

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Accelerating Wireless Broadband)	WT Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Kathryn D. Kirmayer
Senior Vice President–Law and
General Counsel
Timothy J. Strafford
Associate General Counsel

Michele C. Farquhar
Arpan A. Sura
Sarah K. Leggin

THE ASSOCIATION OF AMERICAN RAILROADS
425 Third Street, S.W.
Suite 1000
Washington, DC 20024

HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

June 15, 2017

*Counsel to the Association of American
Railroads*

TABLE OF CONTENTS

I.	Introduction.....	1
II.	The Regulatory Challenges of Extensive Wireless Infrastructure Deployment Led to the Adoption of the <i>PTC Program Comment</i>	3
III.	The Railroads’ Experience Under the <i>PTC Program Comment</i> Underscores the Need for Further Reform.....	4
	A. Strict Deadlines, Exclusions, and Batching Reforms Promote Predictability and Accelerate Deployment.....	5
	B. Failure to Address Tribal Fees Leads to Escalating Costs.....	7
	C. Completing Another Program Alternative Process Would Be Too Slow and Inefficient.....	12
IV.	Categorically Excluding All Railroad Wireless Infrastructure Will Accelerate the Rollout of Public Safety Technologies.	14
	A. The Commission Lacks Jurisdiction to Apply its NHPA and NEPA Rules to Railroads’ Wireless Infrastructure Deployments.....	16
	B. Excluding Transportation Corridors from Review Is Consistent with Current Congressional Priorities and Past Federal Agency Decisions.	18
	C. The Commission Should Eliminate Redundant Review of Deployments Within Three Miles of Sites Already Cleared Under the <i>PTC Program Comment</i>	21
	D. Conducting Duplicative Review of Deployments in Rail Yards That Have Already Undergone Extensive Disturbance Is Unnecessary and Inefficient.	22
	E. Railroad Infrastructure Less Than 25 Feet in Height Should Be Excluded from Review.	26
V.	The Commission Should Reform Its Overbroad Floodplain Review Requirements.....	27
VI.	Conclusion.	32

EXECUTIVE SUMMARY

The Rail Safety Improvement Act of 2008 required that freight railroads implement Positive Train Control (“PTC”) technology to prevent accidents. That mandate required Association of American Railroads (“AAR”) members to spend billions of dollars to deploy PTC, including the installation of more than 20,000 wayside poles and thousands of antenna base stations along rail track crisscrossing the entire United States. Obtaining regulatory clearance for each deployment under the FCC’s standard environmental and historic preservation rules would have proved insurmountable. Accordingly, the Commission and the Advisory Council on Historic Preservation (“ACHP”) adopted a program alternative in 2014 (“*PTC Program Comment*”) to streamline review of certain PTC wireless infrastructure. AAR and its members greatly appreciated the efforts of the Commission, the historic preservation community, and the Native American Tribes in helping to expedite the implementation of this federally mandated safety technology.

The *PTC Program Comment* experience sheds light on additional opportunities to streamline the review of all wireless infrastructure used by the railroads. The railroads continue to face numerous obstacles under the Commission’s environmental and historic preservation review processes. Available data collected from AAR’s members shows that:¹

- ***Historic and environmental issues are virtually nonexistent.*** Approximately 99.98 percent of the 17,201 deployments submitted for Section 106 review since the *PTC Program Comment*’s adoption resulted in a finding of no adverse effects. Roughly five percent of all deployments involved soil samples or excavations, site visits, or construction monitors. Of the 710 (or more) floodplain reviews conducted since May

¹ The data presented in these Comments *understates* the total fees, costs, and deployments incurred by the railroads. Data was not available in all instances for every AAR member. Aggregate data based on information provided by certain AAR members is available in Appendix A to these Comments.

2014, there have been zero findings of environmental impact. These results are illustrative of what can be expected from future reviews across the entire system.

- ***Delays are substantial.*** Deployments, particularly those not governed by the *PTC Program Comment*, take a significant amount of time to receive Section 106 approval. AAR members report that it takes anywhere between 92 and 225 days on average to clear a deployment not subject to the *PTC Program Comment*. Meanwhile, AAR members report that it usually takes two to three months to clear FCC floodplain review, which can add three to six months to overall deployment timelines.
- ***Tribal fees are exorbitant and growing.*** Since the *PTC Program Comment* was adopted, AAR's members have cumulatively spent at least \$27,795,900 in tribal and consultative fees to comply with Section 106 review. Four AAR members report spending at least \$2,500 in tribal fees on average for each site subject to the *PTC Program Comment*, with one spending as much as \$6,300. Many tribes are also aggressively expanding their geographic areas of interest. One national railroad, for instance, reports that 32 tribes on average now express interest in reviewing a given deployment. The growing number of tribes demanding fees has led to the rise in consulting and third-party costs. According to one AAR member, average total costs per site have risen 158 percent since 2014. Another member currently spends \$11,500 on average in overall costs per site.

AAR's members will continue to deploy safety-enhancing wireless infrastructure in the coming years. Adopting the following reforms will help expedite the completion of this critical infrastructure while respecting tribal sovereignty and environmental integrity:

- ***Harmonize regulatory treatment of all railroad deployments.*** The *PTC Program Comment* adopted streamlined treatment for certain PTC deployments. But there are also a whole host of other safety-related wireless technologies that fall outside the *PTC Program Comment*. Deployments subject to standard Section 106 treatment can result in review periods three to four times longer than those governed by the *PTC Program Comment*. As the remaining PTC infrastructure is deployed, the Commission should ensure that all deployments, whether or not covered by the *PTC Program Comment*, enjoy streamlined treatment and benefit equally from the reforms adopted in this proceeding.
- ***Exclude undertakings that pose nonexistent risk to historic, tribal, and environmental interests.*** Consistent with past decisions of the Federal Railroad Administration, the Commission should find that railroads' wireless infrastructure deployments are not federal "undertakings" under the National Historic Preservation Act or "major Federal actions" under the National Environmental Protection Act

(“NEPA”). Alternatively, given the extreme unlikelihood of adverse effects, categorical exclusions from Section 106 review are warranted. The Commission should exclude deployments within railroad transportation corridors, which are heavily industrialized and have experienced repeated disturbance over the course of many decades. In addition, or in the alternative, Commission should exclude new wireless facilities within three miles of the more than 17,201 deployments and 23,000 track miles that have cleared Section 106 review. Duplicative review of new deployments adjacent to or within previously approved sites should not be required, particularly when balancing the cost and delays against any negligible adverse impact. At a minimum, the Commission should exclude deployments within existing rail yards and those less than 25 feet in height.

- ***Eliminate or establish reasonable limits on tribal fees.*** The railroads have paid millions of dollars in tribal fees resulting in findings of no adverse effects; spending more money on future tribal consultations will not yield a different outcome. In addition, tribes should be required to assess fees only in the rare instance when they actually provide services, and these fees should be limited to the actual cost of providing services. Some tribes have established reasonable, definitive, and transparent fee schedules, and the Commission can reduce the cost of deployment by adopting or encouraging such fee schedules across the board.
- ***Reform NEPA floodplain review.*** The Commission’s current rules categorically require environmental assessments for floodplain deployments, reflecting the assumption that such construction poses grave environmental risks. The evidence, however, shows that AAR’s members have *never* received a finding of environmental impact in floodplains. The Commission should adopt defined criteria which, when met by the applicant, trigger an exclusion from floodplain review.

AAR commends the Commission for its leadership in kick-starting a holistic process to reevaluate its environmental and historic review procedures. By adopting meaningful reform, the Commission can help ensure that railroads efficiently and expeditiously implement next-generation railroad technologies that promote safe and secure operations.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Accelerating Wireless Broadband)	WT Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

I. INTRODUCTION.

The Association of American Railroads (“AAR”)² respectfully submits these comments in response to the Notice of Proposed Rulemaking in this proceeding seeking comment on streamlining regulatory barriers to wireless infrastructure deployment.³

AAR’s members were among the first to confront the regulatory obstacles associated with ubiquitous wireless infrastructure deployment. In 2008, Congress required freight railroads to deploy Positive Train Control (“PTC”) technology on aggressive timelines throughout the United States. Finding that the FCC’s standard rules and procedures for historic⁴ and environmental⁵ review were poorly suited to the task, the Commission and the Advisory Council on Historic Preservation (“ACHP”) adopted the *PTC Program Comment* in May 2014 to reduce

² 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, <http://bit.ly/2rznZLv>.

³ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, WT Docket No. 17-79, FCC 17-38 (rel. Apr. 21, 2017) (“*Wireless Infrastructure NPRM*”).

