

## ADVERSE EFFECT AGREEMENT

## AMONG

XXX RAILROAD, THE [X STATE OR X TRIBE]  
HISTORIC PRESERVATION OFFICER, [HOST TRIBAL  
NATION], AND INTERESTED TRIBAL NATIONS (BY  
NAME) [AND FUND ADMINISTRATOR]

WHEREAS, under the requirements of the Railroad Safety Improvement Act of 2008 (“RSIA”) certain railroads are required to deploy Positive Train Control (“PTC”) systems on portions of their rail networks by December 31, 2015, in order to prevent certain railroad accidents; and

WHEREAS, the Federal Communications Commission (“FCC”) has determined that the deployment of the equipment (“PTC Infrastructure”) required to support PTC systems that use spectrum licensed by the FCC is a federal undertaking that is subject to the provisions of Section 106 of the National Historic Preservation Act (“NHPA”) and the rules of the FCC at 47 C.F.R. 1.1307(a)(4); and

WHEREAS, XXX Railroad (“RR”) intends to use the PTC Infrastructure in connection with the operation of a PTC system over spectrum duly licensed or leased by a licensee to RR or an affiliate of RR; and

WHEREAS, RR proposes to install PTC Infrastructure as described further in Appendix A for the implementation of a PTC system within the RR right-of-way in [X county or counties] [State]; and

WHEREAS, the area in which this PTC Infrastructure is to be deployed (“Deployment Area”) is described in detail in Appendix B; and

WHEREAS, RR has, through the Tower Construction Notification System (“TCNS”), invited the participation of Tribal Nations that might attach religious or cultural significance to historic properties within the county(ies) encompassing the Deployment Area, and has provided these Tribal Nations with all of the information specified in Section VII.A of the Program Comment to Tailor the Federal Communications Commission’s Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure (“PTC Program Comment”); and

WHEREAS, RR has provided XXX SHPO/THPO/host Tribal Nation<sup>1</sup> with the same

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<sup>1</sup> The PTC Program Comment does not apply on Tribal land unless the relevant Tribal Nation has agreed to its application. In the case of construction on Tribal land of a Tribal Nation that has an approved THPO under Section 101(d)(2) of the NHPA, the THPO stands in place of the SHPO. If proposed construction is on Tribal land of a Tribal Nation that does not have an approved THPO, the host Tribal Nation and the SHPO have equal rights of consultation and concurrence. This template MOA uses “XXX SHPO/THPO/host Tribal Nation” throughout to include all possibilities.

information entered into TCNS by filing FCC Form 620 in the E106 System [and such other means of communication as the SHPO/THPO/host Tribal Nation may require]; and

WHEREAS, RR has consulted with [name of SHPO/THPO office], which is the State/Tribal Historic Preservation Officer for [State/Tribal Nation] (“XXX SHPO/THPO”), [and host Tribal Nation]<sup>2</sup> pursuant to 36 C.F.R. Part 800, regulations of the Advisory Council on Historic Preservation (“ACHP”) implementing Section 106 of the NHPA; and

WHEREAS, RR has used its regular external communications protocol to inform relevant local governments and federal agencies [identify them if not too many], and the public of these proposed PTC installations and has afforded them an opportunity to express their views; and

WHEREAS, [XXX SHPO/THPO/host Tribal Nation and/or [named Tribal Nations] (“Interested Tribal Nations”)] have indicated that one or more historic properties may be adversely affected by the proposed undertaking; and

WHEREAS, all other Tribal Nations that have requested notification of proposed undertakings within the county(ies) encompassing the Deployment Area either have stated that they have no concerns about the proposed construction or have not responded to reasonable and good faith attempts at contact consistent with the process described in Section VII.D of the PTC Program Comment; and

WHEREAS, [in order to reconcile the RSIA deadline with Section 106 requirements,] RR, XXX SHPO/THPO/host Tribal Nation, and all Interested Tribal Nations agree that the proposed construction will have an adverse effect on [identified historic properties] within or in the vicinity of the Deployment Area;<sup>3</sup> and

WHEREAS, due to technical and operational requirements for PTC systems, it is not possible to avoid or minimize these adverse effects by eliminating construction of PTC Infrastructure or constructing outside the Deployment Area; and

WHEREAS, pursuant to Section VII.D of the PTC Program Comment, adverse effects on historic properties may be resolved through an adverse effect agreement among the railroad and the relevant SHPO/THPO and Tribal Nations, with a copy to the FCC; and

WHEREAS, the RR, XXX SHPO/THPO/host Tribal Nation and Interested Tribal Nations [and fund administrator]<sup>4</sup> have agreed to sign this Adverse Effect Agreement; [and

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<sup>2</sup> Required if construction is on Tribal land of a Tribal Nation that does not have an approved THPO.

