

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Scoping Document for Development of a ) WT Docket No. 13-240  
Proposed Program Comment to Govern )  
Review of Positive Train Control Facilities )  
Under Section 106 of the National Historic )  
Preservation Act )

To: The Commission

**COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION**

PCIA – The Wireless Infrastructure Association (“PCIA”)<sup>1</sup> hereby submit these comments in response to the Public Notice regarding the establishment of a Program Comment to govern review of positive train control (“PTC”) wayside facilities construction under Section 106 of the National Historic Preservation Act (“NHPA”).<sup>2</sup> PCIA previously has explained the benefits of the Program Comment approach and has met with the staffs for the Advisory Council on Historic Preservation (“ACHP”), National Conference of State Historic Preservation Officers (“NCSHPO”), and Federal Communications Commission (“Commission” or “FCC”) to discuss

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<sup>1</sup> PCIA is the national trade association representing the wireless infrastructure industry. PCIA’s members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless, telecommunications, and broadcasting services. PCIA and its members partner with communities across the nation to affect solutions for wireless infrastructure deployment that are responsive to the unique sensitivities and concerns of each community.

<sup>2</sup> *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*, Public Notice, DA 13-1980 (Sept. 27, 2013) (“Public Notice”).

potential uses for other defined classes of undertakings.<sup>3</sup> PTC has a clearly definable set of proposed facilities – waypoles – that make it a good candidate for a Program Comment. Therefore, PCIA supports the Commission’s proposal to move forward with a Program Comment.

The implementation of Program Comments by other agencies demonstrates that it can expedite the Section 106 process to address vital public interest priorities while also protecting historic properties. Further, as discussed below, absent adoption of a Program Comment, the rail industry and its partners may be unable to implement PTC by the December 31, 2015 deadline mandated by Congress.

## **BACKGROUND**

Pursuant to Section 106 of the NHPA, the Commission is required to consider the effects of federal undertakings on historic sites. Regulations developed by the ACHP and codified at 36 C.F.R. Part 800 describe the procedures that Federal agencies, including the FCC, must follow to ensure compliance with its Section 106 obligations. As implemented by the FCC, these regulations generally require Commission licensees and applicants to consult with relevant State Historic Preservation Officers (“SHPOs”) or Tribal Historic Preservation Officers (“THPOs”) to consider on a case-by-case basis whether a proposed federal undertaking may adversely affect an eligible or listed historic property.<sup>4</sup>

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<sup>3</sup> *See, e.g.*, Letter from Jonathan M. Campbell, Director, Government Affairs, PCIA to Dan Abeyta, Assistant Chief, NEPA Adjudications, Spectrum and Competition Policy Div., Wireless Telecommunications Bureau, FCC (Feb. 18, 2013).

<sup>4</sup> *See* 47 C.F.R. § 1.1307(a)(4); Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), 47 C.F.R. Pt. 1, App. B.; Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (2004) (“2004 NPA”).

The Rail Safety Improvement Act of 2008 requires that all major freight and passenger railroads deploy PTC systems by December 31, 2015.<sup>5</sup> PTC will enable the railroads to improve the safety of freight and passenger train operations by preventing derailments, incursions into work zones, collisions, and the resulting destruction of property, damage to the environment and loss of life. Because PTC will use radio spectrum licensed by the FCC for use by the railroads, the FCC considers the construction of the poles necessary to support the PTC antennas to be an FCC undertaking under the NHPA.<sup>6</sup> Thus, the Commission believes that railroads installing such PTC facilities must comply with the FCC's Section 106 obligations.

Section 800.14(e) of the ACHP's regulations, however, established the Program Comment procedure that permits an agency, such as the FCC, to request a Program Comment from the ACHP in lieu of case-by-case review. The benefit of a Program Comment is that it would create an expedited and uniform Section 106 process for a class (or classes) of undertakings.

## **DISCUSSION**

### **I. PROGRAM COMMENTS FACILITATE SECTION 106 COMPLIANCE AND WILL EXPEDITE WIRELESS DEPLOYMENT**

The Program Comment procedure is a time tested, effective method of ensuring that programs administered by Federal agencies comply with Section 106. The ACHP has entered into Program Comments with numerous agencies in the past, including the General Services Administration,<sup>7</sup> the Department of Defense,<sup>8</sup> the Department of Energy,<sup>9</sup> Department of the

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<sup>5</sup> Pub. L. No. 110-432, 122 Stat. 4848 (2008).

