

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

In the Matter of)	
)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies)	WT Docket No. 13-238
)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting)	WC Docket No. 11-59
)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers)	RM-11688 (terminated)
)	
2012 Biennial Review of Telecommunications Regulations)	WT Docket No. 13-32
)	

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Louis P. Warchot
Senior Vice President-Law
and General Counsel

Timothy J. Strafford
Assistant General Counsel

Michele C. Farquhar
Deborah K. Broderson
Hogan Lovells US LLP

The Association of American Railroads
425 3rd Street, S.W. Suite 1000
Washington, DC 20024
(202) 639-2502

**Counsel to the Association of American
Railroads**
555 13th Street, NW
Washington, DC 20004
(202) 637-5663

February 3, 2014

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	- 1 -
II. BACKGROUND	- 2 -
III. THE COMMISSION SHOULD CATEGORICALLY EXCLUDE NEW AND COLLOCATED SMALL WIRELESS FACILITIES, PARTICULARLY ON RAILROAD RIGHTS OF WAY AND IN RAIL YARDS, FROM ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW	- 5 -
A. Revising the FCC’s current environmental and historic preservation exclusions will make them internally consistent, end needless delay in wireless infrastructure deployment, and enable stakeholders to focus on undertakings with potential adverse effects on the human environment.....	- 6 -
B. The FCC should define the exclusion for small wireless facilities from environmental and historic preservation review based on facility size and location, rather than technology.....	- 9 -
C. The FCC has the authority to exclude both collocated antennas and new small wireless construction from environmental and historic preservation review through this rulemaking.	- 13 -
IV. THE FCC SHOULD EXCLUDE REPLACEMENT NON-TOWER STRUCTURES FROM ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW	- 17 -
V. A RULEMAKING IS WARRANTED TO GRANT MORE COMPREHENSIVE REFORM EVEN IF THE ACHP ADOPTS A PTC PROGRAM COMMENT	- 19 -
VI. CONCLUSION.....	- 21 -

EXECUTIVE SUMMARY

The Federal Communications Commission’s (“FCC” or “Commission”) environmental and historic preservation review rules were developed at a time when wireless infrastructure deployment generally meant the construction of a single 300 foot communications tower that loomed over the surrounding landscape. In contrast, the wireless facilities of today are considerably smaller and pose *de minimis* risk of negative effects on the human environment, but must be deployed more quickly and in greater numbers than their predecessors. To address the changing landscape of wireless antenna deployment, the FCC should amend its rules to exclude these “small wireless facilities” from the existing environmental and historic preservation review processes. By defining covered facilities by size rather than technology, the Commission can avoid the risk that any such definition could become obsolete as technologies or terminologies change. Location should also be a factor in drafting such an exclusion, and because of the nature of the nationwide rail corridor, the FCC should specify that the exclusion should include small wireless facilities located on railroad rights of way and in rail yards.

The FCC has the authority to implement these changes in its rules through this rulemaking, and to adopt a related exclusion from environmental and historic preservation review for facilities that replace non-tower structures. While the AAR appreciates the FCC’s efforts to adopt a Program Comment to address Positive Train Control deployment, this rulemaking allows for a comprehensive reform of the Commission’s environmental and historic review processes. Updating the FCC’s facilities siting policies would reflect the emerging reality of new wireless deployments and benefit all stakeholders, while freeing resources for the review of larger undertakings that are located away from railroad rights of way and rail yards and have the potential for adverse effect on the human environment.

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

In the Matter of)	
)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies)	WT Docket No. 13-238
)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting)	WC Docket No. 11-59
)	
Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers)	RM-11688 (terminated)
)	
2012 Biennial Review of Telecommunications Regulations)	WT Docket No. 13-32
)	

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

I. INTRODUCTION

The Association of American Railroads (“AAR”)¹ respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal

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

Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.² As discussed below, the Commission should tailor its environmental and historic preservation review processes to reflect the growing use of smaller, minimally impactful technologies that require the deployment of dozens or even hundreds of facilities in a limited area. Specifically, the Commission should categorically exclude from all environmental and historic preservation review, including review by Tribal Nations, new and collocated small wireless facilities along with replacement non-tower structures, particularly when they are located on railroad rights of way and in rail yards.

II. BACKGROUND

As technologies evolve and demand for wireless services increases, there is a growing need for the Commission to streamline its environmental and historic review processes. By the Commission’s own admission, these processes were not designed to facilitate the deployment of smaller technologies that require the installation of facilities on large numbers of sites. Developed as they were “long before small[er] technologies became prevalent,” the FCC’s environmental and historic review processes “reflect the scale and level of environmental concern presented by traditional deployments on tall structures” such as communications towers.³ As a result, the deployment of wireless infrastructure often involves a time-consuming and burdensome approval process that imposes significant costs on applicants and other

² *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations*, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32, Notice of Proposed Rulemaking, 28 FCC Rcd 14238 (2013) (“*NPRM*”).

