Positive Train Control Program Comment
Questions and Answers

Scope and Use of the Program Comment

Q. Will railroad structures that are not part of the PTC program use the Program Comment procedures?

> **A.** No. Under Section III, the Program Comment is only applicable to PTC wayside poles and associated infrastructure. Railroad structures that are not intended for PTC, as well as PTC structures, such as base stations, that do not meet the parameters set forth in Section III, will continue to be processed under the Nationwide Programmatic Agreement.

Submission Format and Required Materials

Q. Are the E106 and TCNS systems used for PTC the same as those used for non-PTC applications?

> **A.** Yes, the same electronic systems are used for all filings. Filings under the PTC Program Comment are marked in E106 and TCNS with a special icon, and Tribal Nations and SHPOs receive separate letters each week identifying these filings.

Q. What are the submission format and required materials for E106 and TCNS? Are all of the fields in TCNS and on Form 620 required?

> **A.** The railroads must complete all required fields in E106 and TCNS. To the extent these fields require information for a specific location, the railroads should enter data for a representative pole and provide the information for all poles within the filing in an attachment, to the extent such information is required under the Program Comment. The information and materials that are required in both E106 and TCNS are set forth in Section VII.A of the Program Comment, and in general should be provided through attachments. Further guidance regarding the materials to be included in E106 and TCNS filings is available here.

Q. Are the submission materials in the appendix of the January 29, 2014 draft Program Comment still required?

> **A.** No. The requirements in the final Program Comment supersede the process set out in the January 29, 2014 draft.

Q. Will the limits on the number of poles to be submitted through TCNS and E106 within a given period of time be changed in the future?
(*Question added July 1, 2014*)

A. These limits may be modified in the future. Any modification to the limits on batching of submissions will depend on the ability of the parties to process current volumes within the time limits prescribed in the Program Comment.

Exclusions

Q. Do poles that are excluded pursuant to Section V. have to be submitted through E106 and TCNS? (*Answer revised July 1, 2014*)

A. Yes, Section VII.A of the Program Comment states that excluded poles will be submitted. Excluded poles may be included in the same filing with poles that are subject to review or may be filed separately. Railroads should identify in the description field whether the filings includes poles that are subject to review, excluded poles, or both. The map provided with the TCNS and E106 filings must show the location of each excluded pole, and the railroad must identify the basis for each exclusion under the Program Comment. Further guidance regarding the materials to be included in E106 and TCNS filings is available here.

Q. May a SHPO or Tribal Nation object to a pole that is excluded under Section V? (*Answer revised July 1, 2014*)

A. If a SHPO or Tribal Nation believes a proposed pole was ineligible for exclusion under Section V, it should bring its concern directly to the FCC within 30 days of the submission date. For example, a SHPO or Tribal Nation may identify a pole as ineligible for an exclusion because it is within the boundaries of a historic property about which a railroad was previously unaware . SHPOs and Tribal Nations may attempt to resolve these concerns directly with the railroads within the 30-day period. If a SHPO or Tribal Nation notifies the FCC of a concern about an excluded pole, the FCC will notify the affected railroad promptly. Any finding that a pole was incorrectly excluded pursuant to Section V must be based on information about determined-eligible historic properties that is within the SHPO's or Tribal Nation's files or existing knowledge. Concerns about excluded poles will not be considered outside of the 30-day period except in extraordinary circumstances. Such concerns are not subject to the dispute resolution process in Section VII.E of the Program Comment. The FCC will resolve any concerns about eligibility for an exclusion in an expeditious manner, normally within 10 business days.