⁴ See National Historic Preservation Act (“NHPA” or “Section 106”), 54 U.S.C. § 300101 *et seq.*

⁵ See National Environmental Protection Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*

barriers to PTC deployment.⁶ The *Wireless Infrastructure NPRM* seeks comment on the railroads' experience under the *PTC Program Comment* and other issues of importance to the railroad industry.⁷

The *PTC Program Comment* ultimately proved helpful, and there is much to learn from it in this proceeding. As discussed below, however, numerous impediments to wireless infrastructure deployment still exist for the rail industry. The Commission can reduce these barriers by revisiting whether it has jurisdiction under the NHPA or the NEPA over the installation of antennas and related railroad equipment; excluding review of wireless deployments in disturbed areas (*e.g.*, railroad corridors or rail yards), deployments near previously cleared sites, and deployments less than 25 feet tall; constraining tribal fees; establishing definitive “shot clocks” or timelines for Section 106 clearance; and limiting the scope of floodplain review. Any reforms implemented in this proceeding should be technologically neutral, applying equally to all wireless infrastructure deployments, irrespective of whether they are governed by the *PTC Program Comment*. Adopting categorical exclusions rather than proceeding through a program alternative process will help ensure that reform occurs more expeditiously.

By drawing from the lessons of the *PTC Program Comment*, the Commission can better craft rules to accelerate the deployment of all types of wireless infrastructure.

⁶ See *Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, Public Notice, 29 FCC Rcd 5340, Attachment (WTB 2014) (“*PTC Program Comment*”).

⁷ See, *e.g.*, *Wireless Infrastructure NPRM* ¶¶ 35-39, 42-59, 62-63, 66, 70.

II. THE REGULATORY CHALLENGES OF EXTENSIVE WIRELESS INFRASTRUCTURE DEPLOYMENT LED TO THE ADOPTION OF THE *PTC* PROGRAM COMMENT.

The Rail Safety Improvement Act of 2008 (“RSIA”), as amended, mandates that freight railroads install PTC equipment nationwide on certain main track lines by December 31, 2018.⁸ PTC is a wireless telecommunications technology designed to prevent train-to-train collisions and over-speed derailments, among other things. It enables real-time information sharing between trains, wayside devices, and back-office applications.⁹ The RSIA was enacted following several railroad accidents that resulted in fatalities.¹⁰

To comply with the RSIA’s statutory mandate, the railroads were required to install, among other things, several thousand base stations and more than 20,000 wayside poles on the railroad rights-of-way (“ROWS”) approximately every one to three miles.¹¹ Because the PTC wayside poles use licensed spectrum, railroads were required to ensure that all such poles

⁸ Pub. L. No. 110–432, 122 Stat. 4848 (2008); *see* 49 U.S.C. § 20157. Congress originally required that PTC deployment be completed by December 31, 2015. The deadline was unachievable, and was compounded by the Section 106 review process. In response, Congress passed the Surface Transportation Extension Act of 2015, which provides a three-year extension to 2018 for the installation of all PTC structures and hardware, including communication towers or poles, wayside radios, and wayside interface units. Pub. L. No. 114-73, 129 Stat. 568 (2015).

⁹ *Positive Train Control*, Association of American Railroads, <http://bit.ly/1MNxRVI> (last visited June 15, 2017) (“AAR PTC Overview”).

¹⁰ *See Rail Safety Improvement Act of 2008 (RSIA)*, U.S. Dep’t of Transp., Fed. R.R. Admin., <http://bit.ly/2qUZRQR> (last visited June 15, 2017).

¹¹ *See Program Comment for Planned Construction of Positive Train Control Facilities within the Railroad Bed*, Section 106 Scoping Document for Consultation with Tribal Nations, at 1-2 (Sept. 27, 2013).

complied with the NEPA and the NHPA by way of the Nationwide Programmatic Agreement (“NPA”) adopted in 2005.¹²

In early 2013, AAR met with the Commission regarding the challenge of massively deploying this infrastructure consistent with the NPA. The Commission agreed to work with the railroads, Tribal Nations, preservation officers, and the ACHP to develop a program alternative to the NPA.¹³ After more than a year of public comments, draft proposals, private negotiations, and congressional hearings, the Commission and the ACHP adopted the *PTC Program Comment* in May 2014. The Commission identified a number of reasons why the standard Section 106 process was poorly suited to the challenge of large-scale wireless infrastructure deployment.¹⁴ AAR and its members greatly appreciated the efforts of the Commission, the historic preservation community, and the Native American Tribes in establishing the *PTC Program Comment*.

III. THE RAILROADS’ EXPERIENCE UNDER THE *PTC PROGRAM COMMENT* UNDERScores THE NEED FOR FURTHER REFORM.

AAR’s members have developed valuable insights regarding the strengths and weaknesses of the *PTC Program Comment*. Drawing from the railroads’ three years of experience, the Commission can craft broader Section 106 reform far better suited for new and

¹² Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Appendix C to Part 1 (2005) (“NPA”).

¹³ See 36 C.F.R. § 800.14.

¹⁴ The Commission articulated four reasons for adopting the *PTC Program Comment*. First, the railroads were required to deploy an unusually large number of poles by an aggressive deadline. Second, given the RSIA’s mandate, a “no build” alternative was not an option. Third, the technological limitations of PTC limited the railroads’ flexibility in where they could place poles and other infrastructure. Finally, preventing train collisions and the loss of human life presented compelling public safety considerations. See *PTC Program Comment* § II. These concerns have become equally applicable to a host of next-generation wireless infrastructure technologies.

future wireless technology deployments. In particular, the Commission should cap tribal fees, establish strict review timelines, and adopt categorical exclusions. These reforms should be technologically neutral and apply equally to all railroad wireless infrastructure deployments, regardless of whether they are governed by the *PTC Program Comment*.

A. Strict Deadlines, Exclusions, and Batching Reforms Promote Predictability and Accelerate Deployment.

The *PTC Program Comment* adopted numerous reforms that helped expedite review. It provides that tribes have 30 days to review a submission, and the clock does not stop or reset for tribes' follow-up requests.¹⁵ Where a tribe fails to respond within 30 days, the railroad may refer the application to the Commission, which has an undefined window to resolve the matter.¹⁶ The 30-day clock may be extended during the consultation process to reach a mitigation agreement and for referrals to the Commission where the parties have reached an impasse.¹⁷

In addition to promulgating more reasonable deadlines, the *PTC Program Comment* excluded certain wayside pole deployments from review for, among other things, (i) wayside structures within 500 feet of certain existing structures; (ii) most collocations of wayside antennas on existing railroad infrastructure; (iii) certain infrastructure in rail yards; and (iv) facilities on the rails or the track beds.¹⁸ For non-excluded PTC wayside pole deployments, the *PTC Program Comment* permitted batched submissions of geographically proximate

¹⁵ See *PTC Program Comment* § VII.D.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *PTC Program Comment* § V.

deployments.¹⁹ AAR's members have found that the exclusions and batching process have been particularly helpful in expediting deployment. The *PTC Program Comment*'s procedures represent a major improvement over the NPA's opaque and indeterminate timelines.

But there is room to optimize the process. The *PTC Program Comment*'s deadlines are not definitive in all cases, and their open-endedness can lead to delays. In some cases, tribes have been non-responsive when they lack familiarity with the requirements of the *PTC Program Comment* or when a preservation officer is unavailable. AAR's members report that average Section 106 review for deployments under the *PTC Program Comment* ranges from 40 to 106 days per site; the large variance in review times underscores the continued unpredictability of the process. And the problem of delays is more pronounced for railroads' deployments not subject to the *PTC Program Comment*, which do not enjoy the benefits of batching, shorter deadlines, and exclusions. For these deployments, which are governed by the NPA, AAR members report that review can take between 92 to 225 days on average to complete.

The Commission can and should impose firm Section 106 review deadlines for all deployments, regardless of whether the *PTC Program Comment* applies.²⁰ The ACHP's rules provide that an agency need only provide a tribe a "reasonable opportunity" to identify concerns regarding historic properties,²¹ and the 2000 Executive Order establishing guidelines for consultation and coordination with tribes provides that agencies must only establish procedures

¹⁹ *Id.* §§ VII.A-B. See *Wireless Infrastructure NPRM* ¶¶ 62-63 (seeking comment on the "benefits that could be realized through the use of batching").

²⁰ See Competitive Carriers Ass'n, *Clearing the Path for America's Wireless Future: Addressing Hurdles to Meet the Pressing Need for Our Nation's Wireless Infrastructure*, WT Docket No. 17-79 *et al.*, at 18 (June 8, 2017) ("CCA White Paper") (proposing adoption of "commonsense 'shot clocks'" throughout the Section 106 process).

²¹ 36 C.F.R. § 800.2(c)(2)(ii).

that allow for “timely input” by tribal officials.²² Other agencies have imposed firm deadlines on tribes,²³ 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.²⁴ Consistent with these decisions, the Commission should establish strict review deadlines here.

