

**MEMORANDUM OF UNDERSTANDING BETWEEN  
THE FEDERAL COMMUNICATIONS COMMISSION AND  
BNSF RAILWAY COMPANY**

I. PURPOSE AND PARTIES

The Federal Communications Commission (“FCC” or “Commission”) and BNSF Railway Company (“Railroad”) (collectively, the “Parties”) enter into this Memorandum of Understanding (“MOU”) regarding compliance with the Environmental Rules<sup>1</sup> relating to the past construction of wireless communications facilities, towers, equipment cabinets and associated structures for positive train control (“PTC”) systems.<sup>2</sup> This MOU discharges the Parties’ obligation under the Environmental Rules applicable to Railroad’s construction prior to and including May 2013 of wireless communications facilities used for PTC.

The FCC is an independent federal agency created by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (the “Act”). The Act grants the FCC authority to establish rules and procedures for the licensing of non-federal government communications services. Under the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470f, the FCC is required to take into account the effects of certain of its undertakings on historic properties included in or eligible for inclusion in the National Register of Historic Places (“National Register”). Under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4332, the FCC is required to take into account the effect of certain of its actions on the human environment. As relevant here, under the Act and related FCC rules, decisions and policies, the FCC regulates the construction of structures built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.

Railroad is a Class 1 freight railroad operating on 32,500 route miles of track in 28 states and two Canadian provinces, and is a top transporter in North America of consumer goods, grain and agricultural products, low-sulfur coal, and industrial products such as petroleum, chemicals, and asphalt.

---

<sup>1</sup> “Environmental Rules” means the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), as amended (codified at 42 U.S.C. §§ 4321-4347) (“NEPA”); the National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (codified at 16 U.S.C. § 470 *et seq.*) (“NHPA”); the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*; any other communications laws implementing NEPA and/or NHPA; the regulations of the Advisory Council on Historic Preservation; and the rules and regulations of the FCC (“FCC’s Rules”) as related to NEPA and/or NHPA.

<sup>2</sup> This MOU includes wireless communications facilities that were constructed for PTC, as well as collocations on existing facilities that were adapted for PTC use.

This MOU includes one attachment, Cultural Resource Fund (Attachment A), which is incorporated by reference and made a part of this MOU.

## II. BACKGROUND

The Environmental Rules require applicants and licensees to consider whether their proposed facilities would have a significant environmental effect, including whether the facilities would affect historic properties listed or eligible for listing in the National Register, including sites of religious and cultural significance to Tribal Nations.<sup>3</sup>

In 2008, Congress enacted the Rail Safety Improvement Act of 2008 (“RSIA”), Pub. L. No. 110-432, that requires all Class I freight and passenger railroads by December 31, 2015 to deploy and commence operation of interoperable PTC systems on all lines that carry poison- or toxic-by-inhalation hazardous materials and five million gross tons or more of annual traffic, and on any main rail line tracks over which intercity or commuter rail passenger train service is regularly provided. Railroad is a Class I freight railroad, and is required by the RSIA to commence operation of PTC on its covered tracks by the Congressionally mandated deadline. To deploy PTC, Railroad must construct wireless communications facilities necessary to support wireless antennas and other communications equipment.

Prior to and including May 2013, Railroad constructed PTC wireless communications facilities in compliance with the requirements set forth in the RSIA. On January 31, 2014, Railroad provided the FCC with a letter containing information regarding all previously constructed wireless communications facilities constructed for PTC potentially requiring review under the Environmental Rules, including the number of facilities that had been constructed, the date of each construction, and their location. On January 23, 2014, the FCC and Railroad entered into a Tolling Agreement to toll the statute of limitations for any applicability of the Environmental Rules to PTC wireless communications facilities constructed on or after January 23, 2014.<sup>4</sup>

Since May 2013, the FCC has engaged in consultation and discussions with Tribal Nations, SHPOs, the Advisory Council on Historic Preservation (“ACHP”), and other stakeholders regarding the applicability of the Environmental Rules to the PTC wireless

---

<sup>3</sup> As used herein, the term “Tribal Nations” encompasses those Indian tribes recognized by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a *et seq.*

<sup>4</sup> See Tolling Agreement between Federal Communications Commission and BNSF Railway Company Regarding the Construction of Wireless Communications Facilities for Positive Train Control (Jan. 23, 2014)(“Tolling Agreement”).

communications facilities constructed prior to that date. The terms of this MOU incorporate recommendations that were raised in those consultations and discussions.

