

**Written Statement of
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Before the

**Subcommittee on Surface Transportation and
Merchant Marine Infrastructure, Safety, and Security
Committee on Commerce, Science, and Transportation
United States Senate**

“Enhancing Our Rail Safety: Current Challenges for Passenger and Freight Rail”

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Chairman Blumenthal, Ranking Member Blunt, and Members of the Subcommittee, thank you for this opportunity to appear before you today concerning the Federal Communications Commission’s role in enhancing rail safety. My name is Geoffrey Blackwell, and I am the Chief of the Federal Communications Commission’s (FCC) Office of Native Affairs and Policy, or ONAP, which is part of the Consumer and Governmental Affairs Bureau. ONAP was established in August 2010 to promote the deployment and adoption of communications services and technologies throughout Tribal Lands and Native Communities and to ensure robust government-to-government consultation with federally-recognized Tribal Governments and increased coordination with Native Organizations, including on environmental and historic preservation reviews and related matters. Along with other Commission Bureaus and Offices, ONAP is part of the internal infrastructure team at the Commission that coordinates closely on the matters involved in this hearing.

The Commission recognizes that positive train control (PTC) is a transformative technology that has the power to save lives, prevent injuries, and avoid extensive property damage. Clearly, PTC

deployment is a top priority of all of the agencies and companies represented at the table today. It is also a top priority of the Commission to work with all parties to help them fulfill their various legal obligations and responsibilities and advance the deployment of PTC within the timeframe prescribed by the Railroad Safety Improvement Act of 2008 (RSIA).

At the same time, we recognize the need to balance legitimate concerns regarding the potential impacts of such a major infrastructure deployment on historic properties, including sites of religious and cultural significance to Tribal Nations. This imperative is reflected in the FCC's statutory obligations under Section 106 of the National Historic Preservation Act (NHPA), as well as the National Environmental Policy Act (NEPA). Most notably, NHPA regulations developed by the Advisory Council on Historic Preservation (ACHP) require that the FCC review and assess whether a proposed communications facility may have an adverse effect on historic properties, and consult with Federally recognized Tribal Nations as part of its review process.

For example, railroad tracks often follow historical trade and navigation routes that have been used for centuries, both by European settlers and by Native peoples before and since European settlement. Construction along the tracks therefore has the potential to affect a number of cultural or religious properties, from traditional burial sites to sacred landscapes. Our consultations with Tribal Nations revealed such specific histories. According to the Tribal Historic Preservation Officer (THPO) of the Quapaw Tribe of Oklahoma, when the railroad was constructed through historical Quapaw community lands in the southern plains, the soil of multiple burial mounds was bulldozed into the right-of-way to build up the track bed. According to the THPO of the Mississippi Band of Choctaw Indians, the largest Tribal cemetery ever discovered in the state of Mississippi was found under a railroad right-of-way. Several THPOs

for Tribal Nations resident in both North and South Dakota have identified village sites that lie underneath existing rail lines. Likewise, Tribal Nations with an interest in the Columbia River Gorge have identified sacred sites and petroglyphs that are either underneath or alongside the existing tracks. Construction along railroad tracks can also affect historic properties that are not of cultural and religious significance to Tribal Nations. For example, the Pennsylvania, Georgia, Montana, Wyoming, and New Mexico SHPOs have identified historic districts in their states that lie astride rail lines.

Accordingly, to address these concerns the Commission is dedicating substantial resources to establishing a specially-designed review process that would allow the railroads to deploy PTC wayside infrastructure by the December 31, 2015, statutory deadline, while also ensuring that it meets its statutory obligation to fully consider the effects of this infrastructure on historic properties, including sites of religious and cultural significance to Tribal Nations.