B. Failure to Address Tribal Fees Leads to Escalating Costs.

The *Wireless Infrastructure NPRM* properly focuses on the problem of escalating tribal fees.²⁵ The railroad industry has paid more than \$27,795,900 in tribal and consulting fees over the last three years for their PTC and non-PTC wireless infrastructure deployments. AAR’s experience under the *PTC Program Comment* supports the view that meaningful reform must eliminate or constrain tribal fees.

The *PTC Program Comment* did not address tribal fees.²⁶ Its failure to do so has caused significant economic harm to the railroads.²⁷ Year-over-year tribal fees have steadily increased

²² Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249, Exec. Order 13175 (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).

²³ *See, e.g.*, 25 C.F.R. § 262.3(b)(1) (Bureau of Indian Affairs rule providing that a tribal representative is to reply to a request for information in thirty days); 25 C.F.R. § 262.8(c) (Bureau of Indian Affairs rule 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) (Interior Department rule 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”).

²⁴ *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management*, 455 F.Supp. 2d 1207, 1220 (D.Nev. 2006).

²⁵ *See Wireless Infrastructure NPRM* ¶¶ 35-39, 42-59.

²⁶ AAR repeatedly urged the Commission to limit tribal fees in the run-up to the *PTC Program Comment*. *See, e.g.*, Comments of AAR, WT Docket No. 13-240, at 31-33 (Nov. 15, 2013).

since the *PTC Program Comment* was adopted.²⁸ One AAR member reports that the average fee per tribe for each application subject to the *PTC Program Comment* has risen by 100 percent between 2014 and 2017. Tribal fees have also increased in the aggregate: the railroads have spent more than \$16,072,582 in tribal review fees for their covered PTC deployments. Available data from three different railroads illustrates the exorbitant and growing average overall costs per site (*i.e.*, combined tribal fees and outside consulting costs):

- **Railroad A:** \$6,750 in overall per site costs in 2017—up 158 percent from 2014.
- **Railroad B:** \$11,500 in overall per site costs in 2017—up 91.60 percent from 2014.
- **Railroad C:** \$9,600 in overall per site costs in 2017—up 65.5 percent from 2014.

This dramatic spike directly results from the combination of escalating fees charged per tribe and the increasing number of tribes that have expanded their geographic areas of interest.²⁹

According to one AAR member, for instance, an average of 32 tribes currently express interest in reviewing deployments. With more tribes expressing interest per site, the railroads have been

²⁷ Wireless providers, too, have experienced exponential increases in tribal fees as they attempt to deploy wireless infrastructure. CCA members have faced fees ranging from \$250 to \$1,650 per tribe per location, amounting to an average of more than \$6,300 per project based on costs reported between late 2016 to early 2017. The average charge per tribe more than doubled from 2011 to 2016. *See* CCA White Paper at 2, 15.

²⁸ The Commission recognizes that wireless providers face the same issue. *See Wireless Infrastructure NPRM* ¶ 35 (“[T]he average cost per Tribal Nation charging fees increased by 30% and the average fee for collocations increased by almost 50% between 2015 and August 2016.”).

²⁹ *See Wireless Infrastructure NPRM* ¶ 35 (noting the existence of this problem); *see also id.* Appendix ¶ 39. Indeed, wireless providers note that there is no limitation on the scope of the areas that tribes can designate. Many tribes designate entire states, including major metropolitan areas that have little or no undisturbed ground. Multiple tribes can designate the same area as one of historical interest, like Chicago, which more than 30 tribes have designated. *See* CCA White Paper at 2.

forced to spend more on consulting and other third-party services.³⁰ Three of AAR's members have collectively spent more than \$10,645,978 in PTC-related outside consulting fees.³¹

The same issue afflicts the railroads' deployments governed by the NPA instead of the *PTC Program Comment*. AAR members report that anywhere from 10 to 28 tribes on average have expressed interest in these deployments between 2014 and 2017. The average amount of tribal fees and outside consulting costs per site can be as low as \$4,033 for some AAR members and as high as \$11,750 for others. AAR members have spent at least \$1,077,340 collectively in tribal fees between 2014 and 2017 on NPA-governed deployments.

AAR concurs with commenters from other industries that have noted the lack of valid justification for the spike in tribal fees.³² Tribal fees should reflect the cost of providing a given service.³³ While tribes often need only provide an automated response to a Tower Construction Notification System ("TCNS") submission and indicate their areas of interest, they charge high

³⁰ Wireless providers similarly report that in some areas of the United States, the costs of consulting with tribes under the current rules exceed 50% of the combined cost of other elements of the project, such as support poles, antennas, radios, backhaul, and power. *See* CCA White Paper at 8.

³¹ These and other total amounts presented in these Comments understate the magnitude of the problem. Cost data was not available for every AAR member.

³² *See, e.g.*, Comments of PTA-FLA, Inc., Docket No. 15-180, at 8 (June 28, 2016); Comments of Mobilitie, LLC, WT Docket No. 16-421, at 5, 8 (Mar. 8, 2017) ("Mobilitie Comments"); Comments of Verizon, WT Docket No. 16-421, at 33-37 (Mar. 8, 2017) ("Verizon Mobilitie Comments"); Comments of Sprint Corp., WT Docket No. 16-421, at 44-47 (Mar. 8, 2017) ("Sprint Mobilitie Comments").

³³ *See, e.g.*, Mobilitie Comments at 5 ("[S]ome tribes leverage . . . reviews to demand substantial payments from applicants in return for completing or waiving those reviews. But there is no basis for tribes to seek reviews or to request fees for small cells, because when these facilities are installed in an active right of way they rarely if ever could affect tribal interests."); Sprint Mobilitie Comments at 45 (noting during Sprint's small cell deployment for the Super Bowl "most tribes request[ed] the fee without even a cursory investigation that would have shown the infinitesimal likelihood that their review would demonstrate this to be a site [of historical significance]").

fees to do so.³⁴ These practices contravene the ACHP's longstanding view³⁵ that a tribe may be "justified in requiring payment for its services, just as any other contractor," *but only when* it "fulfill[s] the role of a consultant or contractor."³⁶

Assessing mandatory fees merely to process TCNS applications is impermissible under ACHP guidance. Tribal fees must be for voluntary, consultative services.³⁷ Fees are appropriate where applicants "ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe."³⁸ An applicant may choose not to ask for consultative services; it "is free to refuse just as it may refuse to pay for an archaeological consultant."³⁹ A tribe cannot withhold a routine response for failure to pay processing fees: "If the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving

³⁴ Wireless providers also observe that tribes may be asserting interest and demanding fees in areas where their historical ties are tenuous. Tribes charge an initial "identification" fee, but it is "exceedingly rare for a Tribe to engage in substantive consultations" about the site after extracting the fee. One CCA member reported that tribes never requested further consultation for approximately 20,000 sites for which it used the TCNS process since 2004. *See* CCA White Paper at 13; *see also* Petition for Declaratory Ruling of PTA-FLA, Inc., Docket No. 15-180, at 6 (May 3, 2016) (reporting never receiving a single adverse effect finding for thousands of TCNS submissions) ("PTA-FLA Petition"); Comments of Crown Castle, WT Docket No. 15-180, at 3 (Sept. 28, 2015) (same).

³⁵ *See Fees in the Section 106 Review Process*, ACHP (2001), <http://bit.ly/2qUPDju> ("ACHP 2001 Fee Guidance") (last visited June 15, 2017); ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*, at 13 (2012), <http://bit.ly/2qZR83W> ("ACHP 2012 Handbook").

³⁶ ACHP 2001 Fee Guidance; *see also* ACHP 2012 Handbook at 13.

³⁷ *See* CCA White Paper at 1-2 (explaining that tribes that declare an interest in a site "withhold consent unless the siting applicant pays an application fee . . . even though neither the FCC's rules nor the NHPA require fee payment or obtaining Tribal concurrence").

³⁸ *See* ACHP 2012 Handbook at 13.

³⁹ *See id.*

payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.”⁴⁰ Accordingly, the ACHP explains that “the agency or applicant is not required to pay the tribe for providing its views.”⁴¹

The *Wireless Infrastructure NPRM* proposes sensible solutions to the problem of tribal fees.⁴² These reforms promise to reduce barriers to deployment, establish predictable expectations, align the Commission’s practices with ACHP guidance, and importantly, affirm the reasonable practices of those tribes that do constructively engage in the review process. First, the Commission should definitively state that tribal fees are not a precondition to obtaining Section 106 approval. Rather, they are appropriate only for voluntary, consultative services. The Commission must make clear that consultation does not include automated responses to TCNS submissions expressing potential interest based on geographic location. Nor does consultation include the mandatory, ministerial task of processing an application. Second, the Commission should ensure that tribal fees bear a reasonable relationship to the cost of consulting. One possible solution is to adopt or propose a fee schedule capping the fee for various services. The cost recovery schedule adopted by the United South and Eastern Tribes (“USET”) demonstrates the feasibility of this approach.⁴³ The USET cost recovery schedule does not impose charges to identify tribes or for the initial contact; for survey reviews and site

⁴⁰ See ACHP 2001 Fee Guidance.