³ *Id.* at 14241 ¶ 7.

stakeholders—even when the proposed facility is likely to have little or no potential impact on the human environment or on historic properties.

The acute need for reform of the FCC’s environmental and historic review processes for wireless poles has been highlighted by the challenges faced by the railroad industry, stakeholders and the Commission to meet the Congressionally mandated December 2015 deadline for Positive Train Control (“PTC”) deployment.⁴ In her comments to the *NPRM*, Commissioner Rosenworcel highlighted the PTC mandate, which will require the installation of thousands of small wireless facilities on the railroad rights of way nationwide for public safety purposes, as an example of the need to adapt the FCC’s processes to expedite small wireless infrastructure deployments. However, Commissioner Rosenworcel notes that while PTC deployment could potentially be delayed by the FCC’s current environmental and historic review processes, it “is only one example of the need for [the FCC] to update its facilities siting policies to reflect the emerging reality of new wireless deployments.”⁵ As discussed below, while the AAR applauds the FCC’s recent efforts to adopt a Program Comment to address PTC deployment, this rulemaking allows for a more comprehensive reform of the Commission’s environmental and historic review processes.⁶ The Commission should commit to a general reformation of its

⁴ Congress has mandated that a nationwide PTC network be fully operational on the nation’s passenger and freight railroads by December 31, 2015. *See* P.L. 110-432 (2008). Unlike traditional large communications towers, PTC wayside poles are being installed for public safety purposes, and will have little or no commercial value for the railroads.

⁵ *NPRM*, 28 FCC Rcd at 14321, Statement of Commissioner Jessica Rosenworcel.

⁶ *See* Comment Sought on Draft Program Comment to Govern Review of Positive Train Control Facilities Under Section 106 of the National Historic Preservation Act, Attachment A (“Draft Program Comment”) Section IV.1, WT Docket No. 13-240, *Public Notice*, DA 14-97 (rel. Jan. 29, 2014).

environmental and historic preservation review processes for all small wireless facilities, particularly those located on railroad rights of way and in rail yards.⁷

In the *NPRM*, the Commission seeks comment on potential measures to expedite the environmental and historic preservation review of new small wireless facilities.⁸ For instance, the Commission asks whether and how it should expedite its National Environmental Policy Act of 1969 (“NEPA”)⁹ compliance processes for small wireless facilities and, in particular, if a categorical exclusion would be appropriate.¹⁰ The Commission also asks how it can and should tailor its historic preservation review pursuant to Section 106 of the National Historic Preservation Act (“NHPA”)¹¹ for small wireless facilities.¹²

The AAR recommends that the Commission categorically exclude small wireless facilities from both environmental and historic preservation review and, as a natural extension, specifically exclude all small wireless facilities located on the railroads’ rights of way and in rail

⁷ Although the Commission declined to adopt an exclusion from historic preservation review for installations on rail corridors during the negotiation of the Nationwide Programmatic Agreement (“NPA”) in 2004, it noted that “highways and passenger railways are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest.” *See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1097 ¶ 62 (2004) (“*NPA Report and Order*”). In deciding not to adopt a general exclusion from Section 106 for installations on transportation corridors, the FCC suggested that the procedures outlined in the NPA would reduce the increasing cost and time required to complete the Section 106 process. *See id.* Given the significant rise in the number of small wireless facilities that must be deployed on railroad rights of way and in rail yards since 2004, and the corresponding increased burden on the timely completion of the historic review process, the AAR believes that the FCC should revisit this issue. *See infra* note 36 (discussing the considerable cost associated with the current historic review process).

⁸ *See NPRM*, 28 FCC Rcd at 14239 ¶ 1.

⁹ 40 U.S.C. §§ 4321-4370.

¹⁰ *See NPRM*, 28 FCC Rcd at 14253 ¶ 36.

¹¹ 16 U.S.C. § 470v.

¹² *See NPRM*, 28 FCC Rcd at 14257-58 ¶¶ 53-55.

yards.¹³ The Commission has ample authority to adopt such an exclusion in this rulemaking, which should be based on the covered facility's objective characteristics, such as size and location, rather than the type of technology deployed. Additionally, the Commission should clarify its current procedures and exclude replacement non-tower structures from both environmental and historic preservation review, including Section 106 review by Tribal Nations. Such an exclusion is appropriate because, where a replacement non-tower facility does not constitute a substantial increase in size from the original facility, there is minimal risk of harm to the human environment.

III. THE COMMISSION SHOULD CATEGORICALLY EXCLUDE NEW AND COLLOCATED SMALL WIRELESS FACILITIES, PARTICULARLY ON RAILROAD RIGHTS OF WAY AND IN RAIL YARDS, FROM ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW

The FCC should categorically exclude new and collocated small wireless facilities from both environmental and historic preservation review, and the exclusion should specifically include such facilities located on railroad rights of way and in rail yards.¹⁴ The Commission should draft this exclusion based on the size and location of the covered small wireless facilities, rather than attempting to define the exclusion based on reference to a specific technology such as “distributed antenna systems (DAS)” or “small cells,” as these terms could rapidly become obsolete. The Commission has the authority to exclude the covered small wireless facilities by amending Note 1 to Section 1.1306 as part of this rulemaking.¹⁵ Excluding small wireless

¹³ The exclusion from historic preservation review should encompass review by State Historic Preservation Officers (“SHPOs”), as well as review by Tribal Nations.

