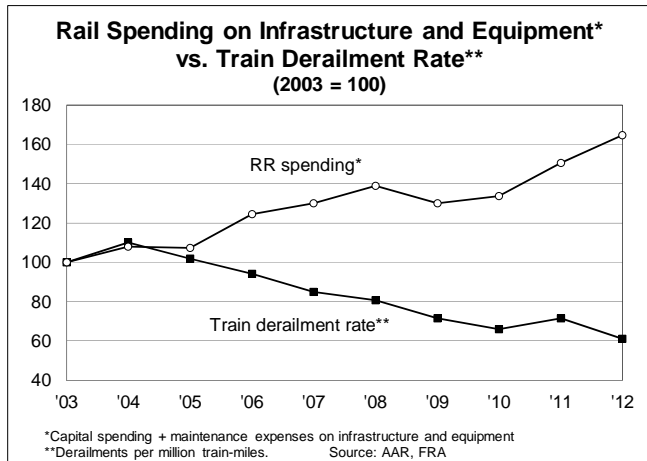
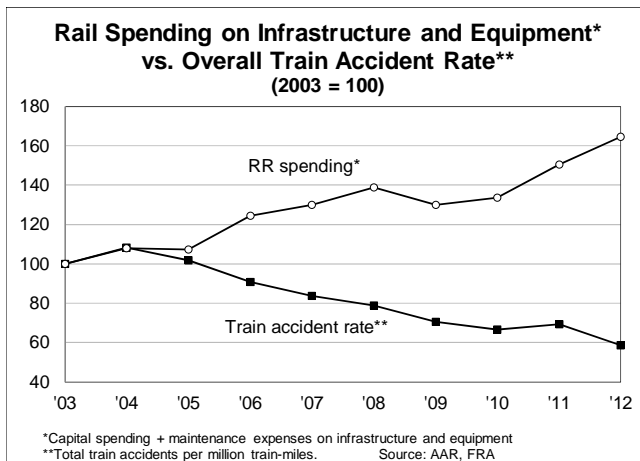
Railroads are proud that their overall safety record, as measured by FRA data, has been trending in the right direction for decades. That said, it is an unfortunate reality that rail accidents occur, despite railroads' capital and labor intensive efforts to prevent them, and we know that some of those accidents have tragic consequences. Given the extent and complexity

² A train-mile is the movement of a train the distance of one-mile. For perspective, a million train-miles is roughly equivalent to 300 train trips across the country.

of rail operations — the railroad “factory floor” is outdoors and approximately 140,000 miles long — infrastructure and equipment sometimes fail and it is impossible to eliminate all risk of accidents. And while railroads respect and applaud the professionalism and attention to safety that rail employees bring every day to their jobs, human error continues to be a leading cause of accidents. Our goal is zero rail accidents, but when accidents do occur, we want to minimize and mitigate their negative impacts.

One of the most important ways that railroads have reduced accidents is through significant and consistent investments back into their networks. In fact, in recent years, America’s freight railroads have been reinvesting more private capital than ever before to renew, upgrade, and expand their infrastructure and equipment, including a record \$25.5 billion in 2012 and a comparable amount in 2013. Rail spending this year is expected to be even higher. The vast majority of these investments have improved rail safety directly or indirectly. In fact, for many of these investments, improving safety is the primary reason the investments are made.

Just from 2008 to 2012, Class I railroads spent nearly \$26 billion in capital expenditures on new crossties (77 million), new rail (2.9 million tons), and new ballast (nearly 61 million cubic yards). Over the same period, they spent billions of additional capital expenditure dollars on signal and communications systems, bridges and tunnels, and machinery. These and other



capital investments, as well as the billions of dollars railroads spend on maintenance of their networks each year, have made railroads much safer. And as the charts above show, there is a clear correlation between rail reinvestments and rail safety improvements.

The Role of Safety-Enhancing Technologies

At a basic level, railroading today seems similar to railroading 150 years ago: it still consists of steel wheels traveling on steel rails. This apparent similarity, however, masks a widespread application of modern technology and a huge variety of ongoing initiatives to research, test, and apply advanced technologies to yield the safety record of continuous improvement experienced by the railroad industry.

Many of these advancements were developed or refined at the Transportation Technology Center, Inc. (TTCI), the finest rail research facility in the world, in Pueblo, Colorado. TTCI is a wholly owned subsidiary of the AAR. Forty-eight miles of test tracks, highly sophisticated testing equipment, metallurgy labs, simulators, and other diagnostic tools are used to test track structure, evaluate freight car and locomotive performance, assess component reliability, and much more. The facility is owned by the FRA but has been operated (under a competitively bid contract with the FRA) by TTCI since 1984.

A few of the many examples of safety-enhancing rail technologies developed at TTCI or elsewhere that have come into widespread use or are in the process of being implemented include:

- *Wayside detectors* that identify defects on passing rail cars, including overheated bearings and damaged wheels, dragging hoses, deteriorating bearings, cracked wheels, and excessively high and wide loads.
- *Internal rail inspection systems* using induction or ultrasonic technology to detect internal flaws in rails which are caused by fatigue and impurities introduced during manufacturing.

- *Track geometry vehicles* that use electronic and optical instruments to inspect track alignment, gauge, curvature, and other track conditions. Processed data from track geometry cars can help railroads determine when track needs maintenance.
- New automated detector systems are being tested and evaluated by TTCI to inspect the under carriage, safety appliances and freight car components using *machine-vision-based car inspection systems*.
- *Ground-penetrating radar* that helps identify problems (such as excessive water penetration and deteriorated ballast) that hinder track stability.
- Because a relatively small share of freight cars cause an inordinately high percentage of track damage and have a higher than usual propensity to derail, TTCI is working on ways to use *optical geometry detectors* to identify poorly performing freight car trucks.³
- *Positive train control (PTC)* systems, designed to automatically stop or slow a train before certain accidents occur, are being developed and implemented. PTC is discussed more fully later in this testimony.

Railroads and their suppliers will continue to pursue these and other technological advances that make rail transportation safer and more secure.

Rail industry safety will also be enhanced by the Asset Health Strategic Initiative (AHSI), a multi-year rail industry program that will apply information technology processes to improve the safety and performance of freight cars and locomotives across North America. In a nutshell, AHSI aims to improve safety and reduce costs across the rail industry by addressing mechanical service interruptions, inspection quality, and yard and shop efficiency. It is based on the recognition that improving asset health means more than just focusing on railcar and locomotive repair. Rather, it encompasses the entire rolling stock health cycle, incorporating prevention, detection, planning, movement, and repair.

Modifying Rail Industry Procedures to Enhance Crude Oil Safety

To enhance the safety of crude oil movements, railroads are voluntarily making operational modifications for trains carrying large amounts of crude oil. These modifications are the result of consultations with Secretary Foxx and other officials at the U.S. Department of

³ In terms of rail cars, “truck” refers to the complete four-wheel assembly that supports the car body.

Transportation (DOT), Administrator Szabo at FRA, Administrator Quarterman at PHMSA, and other government policymakers. Railroads share their vision for making a safe rail network even safer, and we're pleased that we were able to work together to pinpoint new operating practices that enhance the safety of moving crude oil by rail.

First, *routing*. Several years ago, the FRA, PHMSA, the Transportation Security Administration, the Federal Emergency Management Agency, and the railroads jointly developed the Rail Corridor Risk Management System (RCRMS), a sophisticated statistical routing model designed to aid railroads in analyzing and identifying the overall safest and most secure routes for transporting TIH materials. The model uses a minimum of 27 risk factors — including hazmat volume, trip length, population density along the route, availability of alternate routes, and emergency response capability — to assess the overall safety and security of rail routes. The FRA regularly audits railroads' use of the RCRMS. Major railroads have agreed that, no later than July 1, 2014, they will begin using the RCRMS for trains carrying at least 20 carloads of crude oil.

Second, *speed restrictions*. Back in August 2013, railroads self-imposed a 50-mph speed limit for trains carrying 20 or more carloads of crude oil. Beginning no later than July 1, 2014, if a train is carrying at least 20 cars of crude oil and at least one of those cars is an older "DOT-111" car (these cars are discussed further in the next section), that train will travel no faster than 40 mph when travelling within one of the 46 nationwide "high threat urban areas" designated by the Department of Homeland Security.⁴ In addition, railroads will continue to work with

⁴ In the United States, FRA regulations specify that freight rail trackage be classified into one of six track "classes" based on track quality. The class of a section of track determines the maximum FRA-allowable speed for that section. Freight train speed on "excepted" and "Class 1" track cannot exceed 10 mph; on Class 2 track, 25 mph; on Class 3 track, 40 mph; on Class 4 track, 60 mph; and on Class 5 track, 80 mph. In practice, it is common for railroads, for a variety of reasons, to operate at speeds lower than the FRA maximum. (For example, U.S. freight trains rarely, if ever, exceed 70 mph, even on the best Class 5 track.) If a track's class does not permit 40 or 50 mph crude oil trains, those trains will travel no faster than the FRA limit. Our understanding is that, on U.S. Class I

communities through which crude oil trains move to address, on a location-specific basis, concerns that the communities may have.

Third, *inspections*. Comprehensive FRA regulations dictate the various kinds of inspections railroads are required to perform and how often. A description of the full range of inspections that railroads undertake is beyond the scope of this testimony, but suffice it to say that the FRA-mandated inspection regime is comprehensive and thorough.

New FRA regulations regarding inspections for internal rail defects will become effective on March 25th. Railroads have agreed that, going forward, for main line tracks on which trains carrying at least 20 carloads of crude oil travel, they will perform at least one more internal rail inspection each calendar year than the new FRA regulations require. In addition, railroads will conduct at least two automated comprehensive track geometry inspections each year on main line routes over which trains with 20 or more loaded cars of crude oil are moving.⁵ The FRA regulations do not require railroads to perform automated comprehensive track geometry inspections.

Fourth, *defect detectors*. Railroads will make sure that specialized track side “hot box” detectors are installed at least every 40 miles along routes with trains carrying 20 or more cars containing crude oil.⁶ These detectors help prevent accidents by measuring if wheel bearings are generating excessive heat, which is a warning that the bearings are in the process of failing.

Fifth, *braking*. By April 1, 2014, railroads will make sure that trains operating on main line tracks carrying at least 20 carloads of crude oil are equipped either with distributed power

railroads, most of the trackage on which trains with large amounts of crude oil travel are Class 4 or 5 tracks.

⁵ Track geometry includes such parameters as track gauge, curvature, alignment, profile, and the cross level of the two rails. Track geometry inspections are generally performed by sophisticated stand-alone cars that use a variety of sensors, measuring systems, and data management systems to create a representation of the track being inspected.