⁴¹ See *id.*

⁴² *Wireless Infrastructure NPRM* ¶¶ 42-60.

⁴³ See Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act (Oct. 25, 2004).

visitations, fees would range between \$300 and \$500, depending on certain factors.⁴⁴ Third, to combat the growth of fees caused by the increasing number of tribes and their expanding geographic areas of interest, the Commission correctly proposes that tribes work together, de-duplicate their reviews, and charge a single, low fee for their combined services.⁴⁵ Finally, as discussed below, excluding from Section 106 review deployments in locations that have already undergone review or experienced significant ground disturbance will control deployment costs.

C. Completing Another Program Alternative Process Would Be Too Slow and Inefficient.

The *Wireless Infrastructure NPRM* solicits feedback on the desirability of a program alternative as opposed to an informal FCC rulemaking.⁴⁶ Having undergone the program alternative process to achieve the *PTC Program Comment*, AAR respectfully submits that a program alternative is not an optimal procedural vehicle for reform in this proceeding. The final *PTC Program Comment*, while ultimately helpful, required traveling down an inefficient and cumbersome path involving multiple rounds of negotiations, consultations, agency approvals, comment phases, reviewing draft proposals, and periods of simply awaiting further agency action. The process took more than fifteen months, during which PTC deployment was significantly delayed due to a moratorium on tower construction. The program alternative process should be streamlined or avoided where possible in this proceeding.

⁴⁴ See *id.* Attachment, USET Model Explanatory Cost Recovery Schedule.

⁴⁵ *Wireless Infrastructure NPRM* ¶ 55.

⁴⁶ See *id.* ¶ 66.

Administrative delay imposes opportunity costs by depriving the community of public policy that delivers better outcomes.⁴⁷ The *PTC Program Comment* prolonged the rollout of safety-enhancing PTC deployments. Looking forward, AAR's members will continue to deploy PTC and non-PTC wireless infrastructure to reduce the risk of train incidents. Moreover, 5G services will yield numerous public safety use cases such as industrial hazard sensors, vehicular coordination, emergency response services, and other critical M2M communications.⁴⁸ Railroads, like many other industries, will rely on these applications. In evaluating the appropriate procedural vehicle under the NHPA, the Commission's cost-benefit analysis should factor in the ramifications of delay.

The better approach is for the Commission to exclude certain activities or deployments from Section 106 review in this rulemaking proceeding upon determining that they have no foreseeable potential to adversely affect historic properties.⁴⁹ Using this process, the Commission can adopt exclusions to streamline the review of PTC and non-PTC facilities. It is particularly important that reforms in this proceeding apply to facilities governed by the *PTC Program Comment*, and it is not necessary to formally modify the *PTC Program Comment* to do so. In fact, it would be unlawful to exclude such PTC facilities from any streamlining measures

⁴⁷ See, e.g., *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 ¶ 572 (2014) (“[A]n unduly long transition period also could delay the launch of innovative services and cause uncertainty both for providers and television viewers. Our tailored approach will help to ensure that each station reassigned to a new channel transitions to its new channel as soon as possible, and that forward auction winners have access to their newly acquired spectrum as quickly as possible, thus ensuring a successful incentive auction.”).

⁴⁸ Tracy McElvaney, *5G: From a Public Safety Perspective*, NAT'L INSTITUTE OF STANDARDS AND TECH. (2016) <http://bit.ly/2sC1qV6>.

⁴⁹ See 36 C.F.R. § 800.3(a)(1).

adopted here. The statutory mandate to implement PTC, the compelling public safety interests, and the Commission's past decisions make PTC an urgent national priority relative to other wireless deployments.⁵⁰ *A fortiori*, it would be arbitrary and capricious to subject PTC facilities falling under the *PTC Program Comment* to a stricter set of rules than those that apply to other wireless infrastructure.

IV. CATEGORICALLY EXCLUDING ALL RAILROAD WIRELESS INFRASTRUCTURE WILL ACCELERATE THE ROLLOUT OF PUBLIC SAFETY TECHNOLOGIES.

Railroads continue to face Section 106 review burdens when they deploy wireless infrastructure. Some deployments do not qualify for the *PTC Program Comment*'s exclusions and must go through the batching process. Others fall outside of the *PTC Program Comment* altogether and are governed by the NPA.⁵¹ In both cases, regardless of whether the technology is related to PTC, railroads use wireless spectrum to meet critical public safety objectives.⁵² And railroads often use the same infrastructure for PTC and non-PTC applications.

⁵⁰ See RSIA § 104; see, e.g., *PTC Program Comment; Nationwide Programmatic Agreement Regarding the Section 106 National Historic Review Process*, Report and Order, 20 FCC Rcd 1073 ¶ 34 (2004) (“*NPA R&O*”); First Amendment to National Programmatic Agreement for the Collocation of Wireless Antennas, Executed by the FCC and NCSHPO and ACHP (Aug. 3, 2016) (“*First Collocation Amendment*”).

⁵¹ The *PTC Program Comment* is limited in scope and applies only to (1) PTC wayside poles that are no taller than 75 feet located within existing railroad ROWs and (2) PTC wayside pole associated equipment cabinets and other supporting infrastructure also located within existing railroad ROWs. See *PTC Program Comment* § III.

⁵² An example of non-PTC infrastructure is the Advanced Train Control System, which is a fixed digital radio link between multiple base stations along railroad tracks to communicate, monitor, and control trackside or wayside equipment and other types of equipment (railroad police radio, etc.). See FCC, Jill Springer, *Railroad Towers: Issues and Updates for Towers Proposed in Railroad Rights of Way*, <http://bit.ly/2s2zAnO>. Radios are also critical to successful authorization of all train movements. Other examples include very high frequency (“VHF”) radios, automatic equipment identifier readers, end-of-train repeaters, distributed power units,

Nearly all of these deployments pose *no* risk of historic, tribal, or environmental injury. The evidence is compelling: 99.98 percent of all deployments have resulted in a finding of no adverse effect. Of the 17,201 sites and approximately 23,000 miles of track and installations reviewed, virtually all AAR members reported zero sites where an adverse effect was found. A large part of the railroads' footprint includes sites that have already cleared Section 106 review. Three AAR members, for instance, indicate that approximately 99 percent of their respective PTC track miles and specific geographic areas have already been reviewed and cleared. Very few reviews have been non-routine—for instance, approximately 2 percent of sites involved soil samples or excavations; 5 percent involved site visits; and 0.37 percent involved site monitors. These measures ultimately proved unnecessary: PTC deployments present approximately 0.02 percent likelihood of adverse effects.

The Commission should exclude these deployments from the Section 106 process altogether—either because they do not qualify as federal “undertakings” under the NHPA (or “major Federal actions” under the NEPA), or because they warrant a categorical exclusion.⁵³ The evidence conclusively supports a broad exclusion for PTC and non-PTC deployments near or within transportation corridors. It also justifies a series of narrower exclusions, such as for deployments near previously cleared sites, within rail yards, or less than 25 feet in height.⁵⁴ The

dual-tone multi-frequency switches, hot box detectors, dragging debris detectors, remote control locomotive devices, and associated repeaters.

⁵³ See 36 C.F.R. § 800.3(a)(1); *see also* *Wireless Infrastructure NPRM* ¶¶ 64-65.

⁵⁴ *See, e.g.*, Comments of AAR, WT Docket No. 15-180 (Sept. 28, 2015) (“AAR NPA Comments”); Comments of AAR, WT Docket No. 13-238 *et al.*, at 5-17 (Feb. 3, 2014) (“AAR Wireless Siting Comments”); Reply Comments of AAR, WT Docket No. 13-238 *et al.*, at 4-9 (Mar. 5, 2014) (“AAR Wireless Siting Reply Comments”); *see also* Letter from Zachary Champ, Wireless Infrastructure Ass’n., to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.*,

Commission should adopt both broad and narrow exclusions and close the loopholes that currently lead to unnecessary Section 106 review.

A. The Commission Lacks Jurisdiction to Apply its NHPA and NEPA Rules to Railroads' Wireless Infrastructure Deployments.

AAR welcomes the Commission's proposal to revisit whether the deployment of antennas that use licensed spectrum is a Section 106 "undertaking."⁵⁵ The Commission's longstanding approach is especially inapposite to railroads' deployments and should be reversed.

