



**NATHPO**

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

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Submitted via email to [FCCcomments@achp.gov](mailto:FCCcomments@achp.gov)

May 5, 2014

Charlene Dwin Vaughn, AICP,  
Assistant Director  
Office of Federal Agency Programs  
1100 Pennsylvania Ave., NW Suite 803  
Washington, DC 20004

Re: Comments on Revised FCC Program Comment

Dear Ms. Vaughn:

The National Association of Tribal Historic Preservation Officers (NATHPO) has been deeply involved in the Federal Communications Commission (FCC) process to establish efficiencies in implementing Positive Train Control (PTC) throughout the country. The process includes the Advisory Council on Historic Preservation's recommendation to develop a Program Comment. NATHPO has remained informed on this topic, both through participation in a variety of conference calls and meetings, by reading publicly available information on this topic on both the FCC's and the ACHP's websites, and one-on-one communication with the federal agency officials, tribal representatives, and state officials.

Comments in this letter are in response to the ACHP revised, draft Program Comment that is dated April 28, 2014, and the May 1, 2014, limited conference call with Indian tribes on the revised document. It was surprising to see how significantly different the April 28<sup>th</sup> version is from the March 4<sup>th</sup> version.

Overall, NATHPO believes that the Program Comment should describe a process that contains the following provisions:

1. Use of TCNS by slightly modifying the system so that PTC poles may be added. TCNS is a proven and ready system and is most efficient process for working with Indian tribes at the local level.
2. A description of the nationwide Programmatic Agreement with FCC and the related process and efficiency of TCNS should be described in the Program Comment
3. For those tribes that do not currently use the TCNS system, an alternative process for PTC poles should be outlined, if needed.
4. Poles within the railroad right-of-way should not be excluded from the process, especially if the TCNS process is used as noted above. TCNS allows for tribal review of poles, including those that are not currently listed in a tribal or national register.
5. Possible "workload challenges for THPOs" should not be a factor or be included in the Program Comment, as that is an inherent right for each individual Indian tribe to make and not the Federal government's
6. Reasonable and good faith efforts for the railroads to request tribal review of PTC wayside poles and structures should include language that railroads will strictly adhere to the existing right-of-way areas (not expand via a chain reaction noted below)
7. Batching or phasing of pole review requests should be made in reasonable and good faith and once an agreed upon quantity that may be included in a single batch is set, it should not be adjusted without further consultation with Indian tribes
8. Pre-supposed situations should not be made unless there is incontrovertible proof that such situations exist. For example, the assumption that ground disturbance will not affect any historic property or significant cultural resource shall not be made unless there is scientific proof or proper legal reference or existing examples demonstrating otherwise.

Specifically, NATHPO recommends the following:

I. Introduction

- The additional background information that has been added to this section is helpful in explaining Positive Train Control.
- Recommended language to add to this section due to its relevance in the process: In 2001 and 2004 the FCC, ACHP, and NCSHPO signed two nationwide programmatic agreements to deal with urgency of cell tower construction throughout the country. As a result of this process, the FCC created the efficient tribal consultation system, Tower Construction Notification System (TCNS), which is in wide use today. To date, this is the most effective and efficient tool available for a Federal agency to use in directing tribal consultation. For purposes of this Program Comment, the efficiency of TCNS will be utilized by slightly modifying the system so that PTC poles may be reviewed. Specifically, this modification should include a searchable data field on the TCNS system that references PTC projects, similar to the searchable data field that can be used to query a project location or notification status.
- Reference is made to two Class 1 freight railroads installing foundations that "...will also require using fill rock or dirt, either taken from the excavation hole or trucked in from elsewhere..." and language should be clear that the additional fill process complies with all laws.

II. Section 106 Implications

Re: the last sentence in this section, *"Finally, the mentioned pressing deadline as well as the high number...will present significant workload challenges for State and Tribal Historic Preservation Officers, and such challenges may not be met appropriately without increased capacity in those offices."*

Recommendation: Strike this sentence as it is beyond the scope of the ACHP or any Federal agency to represent an Indian tribe in this manner and it is unclear as to why this sentiment is included in this document.

III. Scope and Use of this Program Comment and Applicability Regarding Other Federal Agencies

Re: last sentence in first paragraph, *"To achieve such compliance, FCC may rely on the railroad implementation of alternative agreements under Section V, the exclusions under Section IV, and the review process under Section VI."*

Recommendation: If TCNS is to be used to its fullest extent, then it should be mentioned in this section in addition to alternative agreements.

