June 20, 2014

VIA ELECTRONIC DELIVERY

Mr. Roger C. Sherman
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *FCC Guidance Documents on Satisfying the Positive Train Control Program Comment*, WT Docket No. 13-240

Dear Mr. Sherman:

For over a year the members of the Association of American Railroads ("AAR"), which represent the seven Class I freight railroads, have worked closely with the Federal Communications Commission ("FCC" or "Commission") to resolve issues relating to the environmental and historic preservation review of over 30,000 wireless communications facilities that must be deployed expeditiously nationwide to implement positive train control ("PTC").

The railroads write now to express their concern that the results of this joint effort have been significantly weakened by recent guidance issued by FCC staff, which on its face is inconsistent with the Program Comment adopted by the Advisory Council on Historic Preservation ("ACHP"); creates a review process more onerous than the existing historic preservation review process; and will create further delays in the deployment of PTC. In addition, the Commission's most recent guidance regarding the conversion of Beta test submissions contradicts the FCC's original position on this process. Finally, the railroads ask the FCC to join them in seeking an amendment to the Program Comment to make a modest adjustment to the height requirement for surrounding infrastructure for the wayside pole exclusion. This letter offers more specificity with respect to the summary list of issues and proposed solutions that we provided earlier this week so that the FCC may more easily address the concerns regarding the Guidance Documents.

The AAR and its members urge the FCC to expeditiously revise its guidance to comport with both the text and the spirit of the PTC Program Comment, and to avoid further delay implementing the Congressional PTC mandate established by the Rail Safety Improvement Act ("RSIA").

Background

As the FCC is aware, on May 16, 2014, the ACHP adopted a Program Comment to govern the review of PTC wayside poles and infrastructure going forward.[1] The Program Comment excluded some wireless communications facilities from any historic preservation review; described the means by which the railroads could enter into alternative agreements with Tribal Nations and/or State Historic Preservation Officers ("SHPOs") to govern the review of wayside poles and infrastructure within a particular geographic area; and provided a review process for the effects of wayside poles and infrastructure that were neither excluded nor covered by an alternative agreement. The Program Comment also provided that the FCC, "in coordination with the [Federal Railroad Administration] and the railroads," would issue guidance clarifying aspects of the Program Comment review process.

Since the adoption of the Program Comment, the FCC has issued three guidance documents: (1) a Batching Guidance for TCNS and E106 Submissions Under the Positive Train Control Program Comment ("Batching Guidance");[2] (2) Positive Train Control Program Comment Questions and Answers ("PTC Q&A"); and (3) a revised PTC Q&A[3] that specifically addresses the conversion of applications for review of PTC wayside poles and infrastructure previously submitted pursuant to the FCC's Beta test submission process to the Program Comment process ("Beta Guidance") (collectively, "Guidance Documents").

The railroads are concerned that, despite the clear direction in the Program Comment that the FCC was to coordinate with the railroads, the Guidance Documents were issued without meaningful consultation with AAR members, and directly contradict the language and intent of the ACHP in adopting the Program Comment. To remedy this failing, the railroads propose a number of common sense amendments to these Guidance Documents to allow PTC deployment to go forward in the manner contemplated by and consistent with the ACHP's Program Comment. There is a critical need to revise the Guidance Documents so that the FCC is in compliance with the ACHP's Program Comment, and is not deliberately impeding the implementation of the RSIA.

---

[1] Also on May 16, 2014, each of the seven Class I freight railroads individually signed a Memorandum of Agreement with the FCC, which resolved the environmental and historic preservation review of PTC wireless communications facilities installed on the railroads' rights of way through May 2013.

[2] *See* FCC, Batching Guidance for TCNS and E106 Submissions Under the Positive Train Control Program Comment (June 6, 2014), http://wireless.fcc.gov/ptc/Batching_Guidance_060614.pdf.

[3] *See* FCC, Positive Train Control Program Comment Questions and Answers (last rev. June 13, 2014), http://wireless.fcc.gov/ptc/ptc_q_a2.pdf.

The FCC's Guidance Is Inconsistent with the ACHP's Program Comment

The Guidance Documents issued by the FCC are inconsistent with the Program Comment with respect to several key issues:

- The Program Comment did not contemplate any review of excluded poles;
- The Program Comment did not contemplate counting excluded poles against any batching submission quota; and
- The Program Comment did not contemplate the expanded opportunities for monitoring and/or field surveys provided by the Guidance Documents.