⁶ There may be cases where safety considerations (e.g., a track located on a grade) might dictate otherwise. In these cases, detectors will be installed as close to 40 miles as conditions allow.

locomotives (i.e., locomotives placed in locations other than the front of the train) or with two-way telemetry end-of-train devices. These technologies allow train crews to apply emergency brakes simultaneously from both the head end and locations further back in the train in order to stop the train faster.

Mitigation Through Enhancing Tank Car Safety

While railroads pursue continuous improvement in safe operations, including most recently the new voluntary actions described above, it's important also for tank car standards to evolve to mitigate the consequences of an incident when one occurs. Crude oil and thousands of other products are transported in tank cars. The total North American tank car fleet consists of about 335,000 cars. Railroads themselves own less than 1 percent of these cars; nearly all are owned by rail customers and leasing companies. The dozens of distinct types of tank cars are differentiated by characteristics (pressure or general service, insulated or non-insulated, how much they can carry, and so on) that make them suitable or not suitable for carrying particular commodities. Approximately 228,000 tank cars are so-called "DOT-111" general service tank cars.



These cars are considered the workhorses of the tank car fleet. According to the most recent figures, around 98,000 DOT-111 cars are used to transport crude oil or other flammable liquids.

In the United States, federal regulations pertaining to tank cars are set by PHMSA. Transport Canada performs a similar role in Canada. In addition, the AAR Tank Car Committee sets industry standards regarding how tank cars used in North America are designed and constructed. These standards are often above and beyond federal standards. The Tank Car

Committee is comprised of railroads, rail car owners, rail car manufacturers, and rail hazmat customers, with active participation from the U.S. DOT, Transport Canada, and the National Transportation Safety Board (NTSB).

The rail industry has been aggressively searching for ways to improve tank car safety. For example, in March 2011, the AAR petitioned PHMSA to adopt more stringent requirements for new tank cars used to transport certain types of hazardous materials, including crude oil. These tougher standards called for more puncture resistance through the use of a thicker tank car shell or a jacket, extra protective half-height (at a minimum) “head shields” at both ends of tank cars, and additional protection for the fittings on the top of a car that enable access to the inside of the car.

In July 2011, after it had become clear that PHMSA approval of the AAR’s proposal was not imminent, the Tank Car Committee adopted what the AAR had proposed to PHMSA as the basis for new industry standards for tank cars used to carry ethanol or crude oil. The new standards, referred to as “CPC-1232,” apply to new tank cars ordered after October 1, 2011. To date, around 18,000 tanks cars have been built to this tougher CPC-1232 standard.

More recently, in November 2013, the rail industry called on PHMSA to adopt standards even more stringent than CPC-1232 for new tank cars used to transport crude oil and ethanol. The November 2013 proposal also called for aggressively retrofitting or phasing out of tank cars (including CPC-1232 cars and the older DOT-111 cars) used to transport crude oil or ethanol. The November 2013 proposal recognizes that input is needed from shippers and tank car manufacturers to determine the precise parameters of a phase-out program and to identify the retrofits that should be required.

Since the November 2013 proposal, the rail industry has continued to evaluate what other standards might be appropriate to make tank cars used to transport certain commodities, including crude oil, more robust. For example, railroads now support strengthening tank cars used to transport crude oil with thicker, 9/16th inch shells.⁷ Railroads also would require that tank cars be equipped with jackets and thermal protection, as well as full-height head shields, top fittings protections, and bottom outlet handles that will not open in a derailment.

The graphic on the next page summarizes proposed rail industry standards for tank cars carrying crude oil.

Through these additional standards and other means, railroads are continuing to work with other stakeholders to enhance rail safety and provide certainty to all stakeholders. These efforts reflect the rail industry's long-standing belief that the safety of crude oil by rail is a shared responsibility among all stakeholders in the crude oil supply chain.

The concept of shared responsibility also applies to accurate and timely determinations as to the chemical characteristics of the crude oil railroads are asked to transport. Under federal regulations, the entity "offering" the crude oil to the railroad for transport (*e.g.*, the oil producer) is responsible for properly classifying the oil based on its level of hazard. On February 25, the FRA issued an executive order requiring that crude oil from the Bakken region be tested to ensure that it is properly classified before it is transported by rail. Railroads support the pursuit of proper classification and labeling of petroleum crude oil in tank cars by shippers prior to transport. This is essential to ensuring that first responders are able to safely and appropriately respond in the event of an accident or incident.

⁷ Some railroads also support 9/16th inch tank car shells for freight cars carrying ethanol.

EVOLUTION OF RAIL INDUSTRY TANK CAR STANDARDS FOR CRUDE OIL

The railroad industry is proposing to increase the federal tank car design and construction standards for new tank cars used to transport crude oil. This proposal comes after a previous upgrade proposal which the industry voluntarily adopted and has been observing since October 2011. This graphic shows the additional tank car components included in the latest rail industry proposal.

HIGH CAPACITY PRESSURE RELIEF VALVE

Current Standard: No requirement
Latest Rail Industry Proposal: Requires a high capacity pressure relief device to protect against a rise in internal pressure resulting from fire. Provides for faster release of product.

TOP FITTINGS PROTECTION

Current Standard: Requires top fittings protection to protect the integrity of valves and fittings used to load product in the event of an accident.

Latest Rail Industry Proposal: Contains the same requirement.

STEEL TANK

Current Standard: Requires a minimum 1/2 inch thick steel tank for unjacketed cars and a minimum 3/4 inch thick steel tank for jacketed cars.

Latest Rail Industry Proposal: Requires a minimum 3/4 inch thick steel tank.

HEAD SHIELDS

Current Standard: Requires minimum 1/2 inch thick half height head shields at both ends of the tank car to improve puncture resistance.

Latest Rail Industry Proposal: Requires 1/2 inch thick full-height head shields at both ends of the tank car.

BOTTOM OUTLET HANDLES

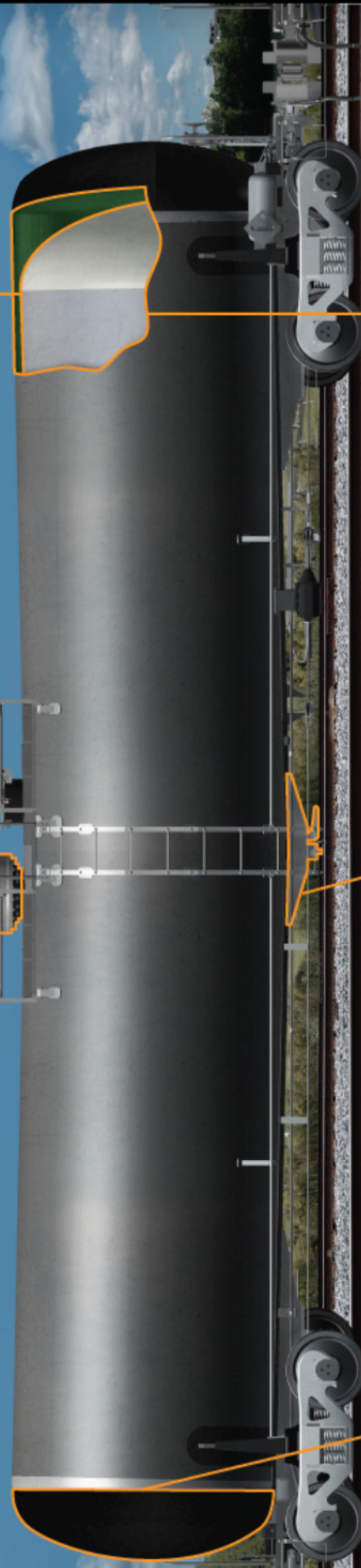
Current Standard: No requirement

Latest Rail Industry Proposal: Requires bottom outlet handle reconfiguration to prevent the handle from inadvertently opening the bottom outlets in the event of an accident.

JACKET AND THERMAL PROTECTION

Current Standard: Requires a minimum 1/2 inch thick steel tank OR a 1/8 inch thick steel jacket.

Latest Rail Industry Proposal: Requires the addition of both a 1/8 inch thick steel jacket around the tank car and thermal protection.



Source: Association of American Railroads, February 2014

Improving Emergency Response: Partnerships with First Responders and Shippers

The railroads have extensive emergency response functions, which work in cooperation with federal, state and local governments, especially since 9/11. Sharing important information about shipments is part of that. Upon request, railroads provide appropriate local authorities with a list of the hazardous materials, including crude oil, transported through their communities. It is simply not true, as one sometimes hears, that railroads refuse to provide this type of information.

Significantly, more than 25 years ago, the AAR established what is now the Security and Emergency Response Training Center (SERTC), a world-class facility in Pueblo, Colorado, that is operated by TTCI. The SERTC has provided in-depth hazmat emergency response training to more than 50,000 emergency responders and railroad and chemical industry employees.

In 2007, Congress authorized the National Domestic Preparedness Consortium (NDPC), a consortium within the Department of Homeland Security and funded by FEMA. The purpose of the NDPC is to identify, develop, test, and deliver training to the nation's emergency first responder community. Of the NDPC's seven members, only one — SERTC — is specifically designed to provide first responder training for rail and other surface transportation accidents. No other training center in the country possesses comparable infrastructure, including dozens of freight and passenger railcars, highway cargo tanks, intermodal containers, van trailer, and even a barge. Live simulations deliver tactical intervention training with unsurpassed realism.

Unfortunately, since it was added to the NDPC in 2007, SERTC has received only \$10 million from FEMA for surface transportation first responder training — \$5 million in 2009 and \$5 million in 2010. We understand that budgets throughout the federal government have been challenged in recent years. That said, Congress provided an additional \$5 million to the NDPC in the 2014 omnibus appropriations act, increasing NDPC funding from \$93 million to \$98 million. FEMA has yet to allocate those dollars among the NDPC members. We hope this

committee would agree that allocating these funds to enhance the ability of first responders to respond to crude oil incidents would be a sensible step for FEMA to take.

In addition to SERTC, as part of their regular operations, railroads and communities develop and evaluate emergency response plans and train more than 20,000 emergency responders each year. Through their own efforts and working in conjunction with the Transportation Community Awareness and Emergency Response Program (TRANSCAER), railroads will continue to work closely with emergency responders in the communities they serve so that damage caused by train accidents can be minimized.

In addition to their other ongoing emergency response training efforts, the AAR recently announced that railroads will provide approximately \$5 million by July 1 of this year to develop a specialized crude-by-rail training and tuition assistance program for local first responders. The funds will be used to design a curriculum at TTCI specifically devoted to crude oil emergency response, to provide tuition assistance for an estimated 1,500 first responders to attend TTCI for training, and to provide additional training to local emergency responders closer to home.

By July 1, 2014, railroads will also develop an inventory of resources for emergency responders along routes over which trains with 20 or more cars of crude oil operate. This inventory will include locations for the staging of emergency response equipment and contacts for the notification of communities. When the inventory is completed, railroads will provide the DOT with information on the deployment of the resources and will make the information available upon request to appropriate emergency responders.