<sup>3</sup> A possible alternative is to stipulate, for purposes of the Adverse Effect Agreement, that the proposed construction will have adverse effects on historic properties without naming these historic properties.

<sup>4</sup> The Fund Administrator, if any, will be selected by RR. The FCC cannot be involved in selecting the Fund Administrator or in overseeing its actions. It is recommended that if the Fund Administrator has been selected at the time the Adverse Effect Agreement is executed, the Fund Administrator be named in the Agreement and added as a signatory.

add one or more clauses identifying any other party that may be signing];

NOW THEREFORE, the RR, XXX SHPO/THPO/host Tribal Nation and Interested Tribal Nations, [and Fund Administrator] agree that the undertaking shall be implemented in accordance with the stipulations set forth below (“Stipulations”) in order to take into account the effect of the undertaking on historic properties. As provided under the PTC Program Comment, compliance with these mitigation measures shall constitute full, complete and adequate satisfaction of the responsibilities of the Commission and the applicant RR under Section 106 of the NHPA and the implementing regulations of the ACHP and the FCC.

### **STIPULATIONS**

The RR will ensure that the following measures are carried out:

#### I. DESIGN AND METHODOLOGY

- a. This Adverse Effect Agreement only applies to PTC Infrastructure (including PTC wayside poles and equipment cabinets and other supporting infrastructure associated with those poles) that will be deployed within existing railroad rights-of-way for use in the implementation and operation of PTC systems. Eligible infrastructure may support either wayside antennas or base stations, but must not be taller than 75 feet (including antenna) or be situated outside the railroad right-of-way. Any other PTC infrastructure within the Deployment Area that is not excluded from review under either the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, or the PTC Program Comment shall be reviewed under existing FCC regulations and procedures.
- b. PTC Infrastructure will be installed [describe method or cross-reference TCNS/E106 submissions] or using other methods as may from time to time be reasonably agreed to by the RR and the SHPO/THPO/host Tribal Nation, after consultation with Interested Tribal Nations, that are intended to minimize disturbance to soil and surrounding areas.

#### II. MONITORING AND UNANTICIPATED DISCOVERIES

- a. XXX SHPO/THPO/host Tribal Nation and each Interested Tribal Nation may have one qualified representative present to serve as a monitor during installation [or describe any arrangements agreed upon to reduce number of monitors]. RR shall compensate Interested Tribal Nations for their reasonable expenses associated with such monitoring. All monitors must receive federally mandated rail safety training. Interested Tribal Nations with similar interests and history are encouraged to designate a single representative for this purpose.
- b. In the event human remains are found, RR and its contractors will immediately stop all work in the area, except for work that may be necessary to secure the site, and

will notify the FCC, XXX SHPO/THPO/host Tribal Nation, and Interested Tribal Nations. RR will comply with State burial law and the Native American Graves Protection and Repatriation Act (“NAGPRA”), if applicable. [If possible, better to determine prior to signing agreement if they will be applicable and include only appropriate provisions.] If no State law or NAGPRA is applicable, RR, XXX SHPO/THPO/host Tribal Nation, and Interested Tribal Nations will attempt to reach agreement on treatment measures. If no agreement is reached within 10 business days, RR may refer the matter to the FCC, with a copy to the ACHP, for resolution in accordance with Section IX.A(2) of the PTC Program Comment. RR will then proceed in accordance with the FCC’s decision.

- c. In the event historic properties other than those containing human remains are found, the railroad will follow the applicable provisions of 36 C.F.R. 800.13(b).

### III. OFFSITE MITIGATION (may include one or more)

- a. Within one year of the date of this Adverse Effect Agreement /By [date certain], RR will complete a field survey and report to identify historic properties, including properties of religious and cultural significance to Tribal Nations, within and adjacent to the Deployment Area [or smaller designated area]. Qualified representatives of XXX SHPO/THPO/host Tribal Nation and Interested Tribal Nations shall be invited to participate in the field survey. RR shall compensate Interested Tribal Nations for their reasonable expenses associated with such participation. Interested Tribal Nations with similar interests and history are encouraged to designate a single representative for this purpose.
- b. Within one year of the date of this Adverse Effect Agreement/By [date certain], RR will provide XXX SHPO/THPO/host Tribal Nation and Interested Tribal Nations a complete ethnographic study addressing the migration and traditional use patterns of Tribal Nations within XX County(ies) [or other defined area].
- c. Within one year of the date of this Adverse Effect Agreement/By [date certain], RR will provide XXX SHPO/THPO/host Tribal Nation and Interested Tribal Nations with a report containing a history of railroad line construction within the Deployment Area and a historic overview of the impact of such construction and operation on the cultural heritage of Tribal Nations.
- d. Within 60 days of the date of this Adverse Effect Agreement/By [date certain], RR will make a contribution of [\$ state amount—lump sum or amount per pole] to a dedicated fund administered by [name of fund/administrator].<sup>5</sup> XXX SHPO/THPO/host Tribal Nation and Interested Tribal Nations may apply for grants from the fund in the amounts of [specify amount for each party]. Grants are to be used to support Tribal and State cultural and historic preservation projects, including: field surveys, ethnographic studies, other cultural resource reports, or