<sup>6</sup> Public Notice at 1.

<sup>7</sup> *Program Comment Issued for the U.S. General Services Administration on Select Envelope and Infrastructure Repairs and Upgrades to Historic Public Buildings*, 74 Fed. Reg. 41917 (Aug. 19, 2009).

Navy,<sup>10</sup> the Department of Transportation,<sup>11</sup> the National Telecommunications and Information Administration,<sup>12</sup> the Rural Utilities Service,<sup>13</sup> and the Federal Emergency Management Agency.<sup>14</sup>

The ACHP has found that Program Comments are “especially advantageous . . . for those agencies that have programs that generate a large number of similar undertakings.”<sup>15</sup> Program Comments also are advantageous from a cost standpoint. The ACHP has quantified that a Program Comment with the Federal Highway Administration (“FHWA”) saved taxpayers \$78 million dollars over the costs that would have been incurred by the more traditional case-by-case review.<sup>16</sup> Further, the cost-savings could also be shared by those entities seeking to comply with Section 106, such as railroads and wireless infrastructure providers.

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<sup>8</sup> *Notice of Department of Defense Adoption of a Program Comment for DoD Rehabilitation Treatment Measures*, 73 Fed. Reg. 76346 (Dec. 16, 2008).

<sup>9</sup> *Department of Energy Notice of Program Comment*, 78 Fed. Reg. 16275 (Mar. 14, 2013).

<sup>10</sup> *Program Comment for the Department of the Navy for the Disposition of Historic Vessels*, 75 Fed. Reg. 12245 (Mar. 15, 2010).

<sup>11</sup> *Program Comment Issued for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges*, 77 Fed. Reg. 68790 (Nov. 16, 2012) (“Section 106 PC”).

<sup>12</sup> *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. 60280 (Nov. 20, 2009).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See ACHP Guidance on Program Comments as a Program Alternative, Questions and Answers* (“ACHP Q&A”), available at <http://www.achp.gov/altguidance/qa.html> (last visited Nov. 14, 2013).

<sup>16</sup> *See News Release, ACHP, Program Comment Expedites Review Process for Nearly 200,000 Bridges Nationally, Saving \$78 Million* (Dec. 7, 2012), available at [http://www.achp.gov/news\\_bridgeagreement\\_20121207.html](http://www.achp.gov/news_bridgeagreement_20121207.html) (last visited Nov. 14, 2013); *see also* ACHP Q&A.

There are certain key principles that should be incorporated in a Program Comment. First, a Program Comment should establish a simple, repeatable process for an expedited and meaningful Section 106 review process. It is essential that specific timelines be established for all the parties so that the submission and review process is finite.<sup>17</sup> Given that an Applicant's project can be dismissed for failure to prosecute, a project should be deemed approved if no other parties to the process object within a specified period.

Second, although it is important that federally recognized tribes be entitled to recover their costs incurred as part of the Program Comment review process, the FCC should strive, either through a Program Comment or a Best Practices agreement, to rationalize and standardize fees (and fee increases).

Third, a Program Comment should clearly set forth the grounds for objecting to covered facilities, the specific evidence necessary to support an objection, and the objector's burden of proof. In addition, if an objection to a covered facility is submitted, the Program Comment should specify a clearly defined, finite period for its resolution.

Finally, a Program Comment should address the process for mitigating adverse effects to historic properties. The mitigation process must establish specific deadlines for issue resolution. If the parties cannot agree on a mitigation approach for a site within the specified timetable, the issue should be referred to the Commission for resolution within a specific timeframe.