No part of the Program Comment as adopted by the ACHP contemplates review, consultation, or an approval process for any excluded pole.[4] Indeed, the language of the Program Comment is clear in that regard: Section V indicates that "[t]he FCC is not required to take into account the effects" of excluded poles and infrastructure on historic properties, and Section VII sets forth the review process only "with regard to wayside poles and infrastructure that are neither excluded under Section V, nor fully covered by an alternative agreement under Section VI." To the contrary, however, the FCC's Guidance Documents stipulate that all excluded poles are subject to the same thirty day review period as non-excluded poles. This provision is contrary to the clear language of the Program Comment and effectively negates the exclusion from review provided by the ACHP.

Requiring each of the exclusions to be reviewed diverts scarce resources to activities that the ACHP has already determined need not be taken into account for purposes of Section 106. This is evident from the FCC's own Batching Guidance, which limits submissions to 200 poles every two weeks, of which only 100 entries may be non-excluded poles. Effectively, the railroads' submissions have been cut in half by the requirement that excluded poles count against the batching quota. Unless the FCC revises its guidance to eliminate the review of excluded poles from SHPO and Tribal Nation review, the process for reviewing every pole – whether it falls within an exclusion or not – will be hopelessly slow.

Finally, the FCC's Guidance Documents create two categories of review for both excluded and non-excluded poles, monitoring and field surveys, and provide that Tribal Nations and SHPOs can potentially request both forms of mitigation for each pole location—whether or not an adverse impact is found. Allowing any form of monitoring for excluded poles directly contradicts the Program Comment. In addition, the Program Comment did not contemplate multiple opportunities for consulting parties to request monitoring. To be consistent with the Program Comment, the FCC should clarify its guidance to: provide that monitoring/field

[4] Section VII of the Program Comment requires only that the railroads include, as part of their submission of wayside poles and infrastructure for review, the location and part of the Program Comment that provides the exclusion for each PTC wireless communications facility. The Program Comment lists this information as part of the supplemental information that provides context for the poles submitted for actual review. It does not give rise to additional review of those excluded poles.

surveys are not appropriate for excluded poles; require a more substantial evidentiary showing than an "explanation" from a SHPO/Tribal Nation as the basis of a request to conduct monitoring or a field survey of non-excluded poles; and limit requests for monitoring/field surveys for non-excluded poles to one per pole location.

The Requirements in the FCC's Guidance Documents Are More Onerous Than Existing Procedures

Applicants seeking to deploy non-PTC wireless communications facilities are subject to the review process established by the Nationwide Programmatic Agreement ("NPA"). Although the ostensible goal of the Program Comment was to allow for expedited review of PTC wayside poles and infrastructure, the Program Comment as modified by the Guidance Documents imposes more challenging and time-consuming provisions than the NPA for processing exclusions, submitting documentation, and allowing monitoring.

Under the NPA, a determination by an applicant that an exclusion applies fully excludes those wireless communications facilities from further historic preservation review. The applicant does not need to input any excluded poles into TCNS/E106, or submit any further information or justification regarding the excluded pole to the FCC or to any consulting party. In contrast, the Guidance Documents provide that the railroads are required to submit all excluded poles into TCNS/E106 and to include maps and lat/long information for each and every excluded pole location, and then grant SHPOs and Tribal Nations a 30-day opportunity to review and comment on those excluded poles.

The NPA does not allow monitoring for excluded wireless communications facilities. Instead, the NPA appropriately provides monitoring as a form of mitigation, to take place after a determination of an adverse effect. Under the process established by FCC staff in the Guidance Documents, any SHPO or Tribal Nation may request monitoring or a field survey—or potentially both—for any site, including excluded poles or infrastructure. Moreover, to require a monitor or field survey, a consulting party only needs to provide an "explanation;" there is no stringent evidentiary standard for a SHPO or Tribal Nation to satisfy to challenge an applicant's assertion that an exclusion applies. In addition to giving rise to the potential for debilitating delays, because each excluded pole can be subject to multiple requests for a field survey as well as subsequent monitoring, this provision creates an unjustified and unfair presumption that the railroads will inaccurately claim exemptions to which they are not entitled.

The FCC should re-evaluate its Guidance Documents to ensure that the PTC-specific process is not more burdensome than that already in place under the NPA, especially regarding exclusions.

The Guidance Documents Will Cause Further Delays in the PTC Deployment Schedule

Many of the Guidance Documents' current provisions are potential sources of delay for PTC deployment.

Encouraging the review of excluded poles by SHPOs and Tribal Nations will prolong the review process and strain the resources of all stakeholders. Inclusion of excluded poles in the review pool may cause confusion as to what is or is not excluded, thus leading to longer review times. Moreover, such review of excluded poles certainly will result in significant expenditure of time and resources in many instances where there is no reasonable expectation of adverse impact to historic or cultural resources. As such, a primary purpose of the Program Comment – to streamline and focus the review process – is eviscerated.