### III. SCOPE OF AGREEMENT

The Parties agree that this MOU shall discharge all obligations under the Environmental Rules, including the obligation to engage in further consultation or discussions with any other party, related to the Railroad's construction or installation prior to and including May 2013 of all PTC wireless communications facilities and related components, including wireless communications facilities and related components used for PTC that are not encompassed by the Tolling Agreement (collectively, "PTC Wireless Communications Facilities").

### IV. EFFECTIVE DATE

The MOU will become effective upon signature by all Parties below. As of the Effective Date, the MOU shall have the same force and effect as any other order of the Commission.

### V. CULTURAL RESOURCE FUND

Railroad agrees to establish, together with other railroads subject to the PTC requirement in the RSIA that constructed PTC wireless communications facilities prior to and including May 2013 and that have entered into Memoranda of Understanding with the FCC, a Cultural Resource Fund totaling ten million dollars (\$10,000,000.00) (the "Fund") aimed at supporting Tribal and State cultural and historic preservation projects as described in Attachment A. Railroad further agrees to contribute its agreed share of the Fund in a series of four (4) payments over an eighteen (18) month period. Further details regarding the timing of contributions to the Fund and Fund administration are provided in Attachment A.

### VI. COMPLIANCE PLAN

Within thirty (30) calendar days after the Effective Date, Railroad agrees to designate a Compliance Officer, who shall be responsible for developing, implementing, and administering a Compliance Plan and ensuring that Railroad complies with the terms and conditions of the Compliance Plan and this MOU. The Compliance Officer shall ensure that the Compliance Plan accords with current or modified Environmental Rules and is periodically reviewed and revised to maintain compliance with current or modified Environmental Rules, and all employees whose duties relate to Environmental Rules responsibilities are updated as needed.

Within sixty (60) calendar days after the Effective Date, Railroad agrees to establish a Compliance Plan, including through the review, affirmation or enhancement of an existing compliance plan, to ensure that all employees of Railroad who perform, supervise, oversee, or manage the performance of duties that relate to Railroad's responsibilities under the Environmental Rules applicable to all Railroad wireless communications facilities receive training on, and comply with, the applicable Environmental Rules, including whether the facilities would affect historic properties listed or eligible for listing in the National Register, including sites of religious and cultural significance to Tribal Nations.

The Compliance Plan shall also provide for the creation and monitoring of a process to ensure compliance with the Environmental Rules for all future construction of wireless communications facilities. The Compliance Plan shall include training materials on building effective relationships with Tribal Nations, and seek to inform Railroad employees of the unique and rich culture and history of Tribal Nations. A copy of Railroad's Compliance Plan will be filed with the FCC seventy five (75) calendar days after the Effective Date.

Railroad's Compliance Officer obligations and Compliance Plan obligations under the MOU shall expire thirty-six (36) months after the Effective Date.

#### VII. REPORTING COMMITMENT

Railroad shall submit to the Commission quarterly reports that shall detail its performance of its duties and responsibilities under this MOU. The first such quarterly report shall be due on the first business day that falls three months after the Effective Date of this MOU. This reporting commitment shall expire three (3) months after the end of the Compliance Plan obligations. Reports shall be submitted to John D. Poutasse, Chief, Spectrum Enforcement Division, Enforcement Bureau at [John.Poutasse@fcc.gov](mailto:John.Poutasse@fcc.gov), and Jeffrey Steinberg, Deputy Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau at [Jeffrey.Steinberg@fcc.gov](mailto:Jeffrey.Steinberg@fcc.gov).