¹⁴ Any exclusion should not encompass compliance with RF emission exposure limits. *See* 47 C.F.R. § 1.1307(b).

¹⁵ *See NPRM*, 28 FCC Rcd at 14351 ¶ 31; *see also* Letter from D. Zachary Champ, PCIA—The Wireless Infrastructure Association (“PCIA”), to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 11-59, GN Docket No. 12-354, 2-5 (filed Mar. 19, 2013) (“PCIA Mar. 19 Letter”). As PCIA and others have noted, the FCC has the authority to achieve the recommended

facilities located on railroad rights of way and in rail yards from environmental and historic preservation review will streamline the deployment of wireless infrastructure, reduce the amount of unnecessary and duplicative review of installations with an established *de minimis* impact on the human environment, and free the resources of the Commission, the ACHP, stakeholders and industry to focus on large and disruptive communications towers as well as facilities deployed in locations that require comprehensive environmental and historic preservation review.

A. Revising the FCC’s current environmental and historic preservation exclusions will make them internally consistent, end needless delay in wireless infrastructure deployment, and enable stakeholders to focus on undertakings with potential adverse effects on the human environment.

The FCC’s current environmental and historic preservation rules provide a needlessly complex and inconsistent patchwork of exclusions from review for new and collocated wireless antennas. For collocated antennas, Note 1 to Section 1.1306 of the FCC’s rules excludes antennas located on an “existing building or antenna tower” from environmental, but not historic preservation, review.¹⁶ The FCC’s Collocation Agreement provides no relief from environmental review, but establishes an exclusion from Section 106 review for antennas mounted on existing towers built on or before March 16, 2001; for antennas on towers built after March 16, 2001 that have undergone the Section 106 review process; and for antennas mounted

exclusions by other means, including by seeking a program alternative from the Advisory Council on Historic Preservation (“ACHP”) or amending the Collocation Agreement and Nationwide Programmatic Agreement. See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, Appendix B (“Collocation Agreement”); Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1, Appendix C (“Nationwide Programmatic Agreement” or “NPA”). However, the AAR believes that the present rulemaking represents the best and most expeditious means of arriving at a comprehensive exclusion from environmental and historic preservation review, that will be based on input from the public and other stakeholders as well as industry and the environmental and historic preservation communities.

¹⁶ 47 C.F.R. § 1.1306 Note 1 (“The provisions of § 1.1307(a) of this part requiring the preparation of EAs do not encompass the mounting of antenna(s) on an existing building or antenna tower unless § 1.1307(a)(4) of this part is applicable.”).

on buildings and non-tower structures located outside of historic districts.¹⁷ The FCC's rules as currently drafted include no specific exclusion from either environmental or Section 106 review for small wireless facilities on buildings or towers. Additionally, for most antennas mounted on new construction, including small wireless facilities, there is no current exclusion from either environmental or historic preservation review unless such construction falls into one of the narrow exclusions included in the Nationwide Programmatic Agreement ("NPA").

As a result of this complicated set of partial exclusions from the environmental and historic review process, "[p]arties seeking to deploy wireless infrastructure often face processes they must complete prior to construction that can take long periods of time and impose significant expense."¹⁸ New technologies may not fit comfortably into the FCC's environmental and historic preservation review regulations. As the *NPRM* correctly observes, the Commission's current environmental and historic preservation review rules were established at a time when "most wireless service was provided through antennas mounted on communications towers at a height of 100 to 200 feet or more."¹⁹ In contrast, contemporary wireless technology can be deployed on poles and other structures that are considerably smaller, but must be deployed in larger numbers, increasing the challenge of quickly clearing the environmental and historic review process. At the same time, the deployment of these small wireless facilities is unlikely to significantly impact the environment or have more than a *de minimis* effect on historic properties, as they use a limited footprint, do not have a significant visual impact on the

¹⁷ See Collocation Agreement Sections III-V.

¹⁸ *NPRM*, 28 FCC Rcd at 14240 ¶ 3.

¹⁹ *Id.* at 14243 ¶ 11; see also *id.* at 14241, 14252 ¶¶ 7, 35.

surrounding area, and require less soil penetration than traditional communications towers.²⁰ Consequently, the use of small wireless facilities is well received by the historic preservation community.²¹

The AAR agrees with PCIA—The Wireless Infrastructure Association (“PCIA”) and other commenters that the Commission should update its existing environmental and historic preservation review rules. The deployment of small wireless facilities on railroad rights of way and in rail yards is especially unlikely to give rise to any negative environmental effects. Railroad rights of ways and rail yards have been subject to heavy and regular maintenance for the life of the track bed. In addition to the long history of disturbance on the rights of way and rail yards by the railroads themselves, the laying of fiber optic cables and other utility infrastructure has resulted in significant development of land along the national rail bed.