The Federal Railroad Administration ("FRA") has determined that railroads' wireless deployments are not undertakings because "[a] railroad would not typically need an individual approval from FRA to install an antenna."⁵⁶ In addition, the FRA has categorically excluded from Section 106 review PTC and non-PTC wireless infrastructure deployments, regardless of whether they involve an antenna installation.⁵⁷ Consistent with the FRA's past decisions, the Commission should find that PTC and non-PTC deployments do not qualify as "undertakings."

at 2 (June 5, 2017) (urging Chairman Pai to "eliminate the need to undergo additional historic preservation review for compound expansion within certain parameters" in order to "expedit[e] the deployment of small cell infrastructure within the public right-of-way").

⁵⁵ See *Wireless Infrastructure NPRM* ¶ 76. The Commission has broad discretion to determine what constitutes an undertaking. See NPA § I.B ("The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA. Nothing in this Agreement shall preclude the Commission from revisiting or affect the existing ability of any person to challenge any prior determination of what does or does not constitute an Undertaking.").

⁵⁶ *Oversight of Passenger and Freight Rail Safety before the Subcomm. on Railroads, Pipelines, and Hazardous Materials of the H. Comm. On Transportation and Infrastructure*, 113th Cong. (2014), <http://bit.ly/2smbC6j> (responses of FRA Administrator Joseph C. Szabo to questions for the record).

⁵⁷ See Update to NEPA Implementing Procedures, 78 Fed. Reg. 2713, 2718 (Jan. 14, 2013) (categorical exclusion 24) (excluding review of the "[i]nstallation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-

At a minimum, railroads' PTC and non-PTC deployments should not be subject to Section 106 when they require no new FCC authorization.⁵⁸ Under the NHPA, a federal agency performs an "undertaking" when it finances, authorizes, or licenses the construction of facilities or other projects.⁵⁹ When the Commission determined that wireless deployments were subject to Section 106, it cited as a statutory predicate the FCC's tower and antenna registration requirements.⁶⁰ In many cases, railroads' wireless deployments occur on structures exempt from tower or antenna registration. In many others, railroads do nothing more than place a new antenna on an existing structure that has already been built. Currently, however, both are deemed "undertakings" under the Commission's Section 106 rules. This illogical outcome lacks a statutory basis, averts no cognizable historic, tribal, or environmental injury, breeds unnecessary confusion, and impedes critical safety enhancements.

If the NHPA does not apply to wireless deployments, neither should the NEPA.⁶¹ Whereas the NHPA applies to federal "undertakings," the NEPA applies when there is a "major

of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair or replacement of surface treatments or pavement markings, small passenger shelters, passenger amenities, benches, signage, sidewalks or trails, equipment enclosures, and fencing, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, and security equipment, including surveillance and detection cameras").

⁵⁸ See PTA-FLA Petition at 10.

⁵⁹ See 54 U.S.C. § 300320 (defining undertaking to include "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a federal permit, license, or approval.").

⁶⁰ NPA R&O ¶ 27.

⁶¹ See *Wireless Infrastructure NPRM* ¶ 76 (asking whether "the standards for defining the scope of our undertaking or major Federal action [are] different under the NHPA than under [the] NEPA").

Federal action.” These terms are materially similar,⁶² as courts have recognized.⁶³ The Commission should ensure that its interpretations of the NEPA and the NHPA remain harmonized. The Commission lacks any basis to apply these statutes to railroads’ wireless infrastructure deployments.

B. Excluding Transportation Corridors from Review Is Consistent with Current Congressional Priorities and Past Federal Agency Decisions.

Exempting transportation corridors within 100 feet of the center line of a railroad ROW will expedite PTC and non-PTC deployment consistent with federal policy. When the Commission adopted partial exemptions for transportation corridors in the 2004 *NPA R&O*,⁶⁴ it concluded that there was insufficient information about the effects of undertakings in transportation corridors to warrant a categorical exclusion under Section 800.3(a)(1).⁶⁵ The *Wireless Infrastructure NPRM* correctly recognizes that “wireless technologies have evolved”

⁶² Compare 40 C.F.R. § 1508.18 (defining federal “action” to “include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals”), with 54 U.S.C. § 300320 (defining “undertaking” to include “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including ... those requiring a federal permit, license, or approval.”) and 36 C.F.R. § 800.16(y) (“Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”).

⁶³ See, e.g., *Sugarloaf Citizens Ass’n v. Federal Energy Regulatory Comm’n*, 959 F.2d 508 (4th Cir. 1992) (“Just as the FERC certification of this Facility is not a ‘major Federal action’ under [the] NEPA, so too such certification is not a federal “undertaking” under [the] NHPA. The standard for triggering NHPA requirements is similar to that for the triggering of NEPA requirements.”).

⁶⁴ *NPA R&O* ¶ 63.

⁶⁵ *Id.* ¶¶ 59-64; see 36 C.F.R. § 800.3(a)(1).

since the *NPA R&O*.⁶⁶ It is now “appropriate to reconsider whether [the Commission] can exclude construction of wireless facilities in transportation rights of way in a manner that guards against potential effects on historic properties.”⁶⁷

Exhaustive review since the *NPA R&O* and the *PTC Program Comment* has revealed the complete absence of adverse effects in transportation corridors and railroad ROWs. Over the past three years, for example, AAR members have performed thousands of infrastructure installations along their ROWs subject to Section 106 review.⁶⁸ In no case have tribal or historic preservation stakeholders found an adverse effect on historic properties. The *PTC Program Comment* currently excludes a limited number of PTC deployments near utility lines that are within 100 feet of a railroad ROW.⁶⁹ The evidence demonstrates that this exclusion is far too narrow. The Commission should adopt a broader Section 800.3(a)(1) exclusion for all deployments within 100 feet of the center line of a railroad ROW.

Another recent development warranting reconsideration is Congress’s express mandate in the Fixing America’s Surface Transportation Act (“FAST Act”). Enacted in 2015, the FAST Act makes deployment in railroad ROWs a national priority.⁷⁰ The FAST Act promotes the

⁶⁶ See *Wireless Infrastructure NPRM* ¶ 70. But see *NPA R&O* ¶ 62.

⁶⁷ *Wireless Infrastructure NPRM* ¶ 70.

⁶⁸ Although both the *NPA R&O* and the *PTC Program Comment* exempt undertakings from review under certain circumstances, a significant number of undertakings were not eligible for exemption. Those undertakings have been submitted and reviewed through TCNS.

⁶⁹ Specifically, the exclusion applies only where the wayside pole or infrastructure is in a railroad ROW and within 500 feet of above ground utility lines or associated infrastructure at least 25 feet in height and located within 100 feet of the railroad ROW center line. See *PTC Program Comment* § V.A(1)(i)(c).

⁷⁰ See, e.g., 161 Cong. Rec. H8988-03 (2015) (Statement of Ranking Member DeFazio) (“[The FAST Act] improves our Nation’s infrastructure, including our roads, public transportation, and rail systems; reforms our Federal transportation programs; refocuses these programs on national

installation of PTC systems through measures that “[a]ccelerate[] the delivery of rail projects by significantly reforming environmental and historic preservation review processes, [and] applying existing exemptions already used for highways to make critical rail investments go further.”⁷¹

Section 11504 of the FAST Act directs the Secretary of the Department of Transportation (“DOT”) to submit to the ACHP “a proposed exemption of railroad rights-of-way” from Section 106 review that is “consistent with the exemption for interstate highways” approved by the ACHP in 2005.⁷² When it exempted undertakings on the highway system, the ACHP found that “[w]hile actions carried out by Federal agencies to maintain or improve the Interstate System will, over time, alter various segments of the system, such changes are considered to be ‘minimal or not adverse’ when viewing the system as a whole.”⁷³ Consistent with congressional recognition that undertakings in railroads ROWs do not pose adverse effects, the Commission should exclude deployments in transportation corridors within 100 feet of the center line of a railroad ROW.

Additional decisions from the ACHP emphasize the minimal likelihood of historic injury posed by undertakings in transportation corridors and ROWs. In May 2017, for instance, the Department of Homeland Security and the ACHP completed negotiation of a program comment that effectively applied the FCC’s existing NPAs to federal lands and streamlined the build-out

priorities, including the flow of freight and commerce; provides greater flexibility for States and local governments to address our needs; streamlines the Federal bureaucracy and accelerates project delivery; promotes innovation to make our surface transportation system and programs work better; and maintains a strong commitment to highway, rail, and hazmat safety.”).

⁷¹ See 161 Cong. Rec. S8357-02 (2015).

⁷² 49 U.S.C. § 24202(b); see Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System, 70 Fed. Reg. 11,928 (Mar. 10, 2005) (“Highway Exemption”).