Finally, it is sometimes claimed that railroads bear no costs for cleanup of oil spills and that the entire response burden falls on local responders. That's not true. Emergency responders have control of railroad accidents in which crude oil (or any other hazardous material) is spilled,

but railroads often provide the resources for mitigating the accident. As noted above, railroads have emergency response plans in place to mobilize the labor and equipment necessary to mitigate accidents. Railroads also reimburse local emergency agencies for the costs of materials the agencies expend in their response efforts.

Address Safety Concerns, But Don't Lose Sight of the Benefits of Domestic Crude Oil

The development of crude oil resources in recent years represents a tremendous opportunity for this country, including the opportunity to move toward energy independence. As a report earlier this year from the Congressional Research Service (CRS) notes, “the prospect of U.S. energy independence is grounded in the production growth from tight oil formations such as the Bakken Formation in North Dakota and Montana, and the Eagle Ford Formation in Texas.”⁸ CRS says that, “Relative to other fuels, the United States is more dependent upon imports for its oil requirements, still accounting for almost 40% of consumption,” but “since June 2005, when crude oil imports reached a peak, they have dropped almost 3.3 million [barrels per day], or 23%, through October 2013.”

It's difficult to overstate the economic and security benefits associated with continued growth in domestic crude oil production. Over time, it will mean reductions in the nation's trade deficit of tens of billions of dollars every year. It will mean new and better employment opportunities for hundreds of thousands of Americans and better economic development opportunities for regions all over the country. It will mean billions of dollars in new tax revenues for governments at all levels. And it will mean less reliance on sources of oil from places in the world that are not secure and whose interests do not necessarily correspond well to those of the United States. The Peterson Institute, a well-respected, nonprofit, and nonpartisan

⁸ “An Overview of Unconventional Oil and Natural Gas: Resources and Federal Actions,” Congressional Research Service, January 23, 2014.

research institution devoted to the study of international economic policy, recently found that, along with lower energy costs, the growth in domestic energy production should increase annual U.S. GDP growth between 0.09 and 0.19 percentage points through 2020. That adds up to hundreds of billions of dollars in higher GDP.

As we discuss ways to enhance the safety of transporting crude oil by rail, these important benefits should be kept in mind.

Positive Train Control

The Rail Safety Improvement Act of 2008 (RSIA) requires Class I freight railroads to install a fully functioning, nationwide positive train control (PTC) network by the end of 2015 on main lines used to transport passengers or TIH materials. Specifically, PTC as mandated by Congress must be designed to prevent train-to-train collisions; derailments caused by excessive speed; unauthorized incursions by trains onto sections of track where maintenance activities are taking place; and the movement of a train through a track switch left in the wrong position. The technology must also be fully interoperable, meaning that the system in place on any one railroad must be able to seamlessly interface with the system on any other railroad.

PTC is an unprecedented challenge, both in terms of the technologies to be used and the integration of those technologies. A properly functioning PTC system must be able to determine the precise location, direction, and speed of trains; warn train operators of potential problems; and take immediate action if the operator does not respond to the warning provided by the PTC system. For example, if a train operator fails to begin stopping a train before a stop signal, the PTC system would apply the brakes automatically before the train passed the stop signal.

Railroads have been devoting massive resources to PTC. They've retained more than 2,200 signal system personnel to implement PTC, and to date have spent approximately \$4

billion (of their own funds, not public funds) on PTC development and deployment. They expect to spend that much again — approximately \$8 billion in total — before development and installation is complete. Hundreds of millions of dollars will be spent each year after that to maintain the system.

PTC's complexity, the enormity of the implementation task, and the fact that much of the technology and engineering applications PTC requires have had to be developed from scratch mean that, despite railroads' best efforts, much work remains to be done. The many potential failure points in PTC systems must be identified, isolated, and corrected, and the system must be made fully interoperable across all of the nation's major railroads — all without negatively affecting existing rail operations.

Railroads also face serious non-technological barriers to timely PTC implementation. Today, the most serious such challenge involves PTC antenna structures.

At its heart, PTC is a massive communications system. Locomotives must be able to communicate with the “back office” concerning the train's speed, location, and many other parameters and receive information regarding, among many other things, the locations of other trains in the area, possible schedule changes, safety alerts, and so on.

This back-and-forth communication can take place only if a sophisticated, comprehensive wireless communications network is in place. A key part of this network is a series of thousands of antennas, spaced (on average) every few miles along the 60,000 or so miles over which PTC is being installed on U.S. freight railroads. These antennas are generally around 40-feet tall, and the vast majority are to be installed directly adjacent to the tracks on existing railroad rights-of-way, owned by the railroads themselves, in holes just a few feet deep and a couple of feet wide. In total, approximately 22,000 PTC-related antennas need to be installed.

The railroad industry began working several years ago with the Federal Communications Commission (FCC) to license the wireless spectrum necessary for PTC, and to its credit, the FCC has worked diligently to address spectrum-related issues. Nonetheless, the industry learned just last year that, under the FCC’s interpretation of Section 106 of the National Historic Preservation Act (NHPA), railroads must ascertain, on an antenna-by-antenna basis, if the antennas will negatively impact areas of historic, cultural, or religious significance.

At the center of the challenge is the FCC’s required notification and evaluation process that utilizes the FCC’s “Tower Construction Notification System” (TCNS) for review by Native American tribes. Under that system, railroads must input certain information into the TCNS. That information is then transmitted to any Native American tribe that has expressed interest in the county in which an antenna will be located.

The initial information that railroads must input into the TCNS, such as the precise location of the antenna to be installed and its height, is relatively straightforward. That information is then transmitted to interested tribes through various means, and the tribe has up to a couple of months to express interest in the proposed antenna site. If it does so, it can demand much more comprehensive information about that site — such as a complete archaeological history — that can be difficult (if not impossible), costly, and time consuming for the railroad to obtain. Based on railroads’ experiences to date, it takes, on average, three to five months between the time the railroad initially inputs information into the TCNS and the time when all necessary reviews are completed and the antenna can be cleared for installation.



An example of a PTC antenna structure near other railroad signals.

Multiply this process by 22,000 antennas and it becomes very clear why this is such a significant issue.

As stated earlier, the vast majority of PTC antennas are not large and are to be installed in small holes on railroads' own rights-of-way. Many of the rail lines in question have been in use for decades, often for well over 100 years. Generally speaking, the rights-of-way at issue have been disturbed countless times in the past as railroads performed standard maintenance, installed other types of signal systems, built culverts, improved drainage, or undertook any of innumerable other activities related to rail operations and infrastructure construction and upkeep.

Once railroads started using the TCNS last year, it quickly became clear that the system was woefully inadequate for a deployment on the scale of PTC and in the time frame mandated by the RSIA. In fact, shortly after railroads began using the TCNS, the FCC asked them to stop using it while the agency developed a new process for PTC antennas. That was around ten months ago.

After nearly a year of discussion among various parties, during which the installation of wayside antennas ceased, on January 29, 2014, the FCC proposed what it calls a "streamlined" process for PTC-related reviews. Unfortunately, we do not believe the "streamlined" process will lead to a meaningful reduction in the substantial and excessive delays associated with PTC antenna installation.

Under the streamlined system, the FCC would still require an antenna-by-antenna evaluation. Perhaps most vexing, even when a tribe cannot identify any specific historic or cultural area or property that could potentially be impacted at any proposed individual antenna site, the tribe can still demand a comprehensive review of the site, which could include field work and the preparation of wide-ranging cultural resource reports and ethnographic studies.

The tribe can also demand that railroads dig holes for antenna structures by hand. These demands, which the streamlined process allows, extend well beyond what is required under the NHPA. Moreover, the streamlined process does not establish firm deadlines by which the FCC will resolve disputes regarding sites, and it is not clear the agency has the resources to manage disputes around potentially thousands of antenna sites.

Included as an appendix to this testimony is a copy of the AAR's recent comments on the FCC's streamlined proposal. As the AAR comments make clear, the FCC has ample authority to exempt all PTC-related infrastructure no taller than 75 feet located on the railroad right-of-way and not immediately proximate to a known historic property. We respectfully suggest that these antennas should be exempted. If the FCC decides not to pursue an exemption, it should put in place a process that really does expedite the historic review process, provides deadlines on the resolution of disputes, and encompasses all railroads' PTC infrastructure on the right-of-way. The existing "streamlined" process does none of these things.

Just to be clear, railroads are not seeking exemptions regarding PTC antenna installations on Native American reservations or similar areas, or in areas that are shown to be of significant historical or cultural interest. In these cases, railroads are happy to work with state preservation officials and tribes. Rather, railroads respectfully suggest that the NHPA was not designed and should not be used to impede PTC antenna installation in the way it has come to.

The bottom line is that without further changes to the FCC approval process, the timeline for ultimate deployment of PTC will be delayed significantly. The 2013 construction season was lost for PTC wayside antennas. A new review process at the FCC will not be in place until at least April of this year. If that process takes several months to clear locations, the 2014 construction season will also be in jeopardy. Railroads will continue to work with the FRA and

the FCC in good faith to try to find a workable solution to this issue. Please keep in mind, though, that these antennas are at the heart of the PTC network, and there is no realistic “work around.” Until railroads are able to install these antennas in large numbers, huge portions of the PTC testing and implementation process simply cannot proceed.

Railroads have been working extremely hard to meet the 2015 PTC deadline, and they will continue to aggressively pursue PTC implementation. However, due to the significant technological challenges associated with PTC development and installation, the eight-month construction moratorium imposed by the FCC, and the remaining PTC regulatory uncertainty, railroads believe that the existing PTC implementation deadline of December 31, 2015 will need to be extended. Doing so would allow railroads, the FRA, and others to make sure PTC is done right.⁹ In the meantime, incremental PTC implementation would continue, meaning that more and more of the safety benefits of PTC would be coming on line.

Conclusion

Our nation’s freight railroads share the urgency of this committee and the public at large regarding the need to augment the safe transport of products by rail. Railroads will continue to work with the Administration, their customers, and other stakeholders as necessary to identify additional safety enhancing steps that will make the North American rail network even safer.

⁹ Some of you may have seen an article in the January 29 [Washington Post](#) on delays to the Washington metro’s new “Silver Line.” The article points out that the line’s automatic train control system has delayed the completion of the project for months and still is not working correctly. The metro’s train control system is many orders of magnitude less complex than what freight railroads are implementing. Still, the metro’s problems offer a clear example of why the rail industry — and policymakers — should be very concerned with PTC implementation and the importance of making sure that such a complex system operates as intended, no matter how long it takes. Unlike the Washington metro, railroads do not have the luxury of simply not operating a new line.