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.²² The current uncertain regulatory landscape slows the pace of wireless deployment and needlessly wastes the time and money of all stakeholders, without providing any benefit to the resources such regulations are intended to protect. Given the changed circumstances in wireless infrastructure deployment and the minimal risk to the human environment posed by such facilities, the FCC should exercise its authority to expand the current exclusions from environmental and historic preservation review to include

²⁰ See Amos J. Loveday, “DAS/Small Cells & Historic Preservation: An Analysis of the Impact of Historic Preservation Rules on Distributed Antenna Systems and Small Cell Deployment,” attachment to PCIA Mar. 19 Letter (“Loveday Report”).

²¹ See *id.*

²² See Comments of PCIA—The Wireless Infrastructure Association and the DAS Forum (A Membership Section of PCIA), *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, at 50-51 (filed July 18, 2011).

small wireless facilities located on railroad rights of way and in rail yards, and such exclusions should encompass both State Historic Preservation Officer (“SHPO”) review and tribal consultation.

B. The FCC should define the exclusion for small wireless facilities from environmental and historic preservation review based on facility size and location, rather than technology.

The FCC should adopt an exclusion from environmental and Section 106 review for small wireless facilities based on the covered facility’s objective physical characteristics, rather than using definitional terms that rely on a technology-based description that could quickly become obsolete. For this reason, the AAR agrees with the Commission that defining any exclusion by reference to DAS or small cell installations could prove both over-inclusive and under-inclusive: under-inclusive, by failing to incorporate related technologies that also merit an exclusion; and over-inclusive, because some facilities associated with DAS or small cell technologies could be larger and more obtrusive than was contemplated when the exclusion was drafted.²³ PCIA has proposed that the FCC define the small wireless facilities to be excluded based on the cubic volume of the installed antenna and supporting infrastructure.²⁴ Under this proposal, small wireless facilities would include installations of up to seventeen cubic feet for equipment enclosures and three cubic feet for each antenna, with no size limit for associated

²³ See *NPRM*, 28 FCC Rcd at 14255 ¶ 46.

²⁴ See *id.* at 14256 ¶ 49; see also Letter from D. Zachary Champ, PCIA—the Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-354, WC Docket No. 11-59, 2 (filed July 22, 2013) (“PCIA July 22 Letter”) (proposing excluded categories including “minimally invasive wireless infrastructure designed to provide service in a limited geographic area,” consisting of “relatively inconspicuous, small form-factor installations consisting of one or more radio transceivers, antennas, interconnecting cables, power supply, and other associated electronics,” with the wireless facilities themselves made up of “an equipment enclosure, antenna and associated equipment”).

equipment located outside of the primary equipment enclosure.²⁵ The AAR supports this position, but to provide additional clarity for applicants, would add to the definition of small wireless facilities a height limit of seventy-five feet for poles, from the base of the pole to the top of the pole or antenna, if the antenna is top-mounted, and specify that the exclusion specifically applies to such facilities located on a railroad right of way or in a rail yard.²⁶ The Commission's original draft of the NPA would have provided an exclusion from historic preservation review for any facility less than 400 feet in height located on a transportation corridor, provided the facility would not require the excavation of any previously undisturbed ground.²⁷ In contrast, seventy-five feet is a height limit already recognized by the FCC, in its draft Program Comment, as an appropriate cut off for exclusions for historic preservation review.²⁸

The FCC should also consider the location where small wireless facilities will be deployed in determining the suitability of an exclusion from environmental and historic preservation review.²⁹ In drafting the NPA, the FCC engaged in consultation with stakeholders, including the ACHP, and ultimately found that communications towers located in a utility or telecommunications right of way were appropriately excluded from Section 106 review based

²⁵ See PCIA July 22 Letter at 2-3. Volume as defined by PCIA is a measure of the exterior displacement, not the interior volume of the enclosures.

²⁶ The FCC's environmental rules explicitly provide that "[t]he specific height of an antenna tower or supporting structure...will not be deemed sufficient to warrant environmental processing" for towers under 450 feet tall. See 47 C.F.R. § 1.1306 Note 2. Other agencies, such as the Department of Energy, have adopted categorical exclusions from environmental review for the construction of even large microwave, meteorological, and radio towers. See 10 C.F.R. § 1021 Appendix B to Subpart D, Categorical Exclusion B1.19.

²⁷ See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Notice of Proposed Rulemaking*, FCC 03-125 (rel. June 9, 2003), Appendix A: Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission at A-9.

²⁸ See Draft Program Comment, *supra* note 6, at Section III.