#### VIII. SUBSEQUENT RULE, ORDER OR ACTION

The passage of legislation by Congress, and/or a written determination by the ACHP, and/or a subsequent FCC rule or Order, that the construction of PTC Wireless Communications Facilities by Railroad prior to and including May 2013 does not constitute a Federal action and/or a Federal undertaking, and/or is otherwise not required to undergo environmental or historic preservation review under any of the Environmental Rules, shall render the MOU moot, of no further force or effect, and no longer subject to enforcement on the date of the enactment of that legislation, determination, rule or Order.

In the event that the MOU is rendered moot, existing contributions to the Fund will remain available for disbursement by the Administrator.

#### IX. INVALIDATION OF MOU BY A COURT OF LAW

If this MOU is invalidated or altered by subsequent judgment of a court of law or a related settlement, and if as a result of that action Railroad is required to submit any or all PTC Wireless Communications Facilities built prior to and including May 2013 to the FCC, the ACHP, or any other agency for review under any of the Environmental Rules, or otherwise provide any mitigation or pay any penalty in connection with the PTC Wireless Communications Facilities, any undisbursed contributions made by Railroad held by the Fund Administrator will remain available for return by the Administrator to Railroad.

#### X. RESOLUTION OF STATUTORY AND REGULATORY ENVIRONMENTAL AND HISTORIC REVIEW REQUIREMENTS

The Parties agree and acknowledge that this MOU relieves the FCC and Railroad of any statutory and/or regulatory obligations under any of the Environmental Rules with respect to the construction prior to and including May 2013 of any PTC Wireless Communications Facilities and that no further review under the Environmental Rules of such facilities for adverse effects from such construction on the human environment or on historic properties, including sites of religious and cultural significance to Tribal Nations, shall be required. The Parties further agree and acknowledge that this MOU discharges the Commission's and Railroad's obligation to engage in further consultation with stakeholders regarding the construction prior to and including May 2013 of PTC Wireless Communications Facilities including Tribal Nations, SHPOs, and the ACHP.

#### XI. PROHIBITION ON ANY FUTURE ENFORCEMENT ACTION

In consideration of the commitments agreed to in this MOU, the FCC agrees that it will not institute on its own motion or on the motion of any third party any new proceeding, formal or informal, or take any new action on its own motion against Railroad concerning any PTC Wireless Communications Facilities constructed prior to and including May 2013 in apparent violation of the Environmental Rules, including the Act, or of any process, procedure, or guidance of the Commission related to the Environmental Rules or the Act.

## XII. TERMINATION OF TOLLING AGREEMENT

The Parties agree that the termination date of the Tolling Agreement will be the Effective Date as defined in Section IV of this MOU, and that the Tolled Period shall be ended on that date.

## XIII. NO PRIVATE CAUSE OF ACTION and DISCLAIMER

Nothing in this MOU creates a private cause of action for any third party. Nothing in this MOU constitutes a legal determination concerning the applicability of any statute or law. Nothing in this MOU waives, modifies, or otherwise changes any Commission rule or order governing Railroad, or imposes any obligation on Railroad other than those commitments explicitly described in this MOU.

## XIV. NO ADMISSION OF LIABILITY

Nothing in this MOU shall be construed as an admission by Railroad of any violation of any provision of the Environmental Rules or any provision of the Act or the Commission's Rules, or of any process, procedure, or guidance of the Commission, nor does Railroad admit any liability or wrongdoing arising out of any of the foregoing. Nothing in this MOU shall be construed as an admission by Railroad that the FCC's interpretation of the Environmental Rules is legally valid and enforceable.