⁷³ See *id.* at 11,929.

of public safety networks such as FirstNet.⁷⁴ It excluded undertakings in “previously disturbed areas or in existing communications or utilities trenches within existing road, railroad, and utility ROWs”⁷⁵ and concluded that “burying communications cable in existing road, railroad, and utility [ROWs] . . . would typically not result in adverse effects to historic properties.”⁷⁶

Decisions like these are on point here. Industrial development occurred many decades ago on land beneath transportation corridors and railroad ROWs. Those who built and maintain the railroads cleared vegetation and trees, erected poles and supporting infrastructure, and extensively excavated the ground. Even today, the ground continues to undergo invasive trenching to install buried wires and cables in existing ROWs—frequently along railroad tracks and in the same corridors where wireless infrastructure will be placed. The deployment of wireless facilities in ROWs presents no greater concern than other activities taking place in the same location. Accordingly, the Commission should exclude from Section 106 review deployments in transportation corridors within 100 feet of the center line of a railroad ROW.

C. The Commission Should Eliminate Redundant Review of Deployments Within Three Miles of Sites Already Cleared Under the *PTC Program Comment*.

Freight railroads must deploy PTC infrastructure every one to three miles along their ROWs. To meet the RSIA’s deployment deadline, AAR’s members have already installed PTC-related infrastructure on a large percentage of their rail track. At the end of 2016, approximately 38 percent of the 60,153 route miles served by AAR’s members housed PTC installations and 77

⁷⁴ See Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property, 82 Fed. Reg. 23,818 (May 24, 2017) (“Federal Lands Program Comment Notice”).

⁷⁵ *Id.* at 23,827.

⁷⁶ *Id.* at 23,823.

percent of the 3,968 base station radios had been installed.⁷⁷ Nearly all of these deployments have already been reviewed and cleared under the *PTC Program Comment*.

Proposed deployments within three miles of previously cleared sites similarly pose no risk of adverse effects. Past ACHP decisions confirm that additional Section 106 review is not required when some other form of review has already been conducted or deemed unnecessary.⁷⁸ Consistent with those decisions, excluding proposed deployments within three miles of previously cleared sites—including, as discussed elsewhere, transportation corridors and rail yards—will eliminate redundant review.⁷⁹

D. Conducting Duplicative Review of Deployments in Rail Yards That Have Already Undergone Extensive Disturbance Is Unnecessary and Inefficient.

The *Wireless Infrastructure NPRM* seeks comment on proposals to “expand the categories” of activities exempt from Section 106 review.⁸⁰ Although the *PTC Program Comment* excludes PTC poles and infrastructure near certain types of “yard track,”⁸¹ it leaves a

⁷⁷ See AAR PTC Overview.

⁷⁸ See, e.g., Notice of Amendment to Program Comment to Avoid Duplicative Reviews for Wireless Communications Facilities Construction and Modification, 80 Fed. Reg. 58,744 (Sep. 30, 2015); Notice of Program Comment for the Rural Utilities Service, the National Telecommunications and Information Administration, and the Federal Emergency Management Agency To Avoid Duplicative Section 106 Reviews for Wireless Communication Facilities Construction and Modification, 74 Fed. Reg. 60,280 (Nov. 20, 2009).

⁷⁹ Cf. NPA § III.F (excluding “[c]onstruction of a Facility in any area previously designated by the SHPO/THPO at its discretion, following consultation with appropriate Indian tribes and NHOs, as having limited potential to affect Historic Properties. Such designation shall be documented by the SHPO/THPO and made available for public review.”).

⁸⁰ See *Wireless Infrastructure NPRM* ¶¶ 64-65.

⁸¹ The *PTC Program Comment* excludes from Section 106 review “wayside poles and infrastructure to be located within the outer boundaries of a system of yard track occupying 100,000 square feet or more” unless the poles and infrastructure are located within 500 feet of National Register properties. See *PTC Program Comment* § V.A.3. The FRA defines “yard track” as “a system of tracks within defined limits used for the making up or breaking up of

significant gap for other deployments on rail yards. The Commission should exclude from Section 106 review PTC and non-PTC deployment on all rail yards.

Rail yards are an integral area of operations. They provide a hub for division points; a source for refueling, maintenance, and repairs; and storage space for freight cars and cargo. Communications among employees and railroads, data transfer and backhaul, and data storage and analysis occur in rail yards and facilitate interoperability. Equipment in rail yards analyzes real-time information and authorizes trains to move safely into new segments of track. To support these functions, railroads use dual-tone multi-frequency signaling to report and change the status of track switches. AAR's members hold thousands of Part 90 and Part 101 licenses for such radios.⁸² These and the many other wireless installations not only promote safe and efficient operations but also protect railroad employees and infrastructure.

Section 106 review of deployments within rail yards is unnecessary. Rail yards are industrial properties on which extensive construction has occurred.⁸³ While much of the infrastructure supporting these communications is already installed in rail yards, additional deployments will be necessary to support next-generation safety applications. Consistent with

trains, for the storing of cars, and for other related purposes, over which movements not authorized by timetable, or by train order may be made subject to prescribed signals, rules or other special instructions.” 49 C.F.R. § 245.5(o). Although that regulatory definition of yard track excludes sidings and main line track passing through the yard, the exclusion in the *PTC Program Comment* applies to all locations within the yard limits. See *PTC Program Comment* § V.A.3.

⁸² Railroads use radios for microwave backhaul, VHF radio, end-of-train, distributed power repeater functions, and many other functions.

⁸³ See AAR Wireless Siting Reply Comments at iii, 4-9; AAR Wireless Siting Comments at 17-18.

the *Wireless Infrastructure NPRM*'s consideration of installations involving no new ground disturbance,⁸⁴ the Commission should exclude review of such deployments in rail yards.

Rail yards are similarly situated to other excluded deployments. The Commission's rules exclude the underground installation of wire or cable along existing corridors⁸⁵ and for certain wireless facilities deployed in above-ground utility and communications ROWs.⁸⁶ The NPA exempts industrial parks similar to rail yards.⁸⁷ Likewise, the ACHP has excluded from review components of the Interstate Highways System that do not lie "within *undisturbed* areas of the right of way."⁸⁸ Based on these decisions, the Federal Railroad Administration urged the Commission to adopt a general exclusion from Section 106 review for deployments in rail yards and similar rail facilities located in railroad ROWs.⁸⁹ The Commission should extend these exclusions to areas where there has been prior ground disturbance.⁹⁰

Replacement facilities and new infrastructure installed in rail yards do not pose any new environmental or historic risk. Buildings and structures in rail yards have been subject to prolonged and sustained construction and modification, lessening the likelihood that the

⁸⁴ See *Wireless Infrastructure NPRM* ¶ 74.

⁸⁵ 47 C.F.R. § 1.1306 Note 1 (excluding from environmental review "the underground installation of wire or cable along existing underground corridors of prior or permitted use").

⁸⁶ See *id.* § 1.1306(c)(1); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 ¶¶ 60-61 (2014); see also *id.* Appendix B § 1.1306 Note 4.

⁸⁷ See NPA; see also Comments of the U.S. Dep't of Transp. and Fed. R.R. Admin., WT Docket No. 13-240 at 2-3 (Feb. 14, 2014) ("FRA PTC Program Comment Comments").

⁸⁸ Highway Exemption at 11931 (emphasis added).

⁸⁹ See FRA PTC Program Comment Comments.

⁹⁰ See AAR Wireless Siting Reply Comments at 5; Comments of PCIA—The Wireless Infrastructure Association and HetNet Forum, WT Docket No. 13-238 *et al.*, at 18-19 (Feb. 3, 2014) ("PCIA Wireless Siting Comments").

collocation of small facilities would lead to adverse effects.⁹¹ Like transportation corridors and railroad ROWs, rail yards may contain structures that are more than 45 years old and are unlikely to contain any buildings or structures that are listed or eligible for listing in the National Register.⁹² Most rail yard structures and facilities are of a standard design and industrial nature, and they are unlikely to be an “exceptional representation of railroad engineering” or possess other unique attributes of historical significance.⁹³ Accordingly, deployment in rail yards will not raise new environmental or historic concerns.⁹⁴

For these reasons, the *PTC Program Comment* excluded from Section 106 review PTC wayside poles and infrastructure located within the outer boundaries of a system of yard track, including all locations within the yard limits.⁹⁵ Adopting a broader exemption for wireless

⁹¹ See AAR Wireless Siting Reply Comments at 5; see also PCIA Wireless Siting Comments at 19 (“There is no record evidence showing facility installations will have any significant environmental or historic effect when located in such corridors, either individually or cumulatively” because the area has already undergone significant, prolonged disturbance).