Background

RSIA requires that freight and passenger railroads deploy by December 31, 2015, interoperable PTC systems along routes transporting passengers and certain hazardous cargoes. While the Federal Railroad Administration (FRA) is responsible for overseeing the railroads' implementation of PTC by the statutory deadline, the FCC plays a role in two aspects of PTC deployment. First, the FCC regulates access to spectrum, and many railroads are installing PTC systems that require licensed spectrum to enable wireless communication. Second, it is well established—and has been upheld by the D.C. Circuit—that a Commission licensee's construction of a facility (e.g., a communications tower) to use Commission-licensed spectrum constitutes a major federal action and federal undertaking within the meaning of NEPA and the NHPA. Thus, the FCC has a legal responsibility to review the environmental and historic

preservation impacts, including impacts on properties of religious and cultural significance to Tribal Nations, of infrastructure projects, like PTC, that will provide wireless services using FCC-licensed spectrum. It is a common misperception that the responsibility to ensure that Tribal Nations have an opportunity to participate in this process arises only with respect to the lands upon which Tribal Nations currently reside. In fact, the NHPA requires a nationwide scope, and Tribal involvement in the FCC process is typically most important on non-Tribal lands. These previously inhabited areas are precisely where Tribal governments do not presently own the land or have the authority to protect their religious and cultural properties, except through the NHPA.

Providing Spectrum

Broadly speaking, the FCC understands that two types of PTC systems will be implemented in the United States. While they both use frequencies in the 217 to 222 megahertz range, they have different spectrum requirements. In the Northeast Corridor, Amtrak and the commuter railroads intend to implement Amtrak's Advanced Civil Speed Enforcement System (ACSES), via 12.5 kHz spectrum channels. Outside of the Northeast Corridor, commuter railroads, Amtrak and the freight railroads intend to implement a system developed by the freight railroads, Interoperable Electronic Train Management System (I-ETMS), via 25 kHz channels.

Since 2010, FCC staff has been working with freight and commuter rails to identify spectrum that is suitable and available for the deployment of an interoperable PTC system. PTC-220, a consortium of the nation's seven Class I freight railroads, has acquired a substantial block of nationwide spectrum, as well as additional spectrum in dense urban markets, for the purpose of implementing PTC systems. FCC staff continues to work with PTC-220 and other relevant stakeholders to enable more intensive use of PTC-220's spectrum holdings, which will allow

other railroads, especially commuter railroads, to benefit from PTC-220's spectrum holdings and networks. Provided that pending and future FRA requirements do not materially impact PTC spectrum needs, we believe the seven Class I freight railroads generally have sufficient spectrum to deploy PTC. We also believe that an increasing number of commuter rails have access to sufficient spectrum to deploy PTC. We continue to work actively with those still seeking spectrum.

Environmental and Historic Preservation Review

The Commission's rules require that applicants ascertain—prior to initiating construction—whether a facility they wish to construct could have a significant environmental impact, including an adverse effect on historic properties. If the facility may have such an impact, the Commission's rules require the preparation of an Environmental Assessment (EA) and further environmental processing.

To determine whether there will be an adverse effect on historic properties, the rules require the applicant to follow certain procedures set forth in the Commission's 2004 Nationwide Programmatic Agreement (NPA) with ACHP and the National Conference of Historic Preservation Officers (NCSHPO). Intended to facilitate historic preservation review for communications projects, the NPA includes procedures for participation of Tribal Nations and, where necessary, referral to the Commission for government-to-government consultation. The NPA also improved the process for SHPO review and excluded some constructions from review under defined conditions. The Commission's rules also specify procedures for NEPA compliance. No formal regulatory action is required to adapt these procedures for PTC wayside poles, and the Commission staff is working with the railroads to make the necessary informal adjustments to the process.

While the Commission's rules include certain exemptions and exclusions from NEPA and NHPA review, none currently available would categorically exclude the entire PTC wayside pole system. The creation of exemptions for infrastructure deployments like PTC would require not only consultation and negotiation with ACHP and NCSHPO, the other necessary signatories to our NPA under ACHP rules, but also a full notice and comment rulemaking proceeding at the Commission, a process that could take a year or longer.