## XV. NON-COMPLIANCE

Should Railroad materially fail to perform any of its obligations under Sections V, VI, or VII hereunder and fail to remedy such obligation within thirty (30) calendar days after receiving written notice from the FCC of such failure and an opportunity to cure this alleged failure: (a) the provisions of Sections X and XI above shall become inoperative and the Commission shall have recourse to any actions and remedies that would otherwise have been available to it had this MOU not been in effect; and (b) the terms of the Tolling Agreement shall be reinstated for six (6) months after the date of the breach.

Railroad shall report any future non-compliance with the Environmental Rules and with the terms and conditions of this MOU within thirty (30) calendar days after its discovery of such noncompliance. Such reports shall include a detailed explanation of (i) each instance of such noncompliance; (ii) the steps that Railroad has taken or will take to remedy such noncompliance; (iii) the schedule on which such proposed remedial actions will be taken; and (iv) the steps that Railroad has taken or will take to prevent the recurrence of any such noncompliance. Reports of future non-compliance with the Environmental Rules shall not be deemed a failure to satisfy Railroad's obligations under Section V, VI, or VII, and shall not render the provisions of Section X and XI

inoperative. All reports of noncompliance shall be submitted to John D. Poutasse, Chief, Spectrum Enforcement Division, Enforcement Bureau at John.Poutasse@fcc.gov, and Jeffrey Steinberg, Deputy Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau at Jeffrey.Steinberg@fcc.gov. Railroad's reporting obligations under this section shall expire thirty-six (36) months after the Effective Date.

XVI. COUNTERPARTS

This MOU may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

**For FEDERAL COMMUNICATIONS COMMISSION:**



Roger C. Sherman, Chief, Wireless Telecommunications Bureau



Kris A. Monteith, Acting Chief, Consumer and Governmental Affairs Bureau



Travis LeBlanc, Acting Chief, Enforcement Bureau

Date: 5/16/14

**For BNSF RAILWAY COMPANY:**



Charles Shewmake  
Vice President and General Counsel  
BNSF Railway Company

Date: 5-19-14

**ATTACHMENT A:  
CULTURAL RESOURCE FUND**

Railroad represents that it will establish, together with other railroads subject to the PTC requirement in the RSIA that constructed PTC Wireless Communications Facilities prior to and including May 2013 and that have entered into Memoranda of Understanding with the FCC ("Other PTC Railroads"), a Cultural Resource Fund totaling ten million dollars (\$10,000,000.00) (the "Fund"), and contribute a total voluntary payment in an amount separately agreed to by Railroad and the FCC ("Agreed Amount") to that Fund. Contributions shall be held by an Administrator in trust or in an appropriate legal vehicle.

At the time Railroad and Other PTC Railroads name the Administrator, Railroad will jointly with the other PTC Railroads release a document regarding the administrative process of the Fund ("Fund Guidelines and Administrative Procedures"), which will provide additional information on the structure, implementation, and administration of the Fund, the grant application and award process, the Administrator tenure and succession, and which shall include the following elements:

- a. Administrator. The Fund shall be administered by a neutral third party ("Administrator"), to be appointed by Railroad and the Other PTC Railroads on or before October 31, 2014. SHPOs and Tribal Nations shall be given the opportunity to recommend potential Administrators and/or any possible board or committee members appointed by the Railroad and Other PTC Railroads to work with the Administrator on grant-making and other administrative issues, provided that the Administrator and any board or committee shall be selected at the sole discretion of Railroad and the Other PTC Railroads. Subject to the provisions contained in this MOU and the Fund Guidelines and Administrative Procedures, the Administrator shall have the authority to make all determinations regarding the disbursement of grants from the Fund, and to resolve any conflicts arising from the administration of the Fund. Any appeals of decisions of the Administrator shall be resolved as set forth in the Fund Guidelines and Administrative Procedures.
- b. Administrative Fees. The Administrator's fees and all administrative costs will be paid from the Fund, and will not constitute more than 6% of the total Fund amount.
- c. Payments to the Fund. Railroad will make payments to the Fund in four equal installments. The first payment shall be made on or before June 30, 2014, with additional payments made on or before January 1, 2015, on or before June 30, 2015, and on or before January 1, 2016.