⁹² See NPA §§ II.A.5, 9; see, e.g., *Norfolk Southern Railway Company — Abandonment Exemption in Erie County, NY*, Docket No. AB-290 (Sub-No. 367X) (Jan. 16, 2015) (“Norfolk Southern Environmental Assessment”) (finding a railway not historically significant because the line was “of a standard design without exceptional representation of railroad engineering and the overall integrity of materials, setting, and feeling have all been weakened as components of the rail line, including ties, rails, ballast have likely been replaced through regular maintenance and as the surrounding landscape has changed and modernized”); see also AAR NPA Comments at 5.

⁹³ See *Norfolk Southern Environmental Assessment* at 7.

⁹⁴ See AAR NPA Comments at 5. In the extremely unlikely event that any remains or architectural resources are found, AAR’s members follow construction guidelines to cease and desist equipment installation.

⁹⁵ See *PTC Program Comment* § V. AAR is not aware of any complaints on historic or environmental preservation grounds that the Commission has received regarding deployments of PTC infrastructure located in rail yards.

facilities within rail yards is consistent with the reasoning underlying the *PTC Program Comment* and the Commission's past decisions.

E. Railroad Infrastructure Less Than 25 Feet in Height Should Be Excluded from Review.

The *Wireless Infrastructure NPRM* seeks comment on further streamlining collocations of wireless antennas and associated equipment to accommodate new technologies and smaller infrastructure.⁹⁶ The *PTC Program Comment* excludes review of certain small infrastructure, namely “wayside antennas less than 10 feet in height that are collocated on existing railroad infrastructure.”⁹⁷ Under the Commission's informal staff guidance, railroad infrastructure less than 15 feet in height need not undergo NEPA or NHPA review. The Commission's tower rules exclude from Federal Aviation Administration review towers 20 feet or shorter.⁹⁸ And by excluding deployments near existing structures taller than 25 feet,⁹⁹ the *PTC Program Comment* recognizes that large infrastructure does not include deployments less than 25 feet in height. The Commission should formalize its guidance and harmonize these various approaches by categorically excluding from review infrastructure less than 25 feet in height.

Doing so would eliminate redundant review, promote PTC and non-PTC deployment, and address the growing need for wireless infrastructure. And it would be consistent with the *First Collocation Amendment*, which expands the categories of Section 106 exclusions to

⁹⁶ See *Wireless Infrastructure NPRM* ¶ 72.

⁹⁷ See *PTC Program Comment* § V.B.

⁹⁸ See 47 C.F.R. § 17.7(e)(3) (“A notification to the Federal Aviation Administration is not required for any of the following construction or alteration Any antenna structure of 6.10 meters (20 feet) or less in height except one that would increase the height of another antenna structure.”).

⁹⁹ *PTC Program Comment* § V.A(1)(i).

account for smaller infrastructure associated with new technologies.¹⁰⁰ Small railroad infrastructure (*i.e.*, less than 25 feet tall) is typically installed in areas with a long history of disturbance and involves little or no new ground disturbance. Nor does it present any risk of visual impairment. As noted above, moreover, areas where railroads would deploy small infrastructure are likely to have already undergone Section 106 review. Deployments less than 25 feet in height are far less likely to give rise to any adverse effects than the large communications towers already excluded from Section 106 review by the NPA, which can reach 200 feet in height and require correspondingly deeper foundations.¹⁰¹

V. THE COMMISSION SHOULD REFORM ITS OVERBROAD FLOODPLAIN REVIEW REQUIREMENTS.

AAR applauds the Commission for its attention to the unnecessary burdens generated by its NEPA floodplain review rules.¹⁰² As noted above, wireless infrastructure deployments are not “major Federal actions” subject to the NEPA. To the extent that Commission finds they are, however, it should streamline its NEPA floodplain review procedures.

Consistent with the experience of other commenters,¹⁰³ AAR’s members have found that the floodplain review represents the biggest delay to wireless infrastructure deployment.

¹⁰⁰ See *First Collocation Amendment*.

¹⁰¹ See NPA § III.D. At a minimum, the Commission should adopt a categorical exclusion for deployments less than 20 feet in height, consistent with its tower siting requirements. See 47 C.F.R. § 17.7(e)(3).

¹⁰² See, *e.g.*, *Wireless Infrastructure NPRM* ¶¶ 18, 23-24, 65 (seeking guidance on revising its rules “so that an [environmental assessment] is not required for siting in a floodplain when appropriate engineering or mitigation requirements have been met[.]”).

¹⁰³ See, *e.g.*, Verizon Mobilitie Comments at 37-39 (“The requirement to prepare and submit environmental assessments for every new facility constructed in a flood plain imposes unnecessary delays on constructing facilities and should be amended.”); Comments of T-Mobile USA, Inc., WT Docket No. 16-421, at 39-40 (Mar. 8, 2017) (“T-Mobile Mobilitie Comments”).

According to one railroad, floodplain review adds three to six months to the approval process and affects 7 to 10 percent of PTC structures.¹⁰⁴ AAR's members have submitted at least 710 environmental assessments ("EAs") for floodplain review since May 2014. The average floodplain review for AAR members can cost anywhere between \$1,000 and \$20,000. One AAR member reports that more than 250 of its EAs have undergone floodplain review since January 2015 alone. After all the time and expense, 100 percent of all reporting AAR members' reviewed PTC track sites have been cleared.

The Commission's floodplain review rules are overbroad. They stand in stark contrast to the Commission's other rules implementing the NEPA, which generally require applicants to prepare an EA only when a proposed facility may significantly affect the environment.¹⁰⁵ The FCC's other NEPA rules typically provide for a case-by-case inquiry relying on the expertise of other federal agencies to determine if there may be a significant effect.¹⁰⁶ Not so with floodplains, where the FCC's rules categorically require review.¹⁰⁷ Even where the expert agency—FEMA or the Army Corps of Engineers—determines that the project will not significantly affect the environment, the Commission nonetheless requires the applicant to

¹⁰⁴ See, e.g., Letter from Michele C. Farquhar, Counsel to AAR, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Apr. 14, 2017).

¹⁰⁵ An EA is to be prepared for actions that ordinarily may have a significant environmental impact. See 40 C.F.R. §§ 1501.4(b), 1507.3(b)(2)(iii). These include facilities to be located in certain sensitive areas, including floodplains. See 47 C.F.R. §§ 1.1307(a), 1.1308(a), 1.1312(b). If an EA shows that a proposed action will have no significant environmental impact, then the agency issues a Finding Of No Significant Impact, 40 C.F.R. § 1508.13, and the proposed action can proceed. However, if an EA indicates that the action will have a significant environmental impact, the action cannot proceed unless the agency prepares an environmental impact statement ("EIS"). See 40 C.F.R. § 1501.4 (requiring an EIS for actions that normally have a significant environmental impact).

¹⁰⁶ See, e.g., Verizon Mobilitie Comments at 39.

¹⁰⁷ See 47 C.F.R. §§ 1.1307(a), 1.1308(a), 1.1312(b).

separately prepare and file an EA.¹⁰⁸ The NEPA does not require such onerous rules.¹⁰⁹ Federal agencies are directed to “*encourage and provide appropriate guidance* to applicants to evaluate the effects of their proposals in floodplains prior to submitting applications,” but they need not require EAs in floodplains.¹¹⁰ Indeed, implementing legislation directs agencies to develop floodplain regulations that promote public safety, but leaves them with discretion in promulgating regulations with respect to the EA process.¹¹¹

The overbreadth of the FCC’s floodplain review process is not justified given the statistically insignificant risk of actual harm.¹¹² Verizon reports that within a three-year period, it has not received a single negative comment for facilities receiving approval from any of the

¹⁰⁸ See *Tower and Antenna Siting*, FCC, <http://fcc.us/2pxXrd7> (last visited June 15, 2017); see also Verizon Mobilitie Comments at 39.

¹⁰⁹ Cf. Floodplain Management, 42 Fed. Reg. 26,951, Exec. Order 11988 § 2(4)(c) (1977) (“Floodplain Management Order”), *amended in part by* Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input, 80 Fed. Reg. 6425, Exec. Order 13,690 (2015) (“Floodplain Management Amendment”) (requiring agencies to reduce the risk of flood loss by issuing or amending regulations and procedures, but not mandating EAs as part of those measures).

¹¹⁰ Floodplain Management Order § 2(4)(c).

¹¹¹ Federal agencies are required to implement public safety-oriented measures such as providing for public review of proposals for construction in floodplains, providing notice of past and probable flood height on new structures, and applying flood-proofing and other flood protection measures to new construction, such as elevating structures. Floodplain Management Order § 3; see also Floodplain Management Amendment § 1 (“It is the policy of the United States to improve the resilience of communities and Federal assets against the impacts of flooding. . . . Losses caused by flooding affect the environment, our economic prosperity, and public health and safety, each of which affects our national security.”).