APPENDIX

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Comment Sought on Draft Program Comment to) WT Docket No. 13-240
Govern Review of Positive Train Control)
Facilities under Section 106 of the National)
Historic Preservation Act)

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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EXECUTIVE SUMMARY

Congress has mandated that a nationwide Positive Train Control (“PTC”) network be fully operational on the nation’s passenger and freight railroads by December 31, 2015. As part of satisfying this statutory mandate, the railroads must install approximately 22,000 wayside poles and other PTC-related infrastructure on the national railroad rights of way. However, nearly ten months after the Federal Communications Commission (“FCC” or “Commission”) promised a solution to expedite the historic preservation review of these facilities—during which time all review was suspended and the entire 2013 construction season lost—the draft Program Comment offers little that would permit the timely deployment of these poles. The Association of American Railroads (“AAR”) continues to feel strongly that the best solution to address the need for expedited, comprehensive historic preservation review of PTC wayside facilities remains an exemption from review for all PTC-related infrastructure no taller than seventy-five feet located on the railroad rights of way and not immediately proximate to a known historic property.

If the FCC declines to seek such an exemption, the Commission should adopt a Program Comment that truly expedites the historic preservation review process for such facilities, imposes firm deadlines on the resolution of the approval process, and ensures that all railroads can benefit from these revisions—which the current draft Program Comment does not accomplish.

Specifically, although the draft Program Comment provides for a conditional exemption for State Historic Preservation Officer review, it:

- Will not apply to any PTC-related infrastructure deployed by at least three of the seven Class I railroads;
- Continues to anticipate time-consuming, pole-by-pole Tribal review;
- Does not offer definitive deadlines for the resolution of review by Tribal Nations;

- Allows Tribes to make automated information requests which have the effect of delaying approval;
- Shifts the burden, properly assigned to Tribes, to the railroads to identify historic properties of cultural and religious significance to Tribal Nations;
- Requires the time-consuming and costly preparation of cultural resource reports that would not be helpful to many Tribal Nations, and that are not required by the existing historic preservation review process; and
- Allows Tribal Nations to require monitoring and/or alternative excavation techniques for potentially every PTC-related deployment site nationwide with no evidentiary showing of the likelihood of the presence of cultural resources.

As provided in the rules of the Advisory Council on Historic Preservation (“ACHP”), program comments are intended to preclude case-by-case review of undertakings. In contrast, the draft Program Comment anticipates the separate review by Tribal Nations of each of the 22,000 PTC-related wayside facilities that must be deployed by the railroads pursuant to a Congressional mandate. Moreover, the proposed historic review process does not provide firm deadlines for the resolution of Tribal consultation, which in the experience of the railroads can take as long as nine months—*for each pole*. The process outlined in the draft Program Comment would not only foreclose the industry from meeting the PTC implementation deadline imposed by Congress, but almost certainly lengthen the deployment process well beyond 2015.

The FCC has the authority to establish firm deadlines for Tribal Nation review, and should do so. Specifically, agencies need only provide a Tribal Nation a “reasonable opportunity” to identify concerns regarding historic properties, and other agencies have imposed decisive deadlines on matters of Tribal consultation. The AAR appreciates the intent behind the conditional exemptions from State Historic Preservation Officer review that the FCC has included in the draft Program Comment, but remains concerned that, as drafted, the Program Comment does not represent a significant improvement over the Commission’s existing Tribal

review process, and in some ways is more onerous. Neither process is suitable for the review of a critical, time-sensitive public safety initiative with the broad, national scope of PTC.

The ACHP's rules do not require that the historic preservation review process be exhaustive, but simply that Federal agencies make a "good faith and reasonable" effort to identify historic properties and "take into account" the effects of their undertakings on such properties. The PTC-related wayside facilities that must be deployed are not 300 foot towers being dug into undisturbed land, but small poles closer in height to standard utility poles already ubiquitous in the urban and rural landscape, and located on the railroad rights of way in soil that has been subject to repeated disruption for, in some cases, well over a hundred years. Importantly, facilities located on the railroad rights of way that have previously been put through the existing historic preservation review process were ultimately found to have no effects on any historic properties, and there is no reason to believe that any of the remaining PTC-related wayside installations will be any different. The draft Program Comment wrongly turns the historic review process on its head and creates a presumption that every site proposed for PTC deployment should be considered a historic property unless shown otherwise by the railroads. In fact, the burden lies on Tribal Nations to establish, through evidence supporting a high probability of the presence of archeological artifacts, that a historic property exists that should be the subject of consultations and, if needed, mitigation.

Finally, while the railroads are prepared to work closely with the FCC, Tribal Nations, State Historic Preservation Officers, and other stakeholders to address concerns regarding previously constructed PTC facilities, resolution of this issue should not be a precondition for arriving at a workable Section 106 process that permits the timely installation of the thousands of remaining wayside structures required for nationwide PTC deployment. The focus of the FCC,

and the draft Program Comment, should be on fulfilling its obligation under the ACHP's rules and enabling the expedited, programmatic review of all PTC-related facilities located on the railroad rights of way.

**Before the
Federal Communications Commission
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In the Matter of)
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Comment Sought on Draft Program Comment to) WT Docket No. 13-240
Govern Review of Positive Train Control)
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Historic Preservation Act)
)
)

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

I. INTRODUCTION

The Association of American Railroads (“AAR”)¹ respectfully submits these comments in response to the Public Notice (“*Public Notice*”) released by the Wireless Telecommunications Bureau of the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.² In the *Public Notice*, the FCC seeks comment on the draft Program Comment³ to govern review of Positive Train Control (“PTC”) wayside facilities under Section 106 of the National Historic Preservation Act (“NHPA”).⁴

The AAR continues to feel strongly that the best solution to address the need for expedited, comprehensive review of PTC wayside facilities remains an exemption from State

¹ The Association of American Railroads (“AAR”) is a voluntary non-profit membership organization whose freight railroad members operate 82 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. More information on the AAR is available at our website, <https://www.aar.org/Pages/Home.aspx>.

² *Comment Sought on Draft Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act*, WT Docket No. 13-240, Public Notice, DA 14-97 (rel. Jan. 29, 2014) (“*Public Notice*”).

³ See *Public Notice* Attachment A (“*Draft Program Comment*”).

⁴ See *Public Notice* at 1; 16 U.S.C. § 470v.

Historic Preservation Officer (“SHPO”) and Tribal review for all PTC-related wayside facilities no taller than seventy-five feet located on the railroad rights of way that are not immediately adjacent to any previously recorded historic properties, as detailed in the AAR’s previous comments on the PTC Scoping Document.⁵ In the alternative, the Commission should modify the draft Program Comment to truly expedite the Section 106 review process, and ensure that all railroads can benefit from these modifications.⁶ As currently drafted, the Program Comment provides beneficial exemptions regarding SHPO review, but fails to significantly address the existing deficiencies in the FCC’s Section 106 Tribal review process. In particular, a request for additional information by a Tribal consulting party can eliminate all deadlines for the resolution of review. Moreover, the structure of the draft Program Comment inverts the normal Section 106 process by requiring that the railroads supply consulting Tribal Nations with information regarding historic properties of potential cultural and religious significance to those Tribes. Neither the Commission’s existing historic preservation review mechanism, nor the process outlined in the draft Program Comment, is suitable for the review of a critical, time-sensitive public safety initiative with the broad, national scope of PTC.

II. THE DRAFT PROGRAM COMMENT WILL NOT EXPEDITE THE CURRENT SECTION 106 REVIEW PROCESS

After waiting nearly ten months for the release of a streamlined solution to the existing historic review process from the FCC, the railroads are disappointed that the draft Program Comment offers no appreciable improvements regarding the Tribal review process. Instead, like

⁵ See Comments of the Association of American Railroads, *Comment Sought on Scoping Document for Development of a Proposed Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act*, WT Docket No. 13-240 (filed Nov. 15, 2013) (“AAR Scoping Document Comments”).

⁶ The AAR’s recommendations for modifying the draft Program Comment are set out in the attached Appendix.

the existing Section 106 review mechanism, the draft Program Comment is poorly suited to expedite review of large scale time sensitive infrastructure projects such as PTC, and in particular lacks clear deadlines for the resolution of application review. The Program Comment, as drafted, would fail to provide the relief needed for the railroads to initiate the deployment of approximately 22,000 PTC-related wayside facilities to satisfy the Congressional public safety mandate, and will delay the installation of PTC past the Congressionally mandated 2015 deployment deadline.

In May 2013, at the FCC's request, the railroads suspended the submission of applications for Section 106 review for PTC wayside infrastructure while the Commission developed a "streamlined" solution for historic preservation review processing, effectively putting all PTC infrastructure deployment in the railroad rights of way on hold.⁷ While the AAR appreciates the FCC's efforts to adopt a Program Comment to address PTC deployment, the historic preservation review process outlined in the draft Program Comment will take at least as long, if not longer, than the existing mechanism to review applications for PTC-related wayside deployment.

⁷ With the permission of the FCC, since May 2013 some railroads have submitted some requests for approval using the established Tower Construction Notification System ("TCNS") process for the review of small base station towers that would otherwise qualify as undertakings covered by the draft Program Comment. On January 8, 2014, the FCC reopened TCNS on a limited basis in a Beta test format for the filing of PTC-related wayside facilities applications batched in groups of no more than twenty contiguous sites located within a single county in areas that were subject to discussion with Tribal Nations at meetings in Rapid City, South Dakota and Tulsa, Oklahoma in fall 2013. *See* Letter from Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission to Timothy Strafford, Assistant General Counsel, Association of American Railroads at 1-2 (Jan. 8, 2014) ("Steinberg Letter"). Several of the railroads have submitted applications for review for PTC-related facilities in the weeks since, and other railroads are engaged in the process of preparing submissions under this interim program. There have been increasing indications, however, that numerous Tribal Nations will not review applications for PTC-related wayside facility installations under the interim program.

A. The Existing Section 106 Process Cannot Expedite the Processing of Large Deployments such as PTC

The current FCC historic preservation review process, which is set out in the Nationwide Programmatic Agreement (“NPA”),⁸ suffers from several shortcomings that have an especially significant negative impact on PTC deployment:

- The Tower Construction Notification System (“TCNS”) process is not suited for the review of relatively large numbers of applications submitted at the same time;
- There are no deadlines to provide a backstop for the resolution of Tribal review, and Tribal Nations may make automated information requests that have the effect of delaying approval;
- Consultative fees charged for Tribal review and monitoring are not transparent; and
- The process places an undue burden on consultative stakeholders to review applications for facilities with *de minimis* effects on historic properties, as evidenced by the lack of findings of significant impact or complaints with respect to historic reviews of wayside facilities completed to date.