A cornerstone of the Commission's implementation of the NPA is the Tower Construction Notification System (TCNS), a secure technology solution that allows parties interested in constructing communications towers to ascertain whether their proposed construction would implicate a Tribal Nation's interest in culturally or religiously significant sites in the area of the proposed construction. TCNS is a non-public system that facilitates the notification, interactions, and review of proposed constructions, while protecting the private nature of both the particular applicant's proposed construction and the site of religious or cultural significance to a Tribal Nation. Use of TCNS immediately narrows the areas of interest of Tribal Nations to only those that they have indicated as relevant in this process and currently, every single Tribal Nation in the country has set its area of interest to participate in the TCNS system. A parallel system, E-106, exists to facilitate review of communications towers by interested state historic preservation officers (SHPOs).

On average the Commission processes more than 10,000 applications a year for new or collocated communications infrastructure through these systems. TCNS and E-106 provide an easy way to exchange information among Commission staff, Tribal Nations, SHPOs and applicants.

Facilitating Efficient PTC Infrastructure Deployment

In the spring of 2013, the railroads informed FCC staff that they intended to deploy PTC using a system that required the construction of approximately 22,000 wayside poles with antennas along the railroad tracks. Through continued discussions with the railroads we concluded, and the railroads have agreed, that the Commission's TCNS and E-106 processes, as they existed, were not suited to ensure efficient review of PTC wayside infrastructure on such a large scale. In fact, the existing TCNS and E-106 process was originally designed for tower-by-tower review and does not efficiently scale up to the large scale and linear nature of the proposed PTC projects. At the same time, we recognized that TCNS and E-106 do offer unique efficiencies that will provide many advantages to the railroads, FCC staff, SHPOs, and Tribal Nations.

Consequently, the Commission immediately sought to develop alternative ways to leverage TCNS and E-106 so as to facilitate the deployment of necessary infrastructure while ensuring compliance with the relevant statutes and our rules. In doing so, we are mindful of the Commission's trust responsibility to consult with Tribal governments prior to implementing any regulatory action or policy that could significantly or uniquely affect Tribal governments, their land and resources.

Complicating our work to create an efficient process for new construction of PTC infrastructure is the fact that we must consider more than 10,000 PTC infrastructure deployments that were undertaken by the railroads without completing the environmental and historic preservation review clearly required by federal laws and regulations. This issue has figured prominently in our discussions with SHPOs and Tribal representatives, and in consultations with Tribal government officials, as we seek to create an efficient review process. Based on those discussions, it is clear to us that issues related to prior construction must be resolved

contemporaneously with the issues surrounding future PTC infrastructure construction of up to an additional 20,000 wayside poles.

In May 2013, FCC senior staff advised the major freight railroads to defer submission of requests seeking SHPO and Tribal review of wayside pole deployments until the FCC could develop a more streamlined process specifically tailored to PTC wayside poles. FCC staff has consistently advised commuter railroads, which will deploy a limited number of wayside poles, to continue using the TCNS and E-106 systems.

The Program Comment

Upon concluding that our existing processes were not suitable for PTC infrastructure review, FCC staff consulted with the Administration's Council on Environmental Quality (CEQ) and with the ACHP on the best path forward. CEQ confirmed that we could not simply exclude PTC wayside poles from the required NEPA review without a formal notice and comment rulemaking process to develop a categorical exclusion. ACHP similarly confirmed that there was no ready path to a broad exclusion from NHPA review. ACHP further advised that the most expeditious way for the Commission to streamline its historic preservation review process is to develop a "Program Comment."

A Program Comment is a document adopted and issued by ACHP that allows a federal agency such as the FCC to follow alternative historic preservation review processes that address specific needs of an agency. Under this approach, the FCC must develop a draft Program Comment and propose it to ACHP after consultation with all stakeholders, including government-to-government consultation with Tribal Nations. Adoption and implementation of the Program Comment does not require a formal FCC rulemaking.