²⁹ See *NPRM*, 28 FCC Rcd at 14256-57 ¶ 50.

solely on their location.³⁰ In making this decision, the FCC noted that due to the increase in the deployment of wireless services and advances in technology, providers were “increasingly finding it feasible to utilize antennas mounted on short structures” resembling telephone or utility poles such as those already found in communications or utility corridors, and opined that the likelihood of an incremental adverse impact on historic properties when such structures were located near existing similar poles was minimal.³¹ The location of undertakings along transportation corridors in particular has been a critical factor in the ACHP’s approval of categorical exclusions from Section 106 review, as in the nationwide exemption relieving all Federal agencies from review of the effects of their undertakings on the interstate highway system,³² and the exemption for undertakings affecting over a dozen categories of highway bridges.³³

Building on the well-reasoned exclusions from environmental and historic preservation review already included in the FCC’s rules, the Commission should adopt a categorical exclusion for small wireless facilities as defined above that are deployed on a railroad right of way or in a rail yard.³⁴ Installing small wireless equipment on a railroad right of way or in a rail yard is unlikely to negatively affect the environment or any historical properties.³⁵ Like the poles

³⁰ *See id.*, citing NPA Section III.E.

³¹ *See* NPA Report and Order, 20 FCC Rcd at 1098 ¶ 63.

³² *See* Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System, 70 Fed. Reg. 11928, 11929 (Mar. 10, 2005).

³³ *See* Program Comment Issued for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges, 77 Fed. Reg. 68790, 68794 (Nov. 16, 2012).

³⁴ The railroad rights of way typically extend fifty feet on either side of the track.

³⁵ Although in some places railroad properties, including rights of way and rail yards, may be at least fifty years old and thus potentially technically eligible for inclusion in the National Register, as the FCC recognized in the draft Program Comment, tracks and other industrial infrastructure on the railroad rights of way are ubiquitous and utilitarian, and the eligibility of any undistinguished railroad property for the National Register should not be a factor in granting an exclusion for small wireless facilities in such areas.

installed along utility and communications corridors, which are already excluded from Section 106 review by the NPA, small wireless facilities located on railroad rights of ways and in rail yards should be subject to exclusion from the environmental and historic review process because they are located in industrial areas that have been subject to extensive and prolonged development and the facilities will be shielded by the industrial surroundings. These areas are highly trafficked by freight and passenger traffic, consist of ground that has been subject to extensive prior disturbance, and are subject to regular maintenance and upgrades.

Like other licensees, railroads are encountering challenging delays and incurring significant costs as they attempt to comply with the Commission's environmental and historic preservation processing rules. These delays jeopardize the railroads' ability to continue operations and satisfy Congressionally mandated public safety deployment requirements. In addition to the administrative delays, the slow pace of environmental and historic review processing gives rise to considerable financial burdens.³⁶ A categorical exclusion for small wireless facilities located on railroad rights of way or in a rail yard, including exclusion from tribal consultation, would allow the railroads to deploy critical wireless infrastructure in the heavily disturbed area along long-established railroad tracks or in industrial rail yards without undergoing time-consuming environmental and historic preservation review, and free the resources of all stakeholders for conducting the critical review of larger installations located in areas of known or potential environmental and historic interest.

³⁶ After submitting fewer than 300 poles to the FCC for historic review processing, one railroad received requests from stakeholders for payment of consultation fees totaling \$338,000, or \$1,203 on average per site. *See* Letter from Theodore K. Kalick, Senior U.S. Regulatory Counsel, Canadian National Railway, to Stephen G. DelSordo, Federal Preservation Officer, Federal Communications Commission at 6 (May 9, 2013) ("Kalick Letter"), attached to Comments of the Association of American Railroads, WT Docket No. 13-240 (filed Nov. 15, 2013). Given statements in the FCC's Draft Program Comment, that cost is like to increase.

C. The FCC has the authority to exclude both collocated antennas and new small wireless construction from environmental and historic preservation review through this rulemaking.

The FCC has the authority to exclude both collocated and new small wireless facilities located on railroad rights of way and in rail yards from environmental and historic preservation review. AAR agrees with PCIA that the current rulemaking is the best way to effect such an exclusion.³⁷

Specifically, as part of this rulemaking, the FCC should modify the language in Note 1 to Section 1.1306 to add a categorical exclusion from environmental and historic preservation review for collocated small wireless facilities as well as for those located on new construction on railroad rights of way and in rail yards. The AAR recommends that the FCC add the following sentence to Note 1 of Section 1.1306, providing relief from both environmental and historic preservation review:

The provisions of § 1.1307(a) do not encompass small wireless facility installations where they are deployed in or on existing buildings, towers, or other structures, or deployed within existing aerial corridors, underground corridors, or on railroad rights of way and in rail yards.³⁸

Such an amendment to Note 1 to Section 1.1306 would expedite and streamline the review of small wireless antennas on existing and newly constructed poles, allowing for faster and more efficient deployments of critical wireless infrastructure. In addition, such an exclusion would save the FCC, the ACHP, SHPOs, Tribal Nations, and the railroad industry significant time, and free resources for the review of larger infrastructure projects with the potential for actual adverse impact on the human environment.

³⁷ See PCIA Mar. 19, 2013 Letter at 5.

³⁸ In addition, the Commission should clarify that the exclusion applies to associated equipment (*e.g.*, power supplies, cabling, converters, and transceivers) that does not exceed the height of the antenna.