The FCC has acknowledged that “[p]arties seeking to deploy wireless infrastructure often face processes they must complete prior to construction that can take long periods of time and impose significant expense.”⁹ The TCNS process was not designed for the approval of relatively large numbers of applications at the same time. The precipitating factor in the FCC’s decision in May 2013 to halt the submission of PTC-related wayside infrastructure was the breakdown of the

⁸ See 47 C.F.R. Part 1, App. C—Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (“NPA”).

⁹ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations*, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14240 ¶ 3 (2013) (“*Wireless Tower Siting NPRM*”).

TCNS process following the submission of 280 applications by a railroad.¹⁰ As the NPA provides that TCNS is the most definitive means for an applicant to ensure it has made contact with all relevant Tribal Nations, the failure of TCNS to accommodate the submission of several hundred applications at a time poses an obvious challenge for the processing of the 22,000 pending PTC wayside facilities.

More critically, the existing Section 106 process does not include deadlines to provide a backstop for the resolution of Tribal review, and Tribal Nations may make automated requests for additional information that can have the effect of postponing the resolution of approval for months after submission. In practice, although the NPA was implemented to improve the historic review process and streamline the approval of communications towers, the railroads have found that Section 106 review for an application typically takes at least five or six months from submission to approval, and can take as long as nine months.¹¹ While the NPA provides clear deadlines in cases where a Tribal Nation expressly disavows any interest in consultation, the FCC has taken the position that the Section 106 review process also allows a Tribal Nation to make automated requests for information to supplement the submission packet, and that each such request essentially “stops the clock” on Tribal review. The submission of an application packet often triggers an apparently automatic request for additional information from Tribal

¹⁰ See Letter from Theodore K. Kalick, Senior U.S. Regulatory Counsel, Canadian National Railway, to Stephen G. DelSordo, Federal Preservation Officer, Federal Communications Commission at 6 (May 9, 2013) (“Kalick Letter”), attached to AAR Scoping Document Comments.

¹¹ Similarly, Verizon recently conducted a survey of its Distributed Antenna System (“DAS”) projects, and found that the average time to complete a review was 84 days, with poles requiring approval from multiple Tribal Nations potentially taking much longer. For example, Verizon reports that a DAS installation on the roof-top of a building in Pennsylvania with no historic effects required consultations with nine Tribal Nations, and the last response was received 126 days after the Tribal review process was initiated; while the installation of a similar small antenna in Cleveland, Ohio was approved by the SHPO in 37 days, but took 150 days to receive approval from all Tribal Nations contacted through TCNS. See Comments of Verizon and Verizon Wireless, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688, WT Docket No. 13-32 at 9 (filed Feb. 3, 2014) (“Verizon NPRM Comments”).

Nations served by TCNS, putting these applications in an administrative limbo with no clear path to resolution. In many cases more than one Tribal Nation expresses interest in consultation on a potential deployment site, giving rise to multiple opportunities for delay, but information requests on the part of only one Tribal Nation can significantly extend the duration of the approval process. As Verizon noted recently regarding this general problem with the current Section 106 process, “[i]f even one tribe does not respond to a notification or fails to render a determination about the effects of a project, the entire project will be delayed by a minimum of 60 days, but many times...the time is far longer.”¹²

The current Section 106 process also involves highly variable and unforeseeable costs for applicants to gather data in response to Tribal requests, as well as to pay Tribal consultative and monitoring fees. Verizon reports that the cost for a consultant’s report can be as much as \$4700 per installation site, which does not include the cost of Tribal consultation fees and additional studies or tests.¹³ For a proceeding of the scale of PTC, consultative fees add up quickly. After submitting fewer than 300 poles to the FCC for historic review processing, one railroad received requests from various Tribal Nations for the payment of consultation fees totaling \$338,000, or \$1,203 on average per site.¹⁴ The lack of transparency regarding potential consultative fees and inability to predict the extent of information requests that will be made results in a difficult budgeting process for applicants for historic preservation review.

One of the most challenging aspects of the FCC’s existing Section 106 process is it places serious burdens on Tribal Nations as consulting parties as well as on the applicants. As

¹² *See id.* at 20.

¹³ *See id.* at 9.

¹⁴ *See* Kalick Letter at 6. More recently, a railroad submitting applications using the Beta TCNS process was informed by a consulting Tribal Nation that its fees for clearing PTC-related infrastructure would be double the fees for reviewing non-PTC infrastructure.

the NPA contains few exclusions, Tribes are required to review large numbers of applications with limited resources, even when the proposed facilities are likely to have little or no potential impact on any historic property of cultural and religious significance to any Tribal Nation. For example, the United South and Eastern Tribes (“USET”) has described how Tribal Nations struggle under the annual burden of reviewing hundreds of communications tower applications, not to mention the added burden of having to review applications for 22,000 PTC-related wayside facilities.¹⁵ The lack of exemptions in the current process for the deployment of infrastructure that will pose no or a *de minimis* risk of adverse effects on historic properties increases the burden on all applicants and stakeholders, including Tribal Nations, in the PTC-related infrastructure review process.¹⁶ Based on the railroads’ previous experiences with Section 106 review, however, the vast majority of communications infrastructure similar in size and location to the PTC-related wayside facilities are ultimately found to have no or minimal effect on historic properties, and so require no further assessment prior to implementation. The FCC should draw from its lengthy history of overseeing the clearance of structures similar to PTC-related facilities without the need for mitigation measures, and draft the Program Comment to avoid increasing the amount of historic preservation review that will ultimately end with a finding of no effects on historic properties.

¹⁵ See Reply Comments of USET, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128 at 2 (filed Sept. 8, 2003).

¹⁶ See *Save Our Heritage, Inc., et al., v. FAA*, 269 F.3d 49, 58 (1st Cir. 2001) (affirming that an agency can exclude undertakings from both environmental and historic preservation review based on a finding of a *de minimis* effect on the human environment); see also *See Wireless Tower Siting NPRM*, 28 FCC Rcd at 14243 ¶ 11; see also Comments of the Association of American Railroads, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, WT Docket No. 13-238 *et al.* at 13-17 (filed Feb. 3, 2014) (“AAR *Wireless Tower Siting Comments*”) (discussing authority of the FCC to exclude wayside deployments from historic preservation review based on a finding of *de minimis* effect).

B. The Process Outlined in the Draft Program Comment Will Not Provide the Needed Relief

The draft Program Comment was intended to address the deficiencies in the current historic review process regarding the expeditious review of PTC-related infrastructure, and the proposed SHPO exemptions will improve and expedite this side of the review process. The process outlined in the draft Program Comment, however, suffers from the following specific problems:

- The revised process will not apply to any PTC-related infrastructure deployed by at least three of the seven Class I railroads;
- While the reformed TCNS submission process purports to offer administrative convenience, it continues to anticipate time-consuming, pole-by-pole Tribal review as opposed to clearance of larger sections of track;
- Like the existing historic preservation review process, the draft Program Comment does not offer definitive deadlines for the resolution of Tribal review;
- Tribal Nations may continue to make automated information requests which have the effect of delaying approval;
- The addition of new required documents, including cultural resource reports, will increase the time needed to prepare applications for submission as well as the time needed for Tribal Nations to review applications, and producing such information is an inefficient and costly exercise as not all Tribal Nations have asked for such documentation; and
- The proposed process allows Tribal monitoring and/or alternative excavation techniques upon request for every pole deployment, without requiring any evidentiary showing of the probability of the presence of cultural resources, instead of as mitigation techniques where necessitated.

The draft Program Comment will not apply to all railroads' PTC-related wayside infrastructure. Although the railroads have previously shared their deployment plans with the FCC, the dimensions of the foundations that are set as the maximum limit for PTC-related facilities in the draft Program Comment are exceeded by at least three railroads.¹⁷ The FCC and industry alike are not well served by a Program Comment that fails to encompass such a large number of PTC-related wayside facilities in its provisions.

¹⁷ See Section IV *infra*.

Without batched review of applications, the draft Program Comment is of limited utility.

In the draft Program Comment, the FCC provides that it may, at its discretion, permit the batched submission of applications for review of PTC-related infrastructure into TCNS. However, the Commission clarifies that any batching of submissions “is for administrative convenience and is not intended to affect the level of review.”¹⁸ Under the ACHP’s rules, a Program Comment is intended to be used “[w]hen effects on historic properties are similar and repetitive or are multi-State or regional in scope,” and Program Comments previously approved by the ACHP generally preclude case-by-case review of undertakings.¹⁹ While the convenience of batched *submission* may be minimally useful in reducing the work of submitting thousands of separate PTC-related applications into TCNS, the failure of the Program Comment also to provide for batched *review* of PTC-related infrastructure effectively dooms the utility of the proposed process.²⁰ Other than the mild and, as the FCC acknowledges, purely administrative convenience of being able to enter groups of PTC-related wayside facilities applications, rather than having to enter each application separately, the batching provision offers no advantages to the railroads, and will not have any impact on the way Tribes will conduct their review.

¹⁸ See *Draft Program Comment* at 7.

¹⁹ See 36 C.F.R. § 800.14(b)(1); see also, e.g., Program Comment Issued for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges, 77 Fed. Reg. 68790, 68791 (2012) (providing for programmatic, rather than site-by-site, review of undertakings affecting highway bridges).

²⁰ Moreover, the FCC has failed to address continuing technical shortcomings with the TCNS process. According to conversations with FCC staff, the only change made to TCNS since its use for PTC-related facilities was suspended in May 2013 has been an expansion in the number of characters that can be entered in the one available free text field (the address field). It is not clear that the design issues that caused the FCC to instruct the railroads not to use TCNS have been resolved. Further, in its January 8, 2014 limited reopening of TCNS on a test basis, the FCC requested that the railroads provide more robust information packages beyond that currently required and submit them into TCNS. See Steinberg Letter at 2. While the railroads have complied by accompanying their applications with a supplemental information package, they have continued to receive automated responses from Tribal Nation requesting more information. This has created confusion, as it is unclear whether or not the submissions have been reviewed, and raises concerns that a similar provision in the draft Program Comment will not be effective in shortening the period for Tribal review.

The draft Program Comment does not include definitive deadlines for the resolution of Tribal review. Although the draft Program Comment facially offers some helpful shortened deadlines (sixty days to forty days) for Tribal Nations to determine that they are not interested in further consultation regarding a specific application, this small benefit is greatly outweighed by the fact that— like the existing Section 106 process—it does not include definitive deadlines for the resolution of Tribal review. Instead, Tribal Nations are permitted to follow up receipt of a submission package with requests for additional information, with no limit on the time to review information packages once provided. The ability to respond to an application with additional information could render the shortened forty day period meaningless, as review in fact could last indefinitely.

The draft Program Comment’s deadline for dispute resolution of sixty days, “unless the FCC determines additional time is necessary,” is similarly ineffective. Indeed, in the railroads’ experience, even with significant additional time, the FCC has been unable to resolve a much smaller number of disputes involving TCNS entries of non-PTC rail infrastructure. The FCC is not adequately staffed now to resolve disputes between various stakeholders, and there is no reason to believe that it could satisfy a sixty day deadline when faced with the review of thousands of entries.