Q. May a SHPO or Tribal Nation request a field survey or monitoring for a pole that a railroad has identified as excluded pursuant to Section V?
(*Question added July 1, 2014*)

A. No, excluded poles are not subject to the field survey or monitoring provisions of the Program Comment.

Q. May a Tribal Nation request compensation to consider whether a pole was correctly excluded pursuant to Section V?
(*Question added July 1, 2014*)

> **A.** No. In supplying information about the existence of known determined-eligible historic properties at a proposed wayside pole site, a Tribal Nation is not acting in the role of a contractor or consultant. Therefore, it cannot reasonably expect compensation consistent with existing ACHP guidance. Should a determination be made that a pole was not correctly excluded under Section V, that pole may then be treated as other non-excluded poles for the purpose of compensation for expert services rendered during the review.

SHPO and Tribal Review of a railroad filing

Q. Are the automated responses some Tribal Nations have programmed into TCNS valid for PTC filings subject to the Program Comment?

> **A.** Under the Program Comment, any request for additional information must be case-specific and include the basis for the request. Accordingly, railroads need not respond to any automated request for information, monitoring, or fees received through TCNS.
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> Other automated responses, such as those containing contact information or other communication preferences, remain valid and should be honored to the extent they are not inconsistent with the Program Comment. This includes a Tribal Nation's automated response that it is not interested in a filing if it does not respond to the filing within 30 days.

Q. Section VII.D states that the SHPOs' and Tribal Nations' 30-day review of an application is not suspended due to an information request. If the railroad does not respond to an information request within the 30-day review period, what happens?

> **A.** If a dispute exists over an information request, the parties are encouraged to raise the matter with the FCC as soon as possible and provide any documentation relevant to the dispute. Parties do not need to wait until the 30-day review period has ended. If the matter is not raised with the FCC during the 30-day review period, and if as a result the SHPO or Tribal Nation does not respond to the substance of the filing within 30 days, the Program Comment requires the railroad to refer the filing to the FCC. In its referral, the railroad shall include any requests for information it has received, together with any related correspondence or summary of oral contacts.
>
> As part of its review, if the FCC concludes that any requests for information should have been satisfied by the railroad, the FCC will direct the railroad to provide the information and designate a reasonable period, not to exceed 30 days, for the SHPO or Tribal Nation to review the response upon receipt.

Q. What happens if a railroad does not satisfy a Tribal Nation's request for compensation in connection with a review?

A. We encourage all parties to discuss any compensation request as early in the process as possible. Consistent with ACHP guidance, any compensation should be commensurate with the work performed. If the parties do not agree on a compensation request, the dispute shall be subject to the same process as a disputed information request. Railroads are expected to remit any compensation promptly, ordinarily within 10 business days after reaching agreement on appropriate compensation.

Parties are reminded that under ACHP guidance, an agency or applicant is not required to pay a Tribal Nation for providing its views during consultation, but a Tribal Nation may expect reasonable compensation for its services in providing information and documentation in the role of a consultant or contractor.

Q. Who determines if there is an adverse effect and when will this be determined?

A. The SHPOs and Tribal Nations will identify whether there is an adverse effect on a historic property during the 30-day review period. If there is a disagreement over whether a historic property is adversely affected, the railroad will notify the FCC within two business days after the end of the 30-day period. The railroad and SHPOs and Tribal Nations are expected to continue consultation and coordination to resolve the disagreement for an additional 10 business days. If an agreement cannot be reached after this time period, any party may refer the matter to the FCC for resolution with a copy to ACHP, as described in Section VII.E of the Program Comment.

Adverse Effect Agreements
(*section added September 26, 2014*)

Q. What is an Adverse Effect Agreement?

A. An Adverse Effect Agreement (AEA), as described in Section VII.D of the Program Comment, is a document unique to PTC wayside infrastructure that memorializes measures the railroad will take to avoid, minimize, or mitigate the infrastructure's adverse effects on historic properties. An AEA is signed by the railroad, the relevant SHPO/THPO, and any Tribal Nations that attach traditional religious and cultural importance to adversely affected historic properties.