As PCIA notes, the FCC has the authority to add the proposed language to Note 1 to Section 1.1306 as part of this rulemaking proceeding.³⁹ The Council on Environmental Quality (“CEQ”) oversees the NEPA activities of Federal agencies,⁴⁰ and its rules allow agencies to exclude from environmental review any actions “which do not individually or cumulatively have a significant effect on the human environment.”⁴¹ Similarly, the ACHP is charged with overseeing the Section 106 process,⁴² and its rules allow Federal agencies to exclude from historic review any undertakings “that do[] not have the potential to cause effects on historic properties.”⁴³ Thus, under the rules of the CEQ and the ACHP, the Commission may exclude small wireless facilities from environmental and historic review if it finds that the facilities do not have “a significant effect on the human environment” or “the potential to cause effects on historic properties.”⁴⁴ The AAR agrees with PCIA that small wireless facilities located on railroad rights of way or in rail yards, with their *de minimis* effects on historic properties, “more than meet these standards.”⁴⁵ In fact, PCIA correctly notes that such facilities actually have a beneficial effect on environmentally sensitive and historic properties, as their small footprint can substitute for larger and more disruptive communications towers.⁴⁶ The FCC also recognizes in

³⁹ See PCIA Mar. 19 Letter at 4-5.

⁴⁰ 42 U.S.C. § 4344; see also *NPRM*, 28 FCC Rcd at 14246-47 ¶¶ 19-20.

⁴¹ 40 C.F.R. §§ 1508.4, 1507.3(b)(2)(ii). As the CEQ has noted, categorical exclusions are not waivers of environmental review, but are “simply one type of NEPA review,” and “are the most frequently employed method of complying with NEPA.” Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75628, 75631-32 (2010).

⁴² 16 U.S.C. § 470s; see also *NPRM*, 28 FCC Rcd at 14249 ¶ 26.

⁴³ 36 C.F.R. § 800.3(a)(1) (“If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.”).

⁴⁴ 40 C.F.R. §§ 1508.4, 1507.3(b)(2)(ii); 36 C.F.R. § 800.3(a)(1).

⁴⁵ PCIA Mar. 19 Letter at 4.

⁴⁶ See generally Loveday Report.

the *NPRM* that constructing such minimally intrusive facilities can actually promote historic preservation, as it can lessen providers' reliance on the construction of larger, more potentially damaging structures.⁴⁷

Section 800.3(a)(1) of the ACHP's rules provides that if an undertaking "is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present," an agency has no further obligations to conduct Section 106 review.⁴⁸ PCIA argues that under Section 800.3(a)(1), a finding by the FCC in a rulemaking that small wireless facilities would have at most a *de minimis* effect on historic properties would satisfy the FCC's obligations under the ACHP's rules and allow the Commission to categorically exclude such facilities from undergoing a Section 106 analysis, and such a finding would also allow the FCC to exclude covered facilities from environmental review.⁴⁹ In the *NPRM*, the FCC asks if Section 800.3(a)(1) sustains such a reading, or instead if this provision only applies where an agency has determined that there is no potential for any effects on historic properties from a type of undertaking.⁵⁰ A plain reading of the language of the ACHP's rules, as endorsed by the First Circuit in *Save Our Heritage, Inc., et al., v. Federal Aviation Administration*,⁵¹ affirms PCIA's assertion that the Commission can revise its rules to categorically exclude small wireless facilities from both environmental and historic preservation review based on a finding of *de minimis* effect.

As noted by the First Circuit in *Save Our Heritage*, the question posed to a Federal agency by NEPA and Section 106 is the same: will any effects of an undertaking on the

⁴⁷ See *NPRM*, 28 FCC Rcd at 14252 ¶ 35; see also *id.* at 14243 ¶ 12, 14245 ¶ 17.

⁴⁸ 36 C.F.R. § 800.3(a)(1).

⁴⁹ See PCIA Mar. 19 Letter at 5.

⁵⁰ See *NPRM*, 28 FCC Rcd at 14259 ¶ 56.

⁵¹ *Save Our Heritage, Inc., et al., v. FAA*, 269 F.3d 49, 58 (1st Cir. 2001) ("*Save Our Heritage*").

surrounding area be *de minimis*.⁵² Answering the question affirmatively for one form of review allows an agency to extend an exclusion to the other.⁵³ In *Save Our Heritage*, several historic preservation organizations and local municipalities argued that the Federal Aviation Administration (“FAA”) did not adequately consider the adverse effects of allowing additional flights to be made to and from a regional airport located near known historic properties.⁵⁴ After study and initial consultation, the FAA found that these additional flights would have a *de minimis* effect, and consequently determined that it was not required to consult further with stakeholders regarding either environmental or Section 106 review before approving the request to allow the additional flights.⁵⁵ The court in *Save Our Heritage* examined the agency’s reasoning, and found that the FAA had arrived at a finding of *de minimis* impact after weighing the number of additional flights compared to the current flight load of the airport, and directly studying the potential effects that could arise from such flights.⁵⁶ Based on this “reasoned finding,” the court rejected the challenge to the adequacy of the agency’s determination, and affirmed that the finding of *de minimis* effects is sufficient grounds for a Federal agency to invoke a categorical exclusion covering both environmental and historic preservation review.⁵⁷