IV. Exclusions

- Is it possible to refer to Efficiencies, rather than Exclusions?
- NATHPO strongly disagrees with exclusion (1) that removes wayside poles and infrastructure within existing rights-of-way from review.
- Reinsert this language from the March 4<sup>th</sup> version: *"Similar to the existing exclusion for communications and utility rights-of-way, covered facilities remain subject to the process for participation of Tribal Nations described herein, which is based on Section IV of the FCC NPA."* Referencing the NPA allows for tribal review at appropriate times throughout the process; TCNS was created to allow tribes to include for review their unevaluated sites for protection.
- Language needs to be added to clarify that poles installed near an already existing, similar pole does not set off a chain reaction of other poles that would be considered excluded from the process

V. Alternative Agreement

- Recommend that the language on using TCNS be strengthened so that it is described as the primary process to be used; any process outside of TCNS would be developed by an individual tribe and the railroad, and in no way would preclude TCNS for other tribes.
- Recommend that language be added to the effect that for those Indian tribes that do not currently use TCNS, then alternative agreements may be reached between the railroad/s and Indian tribe/s.

## VI. Review Process for Effects of Wayside Poles and Infrastructure Not Excluded or Covered by an Alternative Agreement

- Poles and infrastructure should be batched by counties; the coordinate location of all poles and infrastructure considered part of the federal undertaking must be included with the batched submission and must be shown as an overlay on a map of the existing railroad rights-of-way.
- A. “Qualified personnel” needs to be defined in terms of special expertise of tribal representatives in addition to personnel who meet the current Secretary of Interior’s Qualifications. When an Indian tribe informs a Federal agency that a historic property of religious and cultural significance to the tribe may be affected by the undertaking, the Federal agency must consider the “special expertise” of the tribe in identifying this property. The ACHP advises Federal agencies to refer any disputed eligibility determinations to the Keeper of the National Register of Historic Places for a formal determination of eligibility. It is a process that, once concluded, cannot be challenged by the Federal agency.
- A.1. “Tribal databases”: This effort as written would include tribal participation in the process upfront, but if TCNS is used, this preliminary effort would not be necessary.
- A.1. “Tribal information”: This is confidential information and if used, provisions on how this information would be protected need to be included.
- A.1. “Documented historic properties” Not all tribal historic properties are documented and thus, eligible properties should be protected whether or not they are documented
- A.2. “Railroad engineering maps with pole coordinates” should include be shown on a map in the context of within the railroad right-of-way
- B. “Supporting documentation” needs to be defined; the presumption that all tribes will require cultural resource surveys on every tower is misleading and not supported by ten years of using the TCNS process.
- D. Include language to clarify that all 20,000 poles may not be inserted into the TCNS system at the same time with a request to review all 20,000 within 30 days.

## VII. Previously Constructed Facilities

- The proposed timeframe of resolving the issue of previously constructed poles is too long after the fact and should be, at the least, by the current deadline of December 31, 2015.
- Perhaps this issue should be addressed prior to granting broadcasting licenses.

## IX. Involvement of FCC as Requested by Tribes

- There was discussion on moving up one section to Section VIII to follow “Review Process”

## X. Administrative Provisions

- Include definition of applicable laws:  
In accordance with the NHPA [16 U.S.C. 470 §§ 470-470w-6] 1966, undertakings subject to the review process are referred to in S101 (d)(6)(A), which clarifies that historic properties may have religious and cultural significance to Indian tribes. Additionally, Section 106 of NHPA requires Federal agencies to consider the effects of their actions on historic properties (36 CFR Part 800) as does Section 110 (16 U.S.C. § 470h-2(a)) mandates that federal agencies assume responsibility for the preservation of historic properties or resources that fall under the agency’s jurisdiction. Additionally, federal agencies must carry out their programs and projects in accordance with the purposes of the NHPA (16 U.S.C. § 470h-2(d)). The National Environmental Policy Act (43 U.S.C. 4321 and 4331-35 and 40 CFR 1501.7(a) of 1969) offers protection of historic properties and significant cultural resources; and Executive Order 13007 defines "Sacred Sites" in order to protect and preserve Indian religious practices.
- Include definition of Indian tribe
- Include definition of “special tribal expertise” and/or reference to 36 CFR 800.4(c)(1)
- Include definition of right-of-way and refer to database of existing ROW, if exists
- Include definition of “supporting documentation,” per Section VI.B
- Include a description of construction activities that are considered part of the undertaking; that is, wayside poles, base stations, and all other infrastructure that requires ground disturbance, including but not limited to, utilities and access roads.
- F. Semi-Annual Meeting: Minutes and information distributed at this meeting shall be shared with all Indian tribes.

Tribal Consultation Process:

We understand that the tribal consultation process being used for developing this Program Comment has been truncated but we also feel that it important to note for the record that NATHPO does not feel that the process used to date is neither adequate nor respectful.

Please let me know if you have any questions or need additional information.

Sincerely yours,

A handwritten signature in black ink that reads "DBKraus". The letters are cursive and somewhat stylized, with the "D" and "B" being particularly prominent.

D. Bambi Kraus  
President