Although the draft Program Comment takes the unprecedented step of requiring the default submission of a cultural resource report for each PTC-related location prior to any request by a Tribal Nation, the utility of this provision is questionable if Tribal Nations have no deadlines for the review of such information. In the railroads’ experience, preparation of the full list of required information documents, including cultural resource reports, will take from four to six weeks *per installation*. If adopted as drafted, the Program Comment could eliminate the

possibility of the deployment of any PTC-related infrastructure in 2014 for some railroads, as clearances could come too late in the construction season to arrange for work crews before the winter season begins. No benefit will be gained if applicants are required to expend considerable resources to provide such studies upfront if such submissions are not required by a particular Tribal Nation or are not reviewed expeditiously. Moreover, such a provision effectively inverts the Section 106 process by placing the burden of identifying historic properties of cultural and religious significance to Tribal Nations on the railroads.²¹

The draft Program Comment does not require an evidentiary showing prior to monitoring and/or alternative excavation. The draft Program Comment establishes the ability of Tribal Nations to request monitoring and/or alternative excavation techniques on request, with no evidentiary showing. This is a backwards approach to the Section 106 review process. Under the NPA, Tribal consultation is a two-part process. First, consultation is intended to ascertain whether any historic property of cultural and religious significance might be located within the Area of Potential Effects (“APE”). Second, if a determination is made that any such a historic property exists, consultation should attempt to reach an agreement on the presence or absence of effects on that property.²² Only at this second stage would mitigation such as monitoring or alternative excavation techniques be necessary. In contrast, the draft Program Comment suggests that before a Tribal Nation has even ascertained that any historic property exists that could be subject to direct or visual effects from the PTC-related deployment, that Tribe can require that *all* sites be subject to monitoring or to alternative excavation. In fact, with no evidentiary showing, under the draft Program Comment any potentially interested Tribal Nation

²¹ See NPA at Section VI.D.1.b (providing that applicants “shall gather information *from* Indian tribes...to assist in identifying Historic Properties of religious and cultural significance to them”) (emphasis added).

²² See NPA at Section IV.G.

can require monitoring for any site even if a railroad has voluntarily commissioned a field study by a Secretary of the Interior-qualified professional archeologist who has made a determination that no archeological historic properties exist within the APE.²³ The draft Program Comment also does not address the logistics of coordinating the potentially dozens of Tribes who could claim an interest in sending a monitor to observe the installation of a particular site, including the challenge of organizing and scheduling deployments and ensuring the safety of all track-side personnel.

As discussed in Section IV below, to request monitoring or alternative excavation methods as a form of mitigation, a Tribal Nation should first be required to establish—based on its own records, historical documents, or specific cultural resources—that a historic property of cultural and religious significance exists within the relevant APE. As currently drafted the Program Comment establishes the entire national railroad rights of way as a historic property, subject to blanket mitigation. The railroad rights of way, which have been operated for up to 175 years, have been subject to significant, heavy construction and maintenance associated with railroad operations. At a maximum height of seventy-five feet, the PTC-related wayside facilities would be considerably smaller than standard communications towers, and would be closer in height to standard utility poles that are already ubiquitous in the urban and rural landscape. Due to the high level of previous disturbance on the railroad rights of way, and the small scale of the PTC-related wayside facilities, the likelihood of existing cultural resources that could be affected by PTC-related wayside infrastructure deployment and require any form of mitigation is minimal.²⁴ The railroads continue to be open to mitigation in any situation where a

²³ *See id.* at Section VI.D.2.

²⁴ The NPA provides that to assess potential effects on historic properties, applicants should consider factors such as “topography, vegetation, known presence of Historic Properties, and existing land use.”

Tribal Nation expresses a specific concern regarding a historic property and provides evidence to support this concern.

III. THE PROGRAM COMMENT PROCESS DOES NOT REQUIRE THAT ALL IMPACTS ON HISTORIC PROPERTIES BE AVOIDED

The draft Program Comment does not need to guard against any potential impact to any unknown historic property. Congress did not intend that the Section 106 process be exhaustive. As the Commission has previously noted, the NHPA “contemplates a balancing of the likelihood of significant harm against the burden of reviewing individual undertakings” and “does not require perfection in evaluating the potential effects of an undertaking in every instance.”²⁵ Specifically, Section 106 and the ACHP’s rules require that federal agencies “take into account” the effect of their undertakings on historic properties, and engage in a “good faith and reasonable effort” to identify historic properties.²⁶ The standard of review for undertakings under the Section 106 process “is not one of perfection but one of reasonableness, taking into account both the likelihood that adverse effects will not be considered in some instances and the overall benefits to be obtained from streamlining measures.”²⁷

One of the main reasons that the historic preservation review process outlined in the NPA provides for few exclusions is that the type of communications infrastructure that its drafters envisioned was considerably more intrusive on the human environment than PTC-related facilities. The FCC’s environmental and historic preservation review rules were developed at a

See NPA at Section VI.E. In the case of deployment of PTC-related facilities on railroad rights of way, the number of known Historic Properties will be minimal, all vegetation has long been cleared from the ballasted track bed, and the land has been in use for the industrial deployment of rail lines for decades, and in many cases for over a century.

²⁵ Nationwide Programmatic Agreement Regarding the Section 106 National Historic Review Process, *Report and Order*, 20 FCC Rcd 1073, 1087 ¶ 35 (2004) (“*NPA R&O*”).

²⁶ *See* 16 U.S.C. § 470f; 36 C.F.R. § 800.4(b)(1).

²⁷ *NPA R&O*, 20 FCC Rcd at 1082 ¶ 21.

time when wireless infrastructure deployment generally meant the construction of a single 300 foot communications tower that loomed over a previously undeveloped greenfield.²⁸ In contrast, the wayside facilities that will be deployed by the railroads to enable PTC deployment will be considerably smaller, located in areas that have been subject to extensive soil disturbance and are used continuously for rail transportation purposes, and pose *de minimis* risk of negative effects on the human environment.²⁹

As previously discussed, the railroads have seen firsthand that the overwhelming majority of wayside facilities similar in size to PTC-related deployments ultimately are determined by consulting parties to have no effect on any historic property, or to have such a *de minimis* effect that no mitigation is necessary. In fact, similarly-sized facilities on the railroad rights of way that have been processed by the railroads to date have been cleared without a finding of adverse impact. The FCC should give heavy weight to the lack of historic preservation concerns raised regarding all PTC-related facilities located on the railroad rights of way to date. Ultimately, the railroads are caught between two statutory mandates—the need to conduct historic preservation review and the need to satisfy the Congressional mandate for nationwide PTC deployment to meet significant national safety objectives. The AAR asks the FCC to use its considerable discretion in drafting the Program Comment to ensure that these statutory imperatives can be reconciled, so that PTC deployment may move forward. The current draft Program Comment will not accomplish this goal.

²⁸ See *Wireless Tower Siting NPRM*, 28 FCC Rcd at 14243 ¶ 11; see also AAR Wireless Tower Siting Comments at 6-8.

²⁹ See AAR Wireless Tower Siting Comments at 11 (discussing the location of undertakings along transportation corridors as a critical factor in the ACHP's prior approval of categorical exclusions from Section 106 review).

IV. THE PROGRAM COMMENT SHOULD ENCOMPASS ALL PTC-RELATED FACILITIES, IMPOSE FIRM DEADLINES, EMPHASIZE TRIBAL RESPONSIBILITY TO IDENTIFY HISTORIC PROPERTIES, AND PROVIDE FOR LIMITED MONITORING

The AAR continues to feel strongly that the best solution to address the need for expedited Section 106 review of PTC-related infrastructure remains an exemption from SHPO and Tribal review for all wayside facilities no taller than seventy-five feet located on the railroad rights of way that are not immediately adjacent to any previously recorded historic properties.³⁰ Because of their small size, minimal area of direct and indirect impact, and location on previously disturbed industrial rail corridors, the potential effects of PTC-related facilities on historic properties are foreseeable and minimal or not adverse. The FCC has broad authority pursuant to the NHPA and the ACHP's regulations to seek a program alternative that would exempt most PTC-related wayside facilities from Section 106 review.³¹

If the FCC declines to adopt a general exemption for all PTC-related wayside infrastructure, it should draft the Program Comment to provide a process that is superior to the existing Section 106 application submission and review procedures. As an initial matter, the Program Comment should be drafted to provide relief to all railroads, and to exclude all PTC-related facilities located on the railroad rights of way from SHPO review. To initiate Tribal consultation, the only information (other than that required by the current TCNS process) that the railroads should have to submit is detailed maps that will allow Tribal consultants to determine whether the PTC-related facilities would have the potential to affect known historic properties of cultural and religious significance. These maps could be submitted through TCNS, or provided directly to interested Tribal Nations. Once the consultative process is initiated, the Program

³⁰ See AAR Scoping Document Comments at 11-13.

³¹ See *id.* at 18-24.

Comment should provide strict, binding deadlines to ensure that the application review will be resolved in a finite period. The failure to meet such deadlines should be construed as a lack of interest in further consultation. Requests for monitoring by Tribal Nations should only be granted on a showing of evidence that a historic property could be affected by the proposed deployment, with a limit of one monitor per work crew. More details of the AAR's proposed revisions to the draft Program Comment are provided in the attached Appendix.

Failing to make the recommended revisions to the draft Program Comment included below will almost certainly risk the loss of most, if not all, of another construction season this year and, in turn, the inability of the railroads to meet the end of 2015 deadline for nationwide PTC deployment mandated by Congress. According to FCC staff, the Commission plans to submit the draft Program Comment to the ACHP in March 2014, which should result in final approval of the Program Comment in late April or early May 2014.³² Based on this timeline, and given the length of time needed for the preparation of cultural resource reports and other materials mandated by the current draft Program Comment, the railroads would not be able to submit their first applications for PTC-related wayside deployments until late June 2014. Even under the best circumstances as provided under the draft Program Comment, no PTC-facility would be likely to be approved for construction until forty days after submission—or mid-August 2014. Any request for additional information by a Tribal Nation would have the effect of significantly pushing back even these best-case scenario deployment dates, and could result in at least some railroads being unable to deploy any PTC-related facilities in 2014.

³² The ACHP has forty-five days from the date of receipt of the draft Program Comment to act on that program alternative by either adopting it, declining to comment, seeking additional information, or asking for an extension. *See* 36 C.F.R. § 800.14(e)(5).