Q. What is the difference between an AEA and an alternative agreement?

A. An alternative agreement is entered into at the beginning of the Section 106 process to substitute for some or all of the processes set forth in the Program Comment. An AEA is entered into at the end of the Program Comment process to address adverse effects. Although

the two agreements are different, they may have common features, and parties are encouraged to use relevant provisions of the AEA template when negotiating an alternative agreement.

Q. Why has the FCC provided a template for an AEA?

A. Section VII.G of the PTC Program Comment states that the FCC "will prepare an agreement template and guidance on standard measures to assist in the PTC adverse effect agreement drafting and negotiation mentioned above." The FCC expects that such guidance will facilitate negotiations among railroads, SHPOs, and Tribal Nations in addressing common situations.

Q. Must parties use the template in crafting an AEA?

A. No. Parties are free to craft their own agreement so long as it applies only to eligible PTC infrastructure and conforms to the requirements of Section 106.

Q. Must an AEA identify adversely affected historic properties?

A. While an AEA may identify adverse effects on specific historic properties, the parties may also agree to stipulate that adverse effects exist.

Q. What mitigation is appropriate in an AEA?

A. The AEA template sets forth several types of offsite mitigation that the parties may consider. In addition, the parties may agree to any other mitigation that is related to the adverse effects of the construction or to historic preservation in the affected area.

Q. Can an AEA apply to infrastructure that is not subject to the PTC Program Comment?

A. No. Adverse effects of PTC infrastructure that is not covered by the Program Comment must be addressed through a Memorandum of Agreement consistent with the FCC's Nationwide Programmatic Agreement and the ACHP's rules.

Q. Is the FCC a signatory to an AEA?

A. No. However, the railroad must provide the FCC with a copy of any completed AEA.

Q. What happens if the parties cannot agree on an AEA?

A. If the parties cannot reach agreement within 10 business days after the 30-day review period, any party may refer the matter to the FCC, which will decide how any adverse effects will be avoided, minimized, or mitigated.

Monitoring and Field Surveys

Q. What is the difference between monitoring and a field survey? Can a SHPO or Tribal Nation request either one?
(*Answer revised July 1, 2014*)

> **A.** Monitoring refers to having a qualified professional present as an observer during construction. A field survey involves a qualified professional's visit to the site prior to construction to identify, record, and consider avoidance and mitigation measures for historic properties. Although the Program Comment uses the term "monitoring" to refer to these activities interchangeably, both are contemplated under Section VII.F(1) and (2), and either may be requested under appropriate circumstances.
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> Ordinarily, it is not necessary or expected that both a field survey and monitoring will occur at the same site. Nevertheless, in sensitive areas a field survey may reveal specific information about the potential presence of previously unknown historic properties that may be best addressed by monitoring during construction to ensure such historic properties are not adversely affected.

Q. When may a SHPO or Tribal Nation request monitoring or a field survey?

> **A**. A SHPO or Tribal Nation can request monitoring or a field survey any time during the 30-day review period. However, the work does not need to occur within the 30-day review period.

Q. When PTC locations are selected for monitoring or field survey outside the 30-day review process, will the railroad companies be responsible for paying for professional services?

> **A.** Yes. A railroad is expected to pay a reasonable fee for monitoring or surveying services including compensation for reasonable expenses. The terms of compensation will be negotiated as part of the scope of work under Section VII.F(1)(ii).

Q. Once a Tribal Nation or SHPO requests monitoring or a field survey during the 30-day period for review, how will the timeline for completing the process be determined?

> **A.** If a request for monitoring or field survey is made and is agreed to by the railroad, the timeline for completion of work will be determined between the parties. If there is a disagreement regarding a request for monitoring or field survey, it will be resolved under the process and timelines set forth in Section VII.E of the Program Comment.

Q. May a Tribal Nation or SHPO monitor a helical screw installation?
(*Answer revised July 1, 2014*)

> **A.** Monitoring of such installations during construction is likely to be of little value, because little or no material will be raised to the surface. If a Tribal Nation or SHPO wishes to monitor

wayside poles installed using a helical screw, it must provide the basis for its request under Section VII D. Any disagreements between the parties will be resolved through the process set forth in Section VII.E.