## **II. A PROGRAM COMMENT IS APPROPRIATE FOR PTC DEPLOYMENTS IN RAILWAY CORRIDORS**

PTC implementation will require the installation of more than 20,000 wayside poles within existing railway corridors, each of which, as discussed above, is considered by the FCC to

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<sup>17</sup> See generally PCIA Comments, CG Docket No. 11-41, at 5-7 (June 20, 2011) ("PCIA Tribal Comments").

be a Federal undertaking requiring Section 106 review under existing FCC rules.<sup>18</sup> This would nearly double the number of FCC-related Federal undertakings considered annually by the Commission, SHPOs, and THPOs.<sup>19</sup> Accordingly, “the ACHP has recommended that the FCC work with the ACHP and its preservation partners to develop efficiencies that are tailored to the review of PTC wayside facilities, to be memorialized in a Program Comment.”<sup>20</sup> PCIA supports this approach.<sup>21</sup> The FHWA Program Comment eliminating the need for case-by-case review for nearly 200,000 bridges demonstrates that the Program Comment process is capable of expediting far more than the 22,000 waypole facilities projected to be required by PTC.<sup>22</sup>

A PTC Program Comment should incorporate the key principles discussed in Section I. For example, given the importance of PTC implementation and the congressionally mandated deadline, the PTC Program Comment should clearly state the grounds for objecting to covered facilities and the specific evidence necessary to support an objection. If an objection to a covered facility is submitted, but does not meet the criteria set forth in the Program Comment for objections, the objection should not form a basis for delaying Section 106 review.

Because the options available to remedy a valid objection are limited as there will be “little potential for avoidance or minimization [of impact] due to the limited flexibility to move

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<sup>18</sup> Public Notice at 1.

<sup>19</sup> Scoping Document at 4.

<sup>20</sup> *Id.* Moreover, PTC implementation is subject to a compressed timeframe and the ACHP has previously determined that “compressed timeframes” trigger the need for an alternative approach “to eliminate duplicative Section 106 reviews for broadband communications facilities.” See News Release, ACHP, *ACHP Considers Program Comment for RUS/NTIA Communications Facilities* (Sept. 17, 2009), available at <http://www.achp.gov/news090917.html>.

<sup>21</sup> As part of this process, the Commission should consider revising the Tower Construction Notification System process in a tribal-friendly manner as PCIA previously suggested. See PCIA Tribal Comments at 3-5.

<sup>22</sup> Section 106 PC, 77 Fed. Reg. at 68790.

[PTC] poles,”<sup>23</sup> the Commission should adopt a PTC Program Comment that “specif[ies] a simple [and finite] protocol to quickly consider whether avoidance is possible at a particular site.”<sup>24</sup> In cases where avoidance and minimization are not possible, the PTC Program Comment should establish a deadline for the parties to reach a negotiated mitigation plan. If the negotiations prove unsuccessful, the matter should be referred to the FCC for a decision within a specified time period.

Finally, in fashioning Section 106 procedures, the Commission should continually evaluate new technologies and whether they can diminish impacts on historic properties.<sup>25</sup> New technologies make small cell deployments such as PTC waypoles commonplace. Given that current FCC rules treat low structures, such as those used by small cells, as having the same Area of Potential Effect (“APE”) for visual effects as a 199 foot tower,<sup>26</sup> PCIA urges the Commission to establish a new presumed “Visual APE” in the proposed Program Comment for PTC waypoles.

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<sup>23</sup> Scoping Document at 6.

<sup>24</sup> *Id.*

<sup>25</sup> The ½ mile radius APE set forth in the *NPA Report and Order* was based on macrocell technology. As technological developments in wireless equipment shrink the facilities and the platforms they use, the Commission should fashion procedures that reflect these new realities. *See generally Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004) (“*NPA Report and Order*”) (containing 2004 NPA as an attachment), *aff’d sub nom. CTIA-The Wireless Ass’n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

<sup>26</sup> *See* 2004 NPA, Section VI (c) (4).

## CONCLUSION

For the foregoing reasons, the Commission should adopt a Program Comment to facilitate implementation of PTC. The Program Comment process provides the FCC with a vehicle to ensure a meaningful Section 106 review is conducted while simultaneously facilitating swift build out of facilities that benefit the public interest, including public safety systems like PTC and mobile broadband. The Commission also should rely on Program Comments, to the maximum extent possible, in other situations in which Section 106 review of clearly definable classes of facilities could be expedited.

Respectfully submitted,

PCIA – THE WIRELESS INFRASTRUCTURE  
ASSOCIATION AND THE HETNET FORUM

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