Although the Tribal Nation consultative process is not the only factor the railroads must take into account when planning for PTC deployment, delays in approval have already significantly compromised, and will continue to negatively impact, the rest of the construction and implementation process, including ordering and receiving PTC equipment and arranging for contractors for deployment services. For tracks on the northern plains in particular, the deployment season is normally limited by inclement weather by the early fall, and uncertainty regarding when approval for deployment could come will result in the inability to sign contracts to secure work crews before cold weather makes construction impossible. Being unable to deploy PTC wayside facilities in 2014 will also have a profound, negative impact on the testing of PTC systems, and will push back the training and certification of railroad employees on PTC equipment, which must take place before general deployment.

The Program Comment Should Apply to All PTC-Related Facilities. As drafted, the Program Comment is limited to infrastructure situated in a railroad rights of way supporting either a wayside antenna or base station that is no taller than seventy-five feet (including antenna), requires a foundation no deeper than fifteen feet, and creates a foundation hole not in excess of fifteen inches in diameter.³³ PTC-related infrastructure that falls outside of these categories must rely on the Section 106 review process established under existing FCC regulations and procedures. As has been previously disclosed to the FCC, at least three of the seven Class I railroads plan to deploy PTC-related facilities using a foundation hole that will exceed the fifteen inch diameter provided in the draft Program Comment. Rather than make the Program Comment process unavailable for almost half of the affected railroads, the AAR

³³ See *Draft Program Comment* at 5.

believes that the FCC can minimize ground disturbance by refining its definition of covered facilities.

While the diameter of poles deployed by most railroads will be approximately fifteen inches, at least one of the railroads will be deploying PTC wayside facilities using an augered foundation that is eighteen inches in diameter, with a disturbance diameter of up to twenty inches, while two other railroads will be using foundations that will be wider than those contemplated in the Program Comment but also very shallow, requiring a foundation that is less than six feet deep. The FCC can revise its constraints regarding foundation dimensions to include the deployment plans of all railroads without giving rise to any increased risk of adverse effects on historic properties. To ensure that no eligible PTC-related infrastructure is excluded from the Program Comment process, the FCC should clarify that foundation deployments should either have a disturbance diameter of no more than twenty inches with a foundation depth of no more than fifteen feet, *or* an open excavation of any size with a foundation less than six feet deep. Such a provision will allow all of the railroads to rely on the Program Comment while not increasing any potential impact to the human environment.

Tribal Nations Should Be Encouraged to Exclude Counties from Section 106 Review. As drafted, the Program Comment would exclude from SHPO review facilities constructed in existing railroad rights of way where similar structures already exist in the same vicinity.³⁴ The AAR appreciates this helpful exclusion. However, the Program Comment would provide no parallel exclusion from review by Tribal Nations, despite the fact that Tribes and SHPOs share similar historic preservation concerns.³⁵ The AAR believes that Tribal Nations should be able to designate areas, such as counties, for which they are not interested in consultation, and to provide

³⁴ *See id.* at 6.

³⁵ *See id.*

those designations to the railroads as an effective exemption from review.³⁶ To clarify this provision, the FCC should draft the final Program Comment to exclude from Tribal Nation review all PTC-related wayside facilities that have been designated as including no historic properties of cultural or religious significance.

Applicants Should Not Be Required to File Cultural Resource Reports with Their Application. The draft Program Comment provides that applicants seeking to use the FCC's revised historic review process must submit a cultural resources report, prepared by a professional who meets the relevant standards in *The Secretary of the Interior's Professional Qualifications Standards*, with their application.³⁷ The FCC acknowledges that ordinarily applicants are not required to provide such reports as part of their TCNS submissions, but suggests that requiring such a submission is necessary to expedite the Tribal review process, as Tribal Nations "often request a cultural resources report" on receiving an application via TCNS. The AAR believes that rather than asking the railroads to spend the extensive time needed to prepare a cultural resource report for each PTC-related pole or facility, when Tribal Nations are already facing the challenge of reviewing thousands of pole applications, the resources of all stakeholders would be better spent preparing and reviewing the detailed maps which are also required. Such maps provide all information needed to assess whether a particular deployment will have a potential effect on a known historic property of cultural and religious significance to that Tribal Nation.

The requirement of Tribal consultation under Section 106 is based on the presumption that Tribal Nations are better suited to identify historic properties of cultural and religious

³⁶ See *NPA* at Section VI.B (providing that a SHPO or Tribal Historic Preservation Officer "may specify geographic areas in which no review is required for direct effects on archeological resources or no review is required for visual effects").

³⁷ See *Draft Program Comment* at 8.

significance to that Tribe than are applicants or Federal agencies. For this reason, a Federal agency's duty under the NHPA and the ACHP's rules is to seek and consider information regarding historic properties from Tribal Nations. As the NPA notes, the purpose of preliminary communications between an applicant and Tribal Nation is "to ascertain whether Historic Properties of religious and cultural significance to the Indian Tribe...may be affected by the undertaking and consultation is necessary."³⁸ There is no corresponding requirement that the agency, or an applicant, convey all known or suspected information to the Tribes.³⁹ Moreover, many of the required contents of the cultural resources report as provided in the draft Program Comment do not relate to Tribal interests at all, such as "[i]nformation on Federal lands...along or under tracks" and "[o]wnership of tracks on or near Federal lands, including direct ownership or lease arrangements," and so will be of limited utility in assessing whether a historic property of cultural and religious significance to a Tribe might be affected.⁴⁰ For the railroads, the resources needed to assemble cultural resources reports for each PTC-related facility will be overwhelming. As discussed above, on average, the preparation of such a report takes anywhere from one month to six weeks prior to submission per installation.⁴¹

The railroads are also concerned that although the submission of cultural resource reports for each PTC-related facility is intended to expedite review, the draft Program Comment provides a mechanism for Tribal Nations to respond to the receipt of such reports with additional information requests. At least one railroad that has taken advantage of recent permission to

³⁸ NPA at Section IV.G; *see also* NPA at Section VI.D.1.b.

³⁹ *See Slockish v. U.S. Federal Highway Admin.*, 2012 WL 3637465 *9 (D.Or, June 19, 2013).

⁴⁰ *See Draft Program Comment* at Appendix.

⁴¹ In addition, the FCC staff have expressed concerns that the resources of the Tribal Nations are already stretched thin by the need to review nearly 22,000 applications, and at recent consultative meetings in Rapid City, South Dakota and Tulsa, Oklahoma some Tribal representatives stated that they preferred not to receive such reports, and lacked the resources to review such submissions.

resume limited submission of PTC-related infrastructure in TCNS has had a cautionary experience.⁴² Despite submitting a supplementary information package that contained many of the documents described in the draft Program Comment, the railroad continued to receive automated responses from Tribal Nations requesting the submission of an information package. As the railroad had, in fact, submitted such a package, it was impossible to know if the package had been reviewed, what additional information these Tribal Nations might need, or how the railroad was to make a determination regarding how to supplement its submission. If Tribal Nations can respond to a cultural resource report with requests for additional information that can lead to infinite delays in approval, there are no efficiencies gained by generating such reports in advance of Tribal requests. The FCC should draft the Program Comment to eliminate the ability of Tribal Nations to respond to an application with an automated request for additional information.

Deadlines. One of the most fundamental problems with the existing Section 106 review process is the lack of clear and finite deadlines for approval. The draft Program Comment shortens the potential approval period from approximately sixty days to forty days, but does not solve the fundamental problem of unlimited consultative review by Tribal Nations.

As drafted, the Program Comment provides that if an applicant has not received a response from a Tribal Nation twenty days after the application was submitted via TCNS, provided the applicant has attempted at least one follow-up communication during that period, the railroad may ask the FCC to send a letter to the Tribal representative.⁴³ The FCC will send this letter within five days of the request, and if the Tribal Nation does not respond within fifteen

⁴² See generally Steinberg Letter (describing the Beta TCNS submission process).

⁴³ See Draft Program Comment at 10.

days, it will be deemed to have no interest in consultation.⁴⁴ The AAR believes that an approximately forty day period for the approval of PTC-related infrastructure is appropriate, and supports this general timeline provision.

However, there are many circumstances under which the Tribal review process is essentially open-ended. Notably, during the initial twenty day period, a Tribal Nation may ask for additional information. If the railroad provides such information, the draft Program Comment provides no deadline during which the Tribal Nation must complete the review. If the Tribal Nation and the railroad disagree about any aspect of this request, after attempting to resolve their differences in fifteen days the parties may bring their disputes before the FCC. The draft Program Comment does not provide any timeline for the ultimate resolution of such a dispute by the FCC. Similarly, although the FCC pledges to resolve all disputes regarding a submission that requires further review, or a closer examination, within sixty days, it caveats this provision by noting that it can take additional time to resolve the dispute if it determines this is necessary.

Given the narrow questions and largely uniform nature of the PTC-related wayside facilities for review, the AAR believes that all disputes regarding any PTC-related pole should be definitively resolved within thirty days. Based on the detailed maps supplied by the railroads, a Tribal Nation should be able to make a determination regarding the likelihood of historic properties of cultural and religious significance at each pole location within that time period. Moreover, the FCC has ample authority to impose firm deadlines on Tribal Nations for the completion of Section 106 review. The ACHP's rules provide that an agency need only provide

⁴⁴ *See id.*

a Tribal Nation a “reasonable opportunity” to identify concerns regarding historic properties,⁴⁵ and the 2000 Executive Order establishing guidelines for consultation and coordination with Tribal Nations provides that agencies must only establish procedures that allow for “timely input” by Tribal officials.⁴⁶ Other agencies have imposed firm deadlines on Tribal Nations,⁴⁷ and in rare challenges courts have affirmed that “agencies...[may] set deadlines as needed in order to ensure the timely and proper disposition of matters” before them.⁴⁸

If a Tribal Nation makes a determination, accompanied by an evidentiary showing, that a historic property could be affected by a particular PTC-related facility, it should be able to request the presence of a monitor during installation or an alternative excavation method (*see discussion below*). If the Tribal Nation finds that there is no such historic property of cultural and religious significance, or that it will not be affected by the undertaking, the deployment of PTC-related infrastructure should be allowed to proceed. The failure of a Tribal Nation to respond to an application, or to meet any consultative deadline, should be construed as an expression by that Tribe that it has no interest in review of the proposed facility.

Appropriate Limits Should Be Established for Tribal Monitoring and Requests for Alternative Excavation. The draft Program Comment provides that “a Tribal Nation may request

⁴⁵ 36 C.F.R. § 800.2(a)(4).

⁴⁶ Executive Order 13175: *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67249 (2000). Courts have found that an agency may prescribe any reasonable perimeters for Tribal consultation, as long as it abides by those guidelines. *See, e.g., Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395, 397 (D.S.D. 1995) (finding that an agency could have satisfied its obligation with even “perfunctory” consultation, as long as this was in accordance with that agency’s policies).