Q. Will disputes arising during monitoring be resolved in a shorter time frame than the 10-business day period?

A. The FCC will endeavor to answer all disputes presented to it as soon as possible, but it is not required to resolve any dispute in less than 10 business days.

FCC Review of a Filing

Q. If the FCC extends its 10-business day review period due to "exceptional circumstances," is the extension limited to an additional 10-day period?

A. No. The FCC will resolve all such matters as quickly as possible, but it is not limited to any specific period of extension where necessitated under the circumstances.

Converting Beta Submissions into Submissions under the Program Comment
(*section added June 13, 2014*)

Q. In the January 8, 2014 letter from Jeffrey Steinberg to Timothy Strafford, the FCC established a Beta process for the Class 1 freight railroads to submit certain groups of wayside poles through TCNS for review by Tribal Nations. If a Beta submission remains pending because one or more Tribal Nations have not completed the participation process prescribed under the FCC's usual procedures, can it be converted into a submission that applies the Program Comment?

A. Yes. The process to be followed depends upon whether the Beta submission consists solely of poles that are excluded from review under Section V of the Program Comment, or whether some or all poles in the submission remain subject to review. For submissions consisting of poles that remain subject to review, and for submissions that include both excluded and non-excluded poles:

- The railroad should submit its request using our online eSupport system at the following link: https://esupport.fcc.gov/request.htm. Beta Conversion Request should be entered in the Subject field. The Problem Description field must identify the Beta submission by TCNS number and either:
    - Indicate that the materials provided in the Beta submission meet the requirements of Section VII.A of the Program Comment; or

    - Attach supplementary materials as necessary to meet the requirements of Section VII.A of the Program Comment.
- If the filing includes poles that are excluded from review, the railroad must attach supplementary materials identifying the excluded poles and the applicable exclusion for each excluded pole, as provided in Section VII.A.
- The FCC will include submissions that have been converted to processing under the Program Comment in its weekly notifications to Tribal Nations of PTC submissions.
- The railroad must notify the relevant Tribal Nations that the submission has been converted from the Beta process to the Program Comment process within five business days from the date of the FCC notification. If applicable, notification to a Tribal Nation must also indicate that the Tribal Nation's participation in the review was previously completed in response to the earlier submission.

For Beta submissions consisting solely of wayside poles that are subject to an exclusion under Section V of the Program Comment, the railroad should:

- Indicate within TCNS that the submission has been abandoned;
- Notify the relevant Tribal Nations that the submission has been abandoned within five business days from the date the railroad designates the submission as abandoned on TCNS; and
- Submit the excluded wayside poles into TCNS via a new submission under the Program Comment. The new submission need not be limited to the poles that were part of the original Beta submission, but they may be combined in the new submission with other poles, including poles that are not excluded from review.

Conversion of a submission from the Beta process to the Program Comment process restarts all time periods and procedures for Tribal Nations that did not complete participation under the earlier submission. The procedure thenceforth is governed by the terms set forth in the Program Comment.

Because SHPO review under the Nationwide Programmatic Agreement is subject to defined time periods, we do not expect that it will ordinarily be necessary to resubmit previously submitted poles in E106 for review under the Program Comment. In the event a railroad wishes to convert a pending E106 submission to the Program Comment process, it should inquire at PTCQuestions@fcc.gov.

Q. Do railroads have to convert all Beta submissions to the Program Comment process? (*Question added July 1, 2014*)

A. No. If a railroad wishes to continue the review process under the terms of the Beta process it may do so.

Constructed Wayside Poles and the Cultural Resource Fund established by the Memoranda of Understanding
(*section added September 26, 2014*)

Q. Is PTC infrastructure that was constructed prior to June 2013 without completing the Section 106 process subject to Section 106 review? If not, how can the effects of such infrastructure be assessed?