- d. Notice of Payment. Railroad shall send electronic notification of payment to the Administrator on the date each contribution to the Fund is made with a copy to John D. Poutasse, Chief, Spectrum Enforcement Division, Enforcement Bureau at John.Poutasse@fcc.gov, and Jeffrey Steinberg, Deputy Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau at Jeffrey.Steinberg@fcc.gov.
  
- e. Eligibility. All federally-recognized Tribal Nations that registered an interest in consultation in the FCC's Tower Construction Notification System ("TCNS") on any area(s) within a given state on or before December 31, 2013 where PTC Wireless Communications Facilities were constructed ("Eligible Tribe") will be eligible to apply for a grant. SHPOs for each state where PTC Wireless Communications Facilities were constructed prior to and including May 2013 will also be eligible to apply for a grant. The FCC shall issue a Notice of Eligibility to Eligible Tribes and SHPOs that are qualified to apply for cultural and historic preservation grants from the Fund. The Fund Guidelines and Administrative Procedures will establish a start and end date for Eligible Tribes and SHPOs to submit grant applications, and a deadline by which the Administrator must make all disbursements.
  
- f. Application Deadline. Applications for a cultural and historic preservation grant from the Fund must be received by the date provided in the Fund Guidelines and Administrative Procedures. No applications received after that deadline will be considered for grants.
  
- g. Scope of Grants from Fund. The purpose of the Fund is to support Tribal and State cultural and historic preservation programs. Programs eligible for support from the Fund include existing cultural and historic preservation initiatives as well as new projects. Eligible Tribes and SHPOs can apply for grants from the Fund to conduct or commission field surveys, ethnographic studies or other cultural resource reports; to purchase or enhance existing hardware and/or software used for processing historic preservation review requests; to pay the salaries of employees or contractors hired by an Eligible Tribe or SHPO to increase the capacity for conducting any aspect of a cultural or historic preservation initiative, including future historic preservation review; for cultural or historic preservation staff training; or to engage in other related cultural and historic preservation activities.

Railroad will provide any SHPO or Eligible Tribe with reasonable access to Railroad property, including rights of way, for the purpose of activities conducted pursuant to a grant from the Fund, and limited to areas in close proximity to locations where PTC Wireless Communications Facilities were installed. Access to Railroad property shall be subject to standard Railroad safety requirements, restrictions, fees, and other requirements regarding third party access. Railroad retains the right to require that applications for access to Railroad property be submitted to Railroad in writing or by e-mail at least thirty (30) calendar days prior to the requested access date.

As an alternative, Railroad may offer a SHPO or Eligible Tribe the option of commissioning Railroad to conduct a video field survey on the sections of track for which the grant is awarded, and limited to areas in close proximity to locations where PTC Wireless Communications Facilities were installed.

Further information on projects eligible for grants from the Fund, as well as the basis for the decision, and other considerations relevant to the grant process intended to fulfill the purpose of this MOU will be provided in the Fund Guidelines and Administrative Procedures. The Administrator will be charged with making the final determination regarding the eligibility of a proposal for a grant from the Fund.

- h. Administrator Reports. The Administrator shall submit to Railroad and Other PTC Railroads quarterly reports that shall detail disbursements made from the Fund for that quarter, with copies to the FCC. This reporting requirement shall terminate six (6) months after the last funds are disbursed.
  
- i. Termination of Fund. The Fund will terminate when all contributions have been disbursed, subject to the deadlines provided in the Fund Guidelines and Administrative Procedures. In the event that money remains in the Fund after all grants have been processed, the Administrator shall be charged to assign the remaining funds in equal portions to the National Association of Tribal Historic Preservation Officers (“NATHPO”) and the National Conference of State Historic Preservation Officers (“NCSHPO”).