⁴⁷ *See, e.g.,* 25 C.F.R. § 262.3(b)(1) (providing that a Tribal representative reply to a request for information in thirty days); 25 C.F.R. § 262.8(c) (allowing a government official to act if a Tribal government has not responded to a request in fifteen working days); 43 C.F.R. § 7.7(a) (requiring notice of “at least” thirty days to a Tribe prior to the issuance of a permit that “may result in harm to, or destruction of, any Indian tribal religious or cultural site on public lands”).

⁴⁸ *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management*, 455 F.Supp. 2d 1207, 1220 (D.Nev. 2006).

to monitor construction at *any or all sites* within a batched submission.”⁴⁹ The AAR believes that providing pole-by-pole monitoring as a default will entirely defeat the purpose of the Program Comment, which is to provide broad, systematic relief for the deployment of all PTC-related wayside facilities. Allowing individual monitoring of all PTC-related poles represents no improvement over the current Section 106 review process. Monitoring, as a form of mitigation, should only be invoked if the Tribe “provides evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE for direct effects.”⁵⁰ Any disputes arising from the submission of such evidence, including the sufficiency of such evidence, and any disputes regarding whether requests for mitigation or alternative excavation methods should be honored, should be resolved by the FCC within fifteen business days.

Where monitors have been shown to be appropriate, for safety reasons the Program Comment should clarify that a maximum of one monitor will be allowed per railroad work crew.⁵¹ The AAR believes that the most comprehensive approach to monitoring would be the formation of a pool of professionals who satisfy the Secretary of the Interior’s Professional Qualification Standards. Both the railroads and Tribal Nations should be able to contribute monitors to this pool. The railroads would then draw from this group of approved monitors to accompany work crews installing any PTC-related wayside infrastructure for which a Tribal Nation had provided evidence of potential archeological impact. Any disputes regarding the

⁴⁹ See *Draft Program Comment* at 11 (emphasis added).

⁵⁰ See *NPA* at Section VI.D.2.d.

⁵¹ The AAR notes that the draft Program Comment does not provide criteria to govern the coordination of monitors and work crews. Such criteria are critical to ensure that PTC deployment can go forward as scheduled even if, for example, an appointed monitor fails to appear at a work site on a scheduled deployment date. Standard criteria are also necessary to ensure the safety of work crews and monitors on the job site. If the ACHP adopts a Program Comment that includes provisions for monitoring, the FCC should also finalize a list of required working criteria that would ensure that monitoring does not slow the PTC deployment process, or endanger the safety of that deployment.

selection of a monitor for areas of interest for more than one Tribal Nation should be submitted to the FCC, and resolved within fifteen days. The largely uniform historic preservation interests of all Tribal Nations will be well-represented by a Secretary-qualified monitor, and providing for a single monitor will avoid inevitable scheduling delays and safety concerns that will arise if each interested Tribe is entitled to deploy a monitor to each PTC-related wayside site.

As a related concern, the AAR disagrees with the provision in the draft Program Comment that provides that a railroad must honor any request by a Tribal Nation to use an excavation method other than screwing in of the pole or auger drilling “[w]here necessary to ascertain the presence of archeological resources.”⁵² The railroads have invested significant resources in PTC deployment, which includes making a determination regarding the type of foundation and make-up of crews needed to effect this major public safety infrastructure project. Because of the significant financial cost and strain on resources, and safety risks, a request for monitoring or alternative excavation should only be acted upon with a showing by the Tribal Nation that a known historic property of cultural and religious significance exists within the APE, and that the PTC-related wayside facility could negatively affect such a property absent mitigation.

V. THE SECTION 106 REVIEW OF PREVIOUSLY CONSTRUCTED PTC FACILITIES SHOULD BE RESOLVED SEPARATELY

The final section of the draft Program Comment addresses previously constructed PTC facilities, and provides that in order to “benefit from the efficiencies” of the revised historic review procedures, a railroad must provide complete responses to all information requests from the FCC regarding previously constructed PTC facilities. The railroads fully intend to comply, in a timely manner, with all FCC requests. Since Congress first imposed the PTC mandate, the

⁵² See *Draft Program Comment* at 11.

railroads have been trying to implement an important public safety mandate as quickly as possible, with no intent to circumvent existing rules or processes.⁵³ The railroads have always believed that there would be no significant environmental impact or impact on any historic properties from the deployment of infrastructure on its rights of way. While the railroads are prepared to cooperate with the FCC and the Tribal Nations to address concerns regarding previously constructed PTC facilities, to the extent the draft Program Comment suggests otherwise, resolution of those matters cannot be a condition for a workable Section 106 process that permits the timely installation of the thousands of remaining wayside structures required for PTC.

VI. CONCLUSION

Rather than representing a streamlined solution to the existing historical review process, the proposed Program Comment would perpetuate the extensive delays that are characteristic of that process. In particular, the lack of definitive deadlines for the resolution of Tribal consultation only perpetuates problems already inherent in the FCC's Section 106 process. The AAR continues to believe that given the low probability of significant environmental or historic impact, as evidenced by the experience of the railroads with the Section 106 process to date, the FCC should seek an exemption from Section 106 review for all PTC wayside facilities no more than seventy-five feet in height that are located on the railroad rights of way and not within or immediately adjacent to a known, previously recorded historic property. Absent an exemption

⁵³ In the draft Program Comment, the FCC references Section 110(k) of the NHPA, which provides that an agency should not grant a license to an applicant who intentionally significantly adversely affected a historic property. *See id.* (citing 16 U.S.C. § 470h-2(k)); *see also* NPA Section X. The railroads object to any implication that their actions regarding the previously constructed facilities represented an “intentional” attempt to violate Section 106 or any of the FCC’s environmental or historic preservation review rules.

for all PTC deployment, the FCC should revise the draft Program Comment to encompass all PTC-related facilities, impose clear deadlines for the resolution of applications, emphasize Tribal responsibility to identify historic properties, and provide for monitoring and alternative excavation methods only as a form of mitigation when the potential for adverse effects has been established.

Respectfully submitted,

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Appendix

Summary of the AAR's Proposed Program Comment Process for PTC

The AAR continues to believe that the best solution to address the need for expedited, comprehensive Section 106 review of PTC deployment is an exemption for all such facilities no more than seventy-five feet in height that are located on the railroad rights of way and not within or immediately adjacent to a known, previously recorded historic property. If the FCC believes that a Program Comment is necessary, the AAR recommends that the Commission adopt the historic review process outlined below.

- **General**
 - The Program Comment creates an optional alternative process to the existing FCC Nationwide Programmatic Agreement (NPA)
 - Rather than relying on the Program Comment process, in the alternative railroads may use the existing Section 106 process outlined in the NPA, or may enter into arrangements or agreements with Tribal Nations governing the review of all PTC facilities
- **Applicability**
 - Includes all PTC-related facilities located in the railroad rights of way
 - Such facilities must not:
 - Be taller than 75 feet (including antenna);
 - Result in a foundation hole that has a disturbance diameter of more than 20 inches with a foundation depth of more than 15 feet, *or* an open excavation of any size with a foundation more than 6 feet deep; or
 - Be situated outside the railroad rights of way
 - For all other cases, including collocations, Section 106 review will be conducted under existing FCC regulations and procedures
 - The Program Comment does not govern any Section 106 responsibilities agencies other than the Commission may have with respect to those agencies' federal undertakings, but the Program Comment may be adopted by other Federal agencies to satisfy their obligations under Section 106
 - The Program Comment does not apply on Tribal lands unless a Tribal Nation elects to adopt its provisions and in so doing follows the process set forth in Section I.D of the FCC NPA
- **Exclusions from Section 106 review**
 - All PTC-related facilities (as defined above) that are similar to nearby existing structures within the existing railroad rights of way, provided the location is not within the boundaries of a known historic property, and including those areas designated by Tribal Nations as not of consultative interest; and
 - Effects on the rails and the track beds themselves
- **Applicant submission package**
 - May either use TCNS and E106 (where applicable)
 - May batch the submission of poles by county
 - Batched submissions will be accompanied by a detailed map providing locations

- The submission of a cultural resources report, field survey and/or ethnographic survey is discretionary
- Area of Potential Effects (APE)
 - Presumed ¼-mile APE for visual effects
 - Linear APE recommended
- Tribal Nations Review
 - Scope of review: Tribal Nations will review the maps submitted by the railroads to determine whether a facility site is located within a known area of cultural and religious interest
 - Compensation: Tribal Nations may request compensation for the review of applications consistent with the scope described above
 - For areas determined by the FCC to have a high probability of the presence of intact archeological Historic Properties within the APE for direct effects and for which a Tribal Nation has requested a monitor, the Tribal Nation may request compensation for the monitor provided that the monitor meets the criteria described below
 - Tribal Nations may request compensation for the review of applications consistent with ACHP guidance, including recovery of expenses to retain additional human resources to review submitted maps for known areas of cultural and religious interest
 - Applicants shall ask Tribal Nations whether any clarification regarding the provided maps is needed within 20 days of submission
 - The ability to use the automated response in TCNS to request additional information will be disabled for the Program Comment process
 - If a Tribal Nation does not respond to the TCNS submission within 20 days, within which applicant has attempted at least one follow-up contact:
 - 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 5 business days of the applicant's request
 - If the Tribal Nation does not respond within 15 business days after the FCC has mailed its letter or e-mail, it will be deemed to have no interest in review of the proposed facility
 - 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
 - If a Tribal Nation feels that the information provided by the applicant (*e.g.* Google Earth overlays on U.S. Geological Survey maps) is insufficient, the Tribal Nation may appeal directly to the FCC, which will resolve any disputes within 15 business days
 - The FCC will resolve all other disputes between the applicants and Tribal Nations (other than disputes regarding the monitoring process; see below) within 30 business days of a request from either or both parties to intervene
 - The FCC has full discretion to intervene in Section 106 review at any point in the process

- SHPO Review
 - Applicant shall ask SHPO whether additional information is needed no later than seven days after submission
 - SHPO review should be completed within 30 days of submission pursuant to the procedures in the FCC NPA
- Addressing Adverse Effects
 - Processes in the FCC NPA for avoidance, minimization and mitigation continue to apply
 - If a Tribal Nation fails to meet any consultative deadline, as discussed above, it will be deemed to have no interest in reviewing the proposed facility
 - A Tribal Nation may request to monitor construction at any site for which it provides to the FCC evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE for direct effects
 - The sufficiency of such evidence will be determined by the FCC within 15 business days of its submission by the Tribal Nation
 - Only one monitor will be staffed per track crew, and the monitors will be taken from a pool, created by the applicants and Tribal Nations, of professionals who meet the Secretary of the Interior's Professional Qualification Standards
 - Tribal Nations may be compensated for Tribal monitors who meet the Secretary of the Interior's Professional Qualification Standards and that are used for such mitigation
 - Any disputes relating to the selection of monitors shall be referred to the FCC, which will make a decision within 15 days