Allowing consulting parties to request monitoring and field surveys for any pole, including excluded poles, and permitting consultative fees in connection with each request will significantly increase the likelihood of disputes between parties regarding: (1) the scheduling of monitoring/field surveys; and (2) compensation for these activities. This in turn will result in a greater burden on the FCC to resolve disputes within 10 business days.

Batching quotas that ignore the variable needs of the railroads will dramatically prolong the submission period and delay PTC deployment for all railroads. The Guidance Documents establish quotas that disproportionately burden railroads that have a larger number of poles and infrastructure to deploy. While some railroads have fewer than 1000 poles to install, others have over 5000, and will need 13-15 months under the FCC's current quota system just to input all poles into TCNS/E106. Because PTC is an interoperable system, a delay for some railroads will set back all railroads.

The FCC should make rational revisions to its Guidance Documents that will avoid increasing the burden for all stakeholders and disproportionately impacting some railroads.

The Current Guidance on Converting Beta Test Submissions Contradicts Previous Guidance

The FCC's Beta Guidance regarding the conversion of applications for review submitted under the Beta test process contradicts the Commission's original guidance regarding that process.

In a letter from Jeffrey Steinberg to the AAR dated January 8, 2014 ("Jan. 8 Letter"), the FCC explained that it had created a Beta test process, pending approval of a final Program Comment, to allow the Commission to "maintain momentum in order to

promote both timely PTC deployment and an effective Section 106 process." The railroads that followed the rigorous and demanding Beta test process anticipated in good faith that each submission would be considered to have satisfied the FCC's historic review requirements.

Remarkably, the Beta Guidance now provides that converting previously submitted Beta test entries to the Program Comment process will: (1) restart the clock for Tribal and SHPO review; and (2) require railroads to supplement the record with information required by the Program Comment, such as revised maps, even if the original submission fully satisfied the even more detailed information requirements laid out in the Jan. 8 Letter. The Beta Guidance provides consulting parties who failed to respond to Beta test submissions with an additional 30 day review period, plus a 10 day consultative period—even though many submissions have been pending in TCNS/E106 for several months.

The FCC should revise its guidance and find that any Tribal Nation or SHPO that failed to respond to a Beta test submission within 60 days has forfeited its ability to consult, and the pole or infrastructure should be declared cleared.

The ACHP Should Amend the Wayside Pole Exclusion in the Program Comment

As a separate matter beyond the reach of the FCC's Guidance Documents, the railroads ask the FCC to join them in seeking an amendment from the ACHP of the height requirement for structures in the vicinity of wayside poles subject to an exclusion.

Neither the FCC nor the ACHP consulted with the railroads prior to adopting the requirement that, to be eligible for an exclusion, a wayside pole must be within 500 feet of signaling equipment, a catenary bridge or mast, or an above ground utility or distribution line that is at least 25 feet in height. As currently drafted, the exclusion would apply to a 75 foot wayside structure near a 25 foot signal structure, for example, but not to a 20 foot wayside structure near a 22 foot signal structure. The intent of the exclusion, to exclude from review those PTC wayside structures being installed in locations where the infrastructure has already been installed and the visual impacts would be similar, would be better served if the height criteria were either broadened or more directly linked between the heights of the PTC pole and the existing infrastructure.

For this reason, the railroads intend to ask for an amendment to the Program Comment that would lower this height requirement from 25 to 15 feet. Alternatively, the ACHP could amend the Program Comment to clarify that the height requirement is based on a 1:5 ratio, maintaining the relationship between the heights discussed in the Program Comment. For example, a 75 foot tall PTC pole would need nearby infrastructure of at least 15 feet to be eligible for an exclusion; a 30 foot pole would only require surrounding infrastructure of at least 6 feet tall.

Conclusion

Many of the significant problems arising from the Guidance Documents could have been avoided if the FCC had followed the directive of the Program Comment and consulted with the railroads prior to their issuance. In light of the short time frame in which the FCC was working to produce the Guidance Documents, the AAR and its members provide these comments in lieu of that prior consultation, and urge the Commission to amend its Guidance Documents to follow the letter and intent of the Program Comment and to avoid causing further delay in the nationwide deployment of PTC. The railroads also hope the FCC can join them in seeking an amendment of the Program Comment to adjust the height requirement of surrounding infrastructure for the wayside pole exclusion, to ensure that this exclusion is meaningful as intended by its drafters.

/s/ Michele C. Farquhar

Michele C. Farquhar
Deborah K. Broderson
Counsel to the Association of American Railroads
Hogan Lovells US LLP
555 Thirteenth Street N.W.
Washington, D.C. 20004
(202) 637-5663

cc Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly

Charles Mathias
Jessica Almond
John Fowler, Executive Director, ACHP
Ms. Charlene Vaughn, ACHP