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<sup>5</sup> Alternative: ...will establish a mitigation fund in the amount of \$XXX. RR will appoint a neutral administrator for the fund, in coordination with XXX SHPO/THPO/host Tribal Nation and Interested Tribal Nations, by [date].

National Register nominations for historic properties in XX County(ies); preservation and protection of historic or culturally significant resources in or near the Deployment Area; purchase of hardware and/or software used for processing historic preservation review requests; salaries of employees or contractors to increase the SHPO/THPO/host Tribal Nation's or Tribal Nation's capacity for conducting any aspect of a cultural or historic preservation initiative relating to XX County(ies); training and education of Tribal, SHPO/THPO, or other historic preservation experts on the Section 106 process, particularly as it applies to railroad and communications facilities; and other reasonably related cultural and historic preservation activities. [Fund administrator] will establish deadlines for grant applications, decisions, and disbursements [or specify deadlines in the Agreement]. [Add provision for disposition of undisbursed funds.] Such contribution shall not be in lieu of any reasonable compensation that Tribal Nations may charge RR to process and review the proposed deployment of PTC Infrastructure that is the subject of this Adverse Effect Agreement.

#### IV. REMOVAL

In the event that RR or its successor abandons the PTC Infrastructure and associated facilities described herein, RR or its successor is encouraged to dismantle the PTC Infrastructure and associated facilities and notify the FCC, XXX SHPO/THPO/host Tribal Nation, and Interested Tribal Nations.

#### V. DISPUTE RESOLUTION

Should the XXX SHPO/THPO/host Tribal Nation or any Interested Tribal Nation object within thirty (30) days to any plans provided for review pursuant to this Adverse Effect Agreement, the XXX SHPO/THPO/host Tribal Nation or Interested Tribal Nation shall notify the FCC of its objection. The parties agree to abide by the FCC's resolution of the objection in accordance with the procedures specified in 36 C.F.R. Part 800.

#### VI. ENFORCEMENT

The parties shall report any failure to carry out the terms of this Adverse Effect Agreement to the FCC. The parties understand that failure to carry out the terms of this Adverse Effect Agreement will require that the FCC again request the comments of the ACHP, in accordance with 36 C.F.R. Part 800. If the terms of this Adverse Effect Agreement are not implemented, the FCC will provide the ACHP with the opportunity to comment on the effects and mitigation alternatives.

#### VII. OTHER REQUIREMENTS

- a. RR will file this Adverse Effect Agreement with the FCC's Federal Preservation Officer within 10 business days after the final signature is obtained. This Adverse Effect Agreement is effective upon filing with the FCC.

- b. RR will file with the FCC an FCC Form 601 Application and environmental assessment within thirty (30) days of the effective date of this Adverse Effect Agreement and RR will not initiate construction of the PTC Infrastructure until the FCC has approved the environmental assessment.
- c. Execution of this Adverse Effect Agreement and implementation of its terms evidence that the FCC and RR have fulfilled their responsibilities to take into account the effects of this undertaking on historic properties under the NHPA, the implementing regulations of the ACHP, and the PTC Program Comment, and that the ACHP has been afforded a reasonable opportunity to comment on the proposed PTC Infrastructure in accordance with Section 106 of the NHPA as set forth in Section III of the PTC Program Comment.
- d. RR will provide the FCC and all signatories with an annual report on its progress toward completing the items detailed in the stipulations and a final report when implementation of all stipulations is complete.

THE XXX STATE HISTORIC PRESERVATION OFFICER (and/or TRIBAL HISTORIC PRESERVATION OFFICER/HOST TRIBAL NATION)

By: \_\_\_\_\_ Date: \_\_\_\_\_

[Title]

RAILROAD

By: \_\_\_\_\_ Date: \_\_\_\_\_

[Title]

INTERESTED TRIBAL NATION[s]

By:\_\_\_ Date:

[Title]

[FUND ADMINSTRATOR

By: \_\_\_\_\_Date:

Title]

[any other concurring parties]

## Appendix A

(Description of Infrastructure)

Appendix B  
(Deployment Area)