We released a Section 106 scoping document — an initial step in developing a Program Comment – on September 27, 2013. We then met with Tribal officials and railroad representatives, in Rapid City, South Dakota in November 2013, and Tulsa, Oklahoma in December 2013. In an unprecedented fashion, in addition to face-to-face consultations between Federal and Tribal officials, these meetings also included sessions with all interested parties present. At their request, we also coordinated with the railroads to facilitate live demonstrations of their PTC deployments to Tribal officials.

As a result of those meetings and consultations, on January 8, 2014, the Commission advised the Class I freight railroads to begin submitting through TCNS and E-106 proposed PTC infrastructure along segments of track that were discussed during the Rapid City and Tulsa meetings using a Beta version of the process we envision implementing in the Program Comment. While the TCNS and E106 systems are not designed for public inspection, and thus do not have public view versions, we believe it is a good indication of forward progress that at least two of the Class I freight railroads have voluntarily filed information in TCNS, and four have filed forms in the E-106 system.

We began our PTC solutions dialogue with Indian Country in August of last year – the earliest practicable date - at the annual meeting of the National Association of Tribal Historic Preservation Officers in Billings, Montana. We are scheduling additional consultations with Tribal Nations in the Pacific Northwest and Southwest to gather input on the draft Program Comment and continue the productive conversations between the Tribal Nations and the railroads. We also conducted a dialogue in early February with the Culture and Heritage Committee of the United South and Eastern Tribes, and we have conducted numerous other meetings with regional and national inter-Tribal organizations.

FCC staff has also engaged numerous SHPOs on the proposal to create a more efficient review process. In particular, we provided information to the SHPOs by letter in July 2013, October 2013, and January 2014, and we have conducted four teleconferences with the SHPOs in August 2013, December 2013, and February 2014.

The FCC publicly released a draft Program Comment on January 29, 2014. The draft Program Comment would apply to wayside infrastructure that will be constructed within existing railroad rights of way for use in the implementation and operation of PTC systems. Infrastructure eligible for the procedures of the Program Comment may support either wayside antennas or base stations, but must not: (1) be taller than 75 feet; or (2) be situated outside the railroad right-of-way. Eligible infrastructure also must create a foundation hole that is either (1) no greater than 20 inches in diameter (24 inches in the context of manual excavation) and no deeper than 15 feet; or (2) no greater than 30 square feet in surface area and no deeper than 6 feet. Applicants using the proposed Program Comment must ensure that associated cultural resource reports are prepared by professionals who meet the relevant standards in the Secretary of the Interior's Professional Qualifications Standards. Additionally, applicants must be willing to perform field surveys and/or support Tribal monitoring, where necessary to evaluate effects on historic properties, and to compensate Tribal preservation offices for professional services in accordance with ACHP's guidelines. The draft Program Comment seeks to promote administrative efficiency by providing for submission of poles in batches, rather than pole-by-pole, while ensuring that SHPOs and Tribal Nations will receive sufficient information about each pole to evaluate its effects on historic properties.

Comments on the draft Program Comment were due on February 12, 2014. The Commission submitted the Program Comment to ACHP on March 4, 2014. Under its rules, ACHP should act

on the Program Comment by mid-April. Once adopted, the Commission is prepared immediately to begin accepting submissions from railroads under its terms.

Collaboration

Throughout this process, the Commission has been working closely with our partners at the Federal Railroad Administration, the National Transportation Safety Board, ACHP, CEQ, and the U.S. Fish and Wildlife Service to share information and ensure coordination between our agencies. As I stated we are also working closely with Tribal Nations and their cultural preservation officials, the SHPOs and, of course, the railroads subject to the PTC mandate. We will continue our close and productive collaboration with all of these parties to ensure that the Commission's processes do not inhibit the deployment of PTC by the statutory deadline.

In closing, let me reiterate that the Commission recognizes the importance of PTC to enhancing rail safety, and is committed to doing what is necessary to allow for an efficient and timely review process that ensures full consideration of the effects of PTC wayside poles on historic properties, including sites of religious and cultural significance to Tribal Nations, in a manner that allows the railroads to complete construction by the statutory deadline.

Thank you for the opportunity to appear today. I look forward to answering any questions you may have.