¹¹² See, e.g., Comments of Sprint Corp., WT Docket No. 13-238 *et al.*, at 6 (Feb. 3, 2014) (“[I]n most cases, there is no environmental or historic preservation impact or the impact is *de minimis*.”); AAR Wireless Siting Comments at 8 (“The financial and regulatory costs involved in environmental and Section 106 processing far outweigh any minimal danger of environmental effects that would stem from expanding the current exclusions to include small wireless facilities.”).

expert agencies on floodplains, and the Commission approved every site without change.¹¹³ Similarly, AAR's members are unaware of any PTC poles that fail to secure approval after undergoing this review.¹¹⁴ AAR's members have not received a single adverse environmental finding since the adoption of the *PTC Program Comment* in May 2014. The existence of tracks in previously disturbed corridors further underscores the remoteness of environmental harm. Indeed, the same pole would not require environmental review if installed for another public utility purpose.¹¹⁵ Consistent with these facts, the Commission routinely grants floodplain EAs.¹¹⁶

The Commission's EA requirement is often duplicative. Other federal agencies implementing a federal flood insurance program frequently conduct a review of the facility's environmental impact.¹¹⁷ Indeed, proposals for antenna structures in floodplains are often subject to multiple reviews before the Commission even receives the EA. For example, proposed antenna structures may receive an "Elevation Certificate" by the National Flood Insurance Program, FEMA, and U.S. Department of Homeland Security confirming the structure would be sufficiently elevated from flood waters.¹¹⁸ The Commission gives heavy weight to

¹¹³ Verizon Mobilitie Comments at 39.

¹¹⁴ See also *id.*; T-Mobile Mobilitie Comments at 40 & n.126.

¹¹⁵ See 47 C.F.R. § 1.1307(a)(6); see also Reply Comments of PCIA, WT Docket No. 13-328 *et al.*, at 5 (Mar. 5, 2014).

¹¹⁶ See, e.g., *CAAMP'ship, LLC*, Letter, 26 FCC Rcd 3883, 3899 (MB 2011) (approving proposal for facility construction in flood plain); *S-R Broad. Co.*, 23 FCC Rcd 8574, 8583 (MB 2008) ("*S-R Broadcasting*") (same); *Am. Tower Corp.*, Memorandum, 21 FCC Rcd 1680 ¶ 10 (WB 2006) ("*American Tower*") (same).

¹¹⁷ Verizon Mobilitie Comments at 38-39.

¹¹⁸ See, e.g., *S-R Broadcasting Co.* at 8588.

other agencies' reviews in its own evaluation of a floodplain proposal,¹¹⁹ further demonstrating the redundancy of the current process.

AAR supports proposals to tailor the scope of floodplain review. Duplicative review of new deployments near previously cleared sites, for example, is unnecessary and frustrates railroad deployment. AAR members report that 85 to 100 percent of their PTC track on floodplains has already received NEPA clearance. No good reason exists for mandatory review of future installations in previously disturbed and cleared areas. Other reforms can help, too. Some commenters have sensibly proposed that floodplain review be eliminated where an applicant ensures that a site will be built at least one foot above the base flood elevation.¹²⁰ And, at a minimum, the Commission should eliminate the categorical requirement to file an EA. Applicants can prevent environmental degradation by following prescribed construction guidelines as they do for other issues like storm water protection.

The data conclusively shows that the mandate to file an EA is unnecessary—and has been for many years. Requiring and reviewing EAs will be unworkable going forward as providers deploy hundreds of new poles to meet the mandate for PTC deployment and install next-generation non-PTC infrastructure. Many deployments by the wireless industry in rural, underserved, and unserved areas will necessarily be installed in regions within floodplains.¹²¹

The Commission can and should categorically limit NEPA floodplain review of deployments

¹¹⁹ *American Tower* ¶ 10 (primarily finding a local building permit and informal approval by FEMA “sufficient to show that the construction will not have a significant impact on the flood plain” and giving secondary consideration to its own independent review of the EA).

¹²⁰ See T-Mobile Mobilitie Comments at 39; Verizon Mobilitie Comments at 38-39; Comments of Competitive Carriers Ass’n, WT Docket No. 16-421, at 44 (Mar. 8, 2017).

¹²¹ See, e.g., T-Mobile Mobilitie Comments at 40; Comments of Crown Castle, WT Docket No. 13-238 *et al.*, at 3-4 (Feb. 3, 2014).

“which do not individually or cumulatively have a significant effect on the human environment.”¹²²

VI. CONCLUSION.

AAR commends the Commission’s leadership for pressing forward with holistic reform of its NHPA and NEPA review processes. The *PTC Program Comment* experience shows that there is much room to streamline regulatory review of the railroads’ PTC and non-PTC wireless infrastructure deployments, such as further exclusions, establishing strict Section 106 review deadlines, and constraining tribal fees. The Commission should also find that it lacks jurisdiction under the NEPA or the NHPA over railroads’ wireless infrastructure. Alternatively, by categorically excluding deployments in transportation corridors, rail yards, and previously cleared areas, excluding small infrastructure deployments, and streamlining floodplain review, the Commission can expedite the rollout of critical public safety infrastructure.

Respectfully submitted,

Kathryn D. Kirmayer
Senior Vice President–Law and General Counsel
Timothy J. Strafford
Associate General Counsel

/s/ Michele C. Farquhar
Michele C. Farquhar
Arpan A. Sura
Sarah K. Leggin

THE ASSOCIATION OF AMERICAN RAILROADS
425 Third Street, S.W.
Suite 1000
Washington, DC 20024

HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

June 15, 2017

*Counsel to the Association of American
Railroads*

¹²² See 40 C.F.R. §§ 1508.4, 1507.3(b)(2)(ii). CEQ regulations require that an agency that chooses to establish categorical exclusions must also provide for “extraordinary circumstances,” *id.* § 1508.4, under which a normally excluded action may have a significant effect.

APPENDIX A: Wireless Infrastructure Deployment Data of Certain AAR Member Railroads (May 2014 to Present)*

	Low Value	Median Value	High Value	Total Value
PTC Deployments Subject to the PTC Program Comment				
Number of sites reviewed	462	1,038.5	10,357	16,653
Tribal consultation fees	\$386,860	\$756,600	\$11,708,729	\$16,072,582
Average tribal consultation fees per site	\$550	\$2,708.80	\$6,319	--
Outside consultant fees	\$462,000	\$4,366,478	\$5,817,500	\$10,645,978
Average number of days between TCNS submission and approval	40	50	106	--
Average number of tribes expressing interest per site	3.4	14	28	--
Number of sites where there was a finding of adverse effect	0	0	1	1
Number of sites where there was a site visit	0	14	829	872
Number of sites where there were soil samples or excavations	0	6	196	288
Number of sites where there was a construction monitor	0	0	60	62
Percentage of PTC track miles and geographic areas reviewed and cleared	82.8%	98%	99.4%	--
Deployments Not Subject to the PTC Program Comment				
Number of sites reviewed	16	75	210	548
Tribal consultation fees	\$125,655	\$225,843	\$500,000	\$1,077,340
Average overall fees per site	\$4,033	\$7,246.38	\$11,750	--
Average number of days between TCNS submission and approval	92	140	225	--
Average number of tribes expressing interest per site	9.8	10	28	--
Number of sites where there was a finding of adverse effect	0	0	2	2
Number of sites where there was a site visit	0	1.5	28	31
Number of sites where there were soil sample or excavations	2	13.5	45	72
Number of sites where there was a construction monitor	0	0	1	1
Floodplain Review				
Number of applications (EAs) that have undergone floodplain review	27	125	262	710
Average cost associated with each floodplain review	\$1,000	\$1,200	\$20,000	--
Average number of days needed to complete each floodplain review	18	68	90	--
Number of floodplain reviews resulting in an adverse environmental finding	0	0	0	0
Percentage of PTC track miles and geographic areas reviewed and cleared in floodplains	85%	97%	100%	--

* Information in this Appendix reflects available data from certain AAR members and may not be comprehensive in all instances. For example, some data may come from all Class I freight railroads, whereas other data may come from a subset of such railroads.

	Low Value	Median Value	High Value	Total Value
Average Fees Per Tribe Per Application In:				
2014	\$361	\$400	\$450	--
2015	\$374	\$500	\$500	--
2016	\$502	\$700	\$700	--
2017	\$634	\$634	\$800	--
Average Overall Fees Per Application In:				
2014	\$2,617	\$4,245	\$6,000	--
2015	\$2,690	\$4,310	\$6,000	--
2016	\$2,722	\$6,132.50	\$7,850	--
2017	\$2,944	\$8,175	\$11,500	--
Average Number of Tribes Expressing Interest Per Application In:				
2014	7.9	13.5	24	--
2015	7.2	15.25	24.5	--
2016	9.3	23.25	27	--
2017	10.8	17.75	32	--