A. Previously constructed infrastructure is not subject to the review procedures in the Program Comment. To address such previous construction, each of the Class 1 freight railroads has entered into a Memorandum of Understanding (MOU) with the FCC. Under the MOUs, the railroads will establish a $10 million fund to provide grants to SHPOs and Tribal Nations to support cultural and historic preservation programs. SHPOs and Tribal Nations may use these grants, among other purposes, to study the historic preservation effects of previously constructed PTC infrastructure. The railroads have committed to permit reasonable access to railroad property for this purpose.

Q. When will money from the Cultural Resource Fund become available?

A. The administrator of the Cultural Resource Fund will be named by October 31, 2014. The administrator will develop procedures and timelines under which SHPOs and Tribal Nations may apply for grants from the Fund.

Q. Who will be eligible to receive money from the Cultural Resource Fund?

A. Grant monies will be available to the SHPOs of all states in which PTC infrastructure was constructed without Section 106 compliance, and to all Tribal Nations that included areas where such construction occurred within their designated areas of interest in TCNS as of December 31, 2013. The FCC will notify all Tribal Nations and SHPOs that are eligible for funding.

Q. What types of projects will be funded?

A. A wide range of projects will be eligible for grant funds. Among the eligible projects will be field surveys, ethnographic studies, historic property documentation projects and other reports, training on cultural resource topics, purchase of technology and equipment, and salaries to increase capacity for historic preservation review.

Q. A constructed wayside pole has an adverse effect on a historic property. How will the FCC resolve this?

A. A Tribal Nation or SHPO that determines an existing PTC installation has an adverse effect on a historic property should notify the FCC. We will work with the Tribal Nation or SHPO on an appropriate response consistent with the provisions of the Program Comment and MOUs.

Unanticipated Discoveries
(*section added September 26, 2014*)

Q. If a railroad discovers human remains during installation of PTC facilities, what are its obligations?

> **A.** Under Section IX.A of the Program Comment, if an alternative agreement under Section VI of the Program Comment or an adverse effect agreement under Section VII.D is in effect, the railroad shall follow the applicable provisions under that agreement. Otherwise, the railroad shall immediately cease work at the site, except for work necessary to secure the site. In addition, the railroad shall comply with State burial law or NAGPRA, as appropriate. If no State law or NAGPRA is applicable, the railroad shall refer the matter to the FCC, copying ACHP. The FCC will consult with the SHPO and Tribal Nations as appropriate, and also with ACHP should ACHP so request it. The FCC shall issue its decision within 10 business days, unless the FCC finds it necessary to extend this time period due to exceptional circumstances.

Q. If a railroad discovers resources (other than human remains) during installation of PTC facilities, what are its obligations?

> **A.** Under Section IX.B of the Program Comment, the railroad shall follow the applicable provisions under an alternative agreement under Section VI or a PTC adverse effect agreement under Section VII.D should such an agreement be in effect. Otherwise, the Program Comment requires that the railroad follow the applicable provisions of 36 C.F.R. § 800.13(b). In cases where construction has commenced, Section 800.13(b) generally requires notification to the FCC, the SHPO, potentially affected Tribal Nations, and the ACHP within 48 hours so that the FCC can work with these parties to determine appropriate actions to resolve any adverse effects.

Contact Information

Q. How should required notifications and requests for action under the Program Comment be submitted to the FCC?

> **A.** You should e-mail them to PTCQuestions@fcc.gov.

Q. Who should be contacted for additional questions?

> **A.** You may e-mail them to PTCQuestions@fcc.gov. In the alternative, you may contact Stephen DelSordo, Federal Preservation Officer, (202) 418-1986, stephen.delsordo@fcc.gov; Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, (202) 418-7146, aaron.goldschmidt@fcc.gov; or Anne Marie Wypijewski, Senior Attorney, Spectrum and Competition Policy Division, (717) 338-2508, annemarie.wypijewski@fcc.gov.