The court in *Save Our Heritage* found that the FAA had made a reasoned determination that the undertaking in question would have a *de minimis* effect on the human environment based on its consultation with the appropriate state NHPA consulting agency and completion of an

⁵² *See id.*

⁵³ *See id.* at 58-59. Section 800.8 of the ACHP’s rules provides that if an agency’s rules categorically exclude a project from NEPA review and the agency finds that the undertaking is a type of activity that does not have the potential to cause effects on historic properties, historic preservation review is completed. *See* 36 C.F.R. § 800.8(b); 36 C.F.R. § 800.3.

⁵⁴ *See Save Our Heritage*, 269 F.3d at 53-54.

⁵⁵ *See id.* at 57.

⁵⁶ *See id.* at 58-59.

⁵⁷ *See id.* at 61-62.

environmental analysis of the effects of the additional flights.⁵⁸ In this case, the FCC has available the results of its completed environmental and historic reviews, which could be subject to analysis to confirm that the installation of small wireless facilities rarely, if ever, result in a determination of more than a *de minimis* effect on the human environment. As noted in the *NPRM*, the FCC is engaged in consultation with the CEQ and has initiated outreach to various stakeholders, including Tribal Nations, as part of the Section 106 process.⁵⁹ In addition, PCIA has submitted a study that establishes the desirability of small wireless facilities for historic preservation review.⁶⁰ Through this rulemaking and continued consultation with the ACHP and CEQ the FCC has a strong record in support of the exclusions from environmental and historic preservation review, including exclusion from tribal consultation, for small wireless facilities recommended herein.

IV. THE FCC SHOULD EXCLUDE REPLACEMENT NON-TOWER STRUCTURES FROM ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW

In addition to excluding from environmental and historic preservation review new and collocated small wireless facilities located on railroad rights of way or in rail yards, the FCC should similarly exclude structures that replace existing facilities when the incumbent structure is something other than a communications tower. In the *NPRM*, the FCC notes that the NPA currently excludes from routine Section 106 review the construction of a new communications tower that replaces an existing tower, but does not provide a parallel exclusion for the installation of a replacement for a utility pole or other non-tower structure.⁶¹ In addition, the FCC's rules do not provide an exclusion from environmental review for any type of replacement structure.

⁵⁸ *See id.* at 54.

⁵⁹ *See NPRM*, 28 FCC Rcd at 14243 ¶ 13 and nn. 17, 104-105.

⁶⁰ *See Lovejoy Report*.

⁶¹ *See NPRM*, 28 FCC Rcd at ¶ 63.

AT&T has recommended that the FCC extend the existing Section 106 exclusion for replacement towers to cover replacements of non-tower structures, such as utility poles and street signs.⁶² The AAR endorses this proposal, and believes that an exclusion from both environmental and historic preservation review is appropriate for replacement poles and other non-tower structures where the replacement structure does not constitute a substantial increase in size from the original installed facility and is located in close proximity to the site of the existing non-tower facility.⁶³ The exclusion should be applicable regardless of whether the replacement is constructed with different materials.⁶⁴ Just as small wireless infrastructure located on railroad rights of way or in a rail yard should be excluded from environmental and historic preservation review, replacements for such infrastructure should also be governed by the existing Section 106 exclusion for replacement towers.⁶⁵ Such an exclusion is well-justified, as replacement facilities pose even less of a risk to the environment or historic structures than new construction, as the ground on which they are installed has been previously disturbed, and no new visual or direct effects will arise from the installation of a similarly-sized replacement facility.

The FCC can accomplish an exclusion from environmental and historic preservation review for replacement non-tower structures through this rulemaking, by the same means as the general exclusion for small wireless facilities located on railroad rights of way or in rail yards.

⁶² See *id.*, citing Letter from Colleen Thompson, Associate Director Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 11-59, 1 (filed June 17, 2013).

⁶³ Such an exclusion would complement that found in the draft Program Comment, which would exclude from Section 106 review small facilities, no more than seventy-five feet in height, located on the railroad right of way in the same vicinity as other structures, regardless of those structures' purposes. See Draft Program Comment, *supra* note 6, at Section IV.1.

⁶⁴ See *NPRM*, 28 FCC Rcd at ¶ 63.

⁶⁵ See *NPA* Section III.B. The *NPA* excludes from Section 106 review construction of replacement communications towers as long as the new tower does not substantially increase the size of the existing tower, and does not expand the boundaries of the property surrounding the existing tower by more than thirty feet in any direction.

Moreover, the effect of such replacement towers poses a *de minimis* risk to the human environment. The net effect of such an exclusion will be to lower the burden of environmental and historic preservation review on the FCC and other stakeholders, and to accelerate the deployment of wireless infrastructure.

V. A RULEMAKING IS WARRANTED TO GRANT MORE COMPREHENSIVE REFORM EVEN IF THE ACHP ADOPTS A PTC PROGRAM COMMENT

In response to the need to address some of the challenges posed by the current environmental and historic preservation review rules for the deployment of wireless infrastructure, on January 29, 2014 the Commission issued a draft Program Comment, which if adopted by the ACHP would alter Section 106 review for the deployment of PTC infrastructure.⁶⁶ The AAR applauds the Commission for taking steps to attempt to expedite PTC deployment and looks forward to providing the FCC with feedback on the draft Program Comment explaining how it can be improved. Nevertheless, the AAR believes that broader relief will be needed to ease the deployment of the thousands of PTC poles not encompassed by the Program Comment, and the additional thousands of non-PTC poles that will need to be deployed by the railroads and other industry participants in the near future.

The draft Program Comment would specifically exempt from review the construction of PTC facilities constructed on a railroad right of way that would not constitute a substantial increase in size over existing poles or similar structures in the vicinity, provided the facilities would not be located within the boundaries of an historic property.⁶⁷ However, this exclusion would only apply to Section 106 review, and would continue to require tribal consultation and

⁶⁶ See Draft Program Comment, *supra* note 6, at Section IV.1.

⁶⁷ See *id.* at Section IV.1.

the use of the Tower Construction Notification System (“TCNS”) process.⁶⁸ In addition, the draft Program Comment is limited to PTC wayside poles, and so will not necessarily address small facilities not related to PTC, including defect detectors, track-switching devices, and automatic equipment identification (“AEI”) readers.⁶⁹ This exclusion, although welcome, does not go far enough to provide relief to industry, and to other stakeholders, including Tribal Nations, who are otherwise required to review thousands of applications for the deployment of small wireless infrastructure that will have only a *de minimis* effect on the human environment.

One provision from the draft Program Comment should be explicitly adopted in this rulemaking. The draft Program Comment includes a proposed exclusion from Section 106 review for effects of PTC deployment on the railroad track and the track beds.⁷⁰ The AAR recommends that the Commission adopt a broadened version of this exclusion in this rulemaking to cover the deployment of both PTC and non-PTC small wireless facilities. In addition, this exclusion should not be limited to the track and track bed, but should be extended to exempt from Section 106 review the effect of the deployment of any small wireless facilities on any railroad-related properties located in the right of way.⁷¹

Through the present rulemaking, the FCC has the opportunity to facilitate and expedite the deployment of small wireless facilities across the nation, and to address the steadily mounting backlog of poles and other small facilities that wait, often for months, for Commission

⁶⁸ *See id.*

⁶⁹ *See* Kalick Letter, *supra* note 36 at 3-5. The draft Program Comment does not distinguish between wayside antennas and base stations, to the extent these technologies are deployed on structures falling within the defined height, diameter, foundation depth and location limitations. *See* Draft Program Comment, *supra* note 6 at Section III.

⁷⁰ *See* Draft Program Comment, *supra* note 6 at Section IV.2.

⁷¹ *See* Federal Railroad Administration, *Report to Congress: Streamlining Compliance with Section 4(f) of the Department of Transportation Act and Section 106 of the National Historic Preservation Act for Federally Funded Railroad Infrastructure Repair and Improvement Projects* (Mar. 2013), available at <http://www.fra.dot.gov/eLib/details/L04483>.

approval. The FCC should use the present rulemaking to provide a broad exclusion from environmental and historic preservation review for all small wireless facilities less than seventy-five feet in height, and especially those located on railroad rights of way or in rail yards.

VI. CONCLUSION

The FCC should revise its current environmental and historic preservation rules to categorically exclude new and collocated wireless facilities that are located on railroad rights of way and in rail yards. Reforming the current Commission processes will provide greater regulatory certainty for all stakeholders, expedite the deployment of critical wireless infrastructure, and free resources that can be used for the assessment of undertakings that pose an actual risk of negative effects on the human environment. The FCC should define any exclusion for small wireless facilities based on size and location, rather than technology. The FCC has the authority to adopt such exclusions as part of this rulemaking, and additionally should adopt a categorical exclusion from environmental and historic preservation review for replacement non-tower structures, bringing the regulatory treatment of such structures in line with that afforded communications towers. While the draft Program Comment is a movement in the right direction,

its narrow scope to certain PTC installations limits its utility in the future, and the Commission should adopt a comprehensive reformation of its rules to expedite the approval of all small wireless infrastructure located on railroad rights of way and in rail yards.

Respectfully submitted,

By: */s/ Michele C. Farquhar*

Louis P. Warchot
Senior Vice President-Law
and General Counsel

Timothy J. Strafford
Assistant General Counsel

The Association of American Railroads
425 3rd Street, S.W. Suite 1000
Washington, DC 20024
(202) 639-2502

Michele C. Farquhar
Deborah K. Broderson
Hogan Lovells US LLP

Counsel to the Association of American Railroads
555 13th Street, NW
Washington, DC 2004
(202) 637-5663

February 3, 2014