

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
State of Maryland)	File No. 0001601177
Petitions to Deny against Application for)	
Wireless Radio Station Authorization)	
(FCC Form 601) with Environmental)	
Assessment, Lamb’s Knoll, Maryland)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 2, 2004

Released: July 2, 2004

By the Deputy Chief, Spectrum and Competition Policy Division:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we grant an Application for Wireless Radio Station Authorization (“Application”) to modify a microwave public safety license, WPTM669, on Lamb’s Knoll, South Mountain, Maryland, FCC File No. 000160177, filed by the State of Maryland (“State”). The Application includes an Environmental Assessment (“EA”). Two separate petitions to deny (“petitions”) were filed against the Application by the Harpers Ferry Conservancy (“HFC”) ¹ and the Potomac Trail Club (“Club”). ² The National Park Service (“NPS”), as manager of the Appalachian Trail for the Appalachian Trail Conference (“Conference”), also filed comments on the Application, ³ which NPS subsequently requested to withdraw. ⁴

2. The petitioners contend ⁵ that the proposed tower will have an adverse effect on properties which are listed, or are eligible for listing, in the National Register of Historic Places (“National Register”)

¹ The Harpers Ferry Conservancy filed its petition to deny on behalf of the South Mountain Coalition, a coalition of various groups.

² Petitions to Deny - The Harpers Ferry Conservancy, dated March 5, 2004; and the Potomac Trail Club, dated March 5, 2004.

³ NPS Comments, dated March 5, 2004.

⁴ Request for Approval of Withdrawal of Comments of the National Park Service with a Memorandum of Understanding, filed June 30, 2004.

⁵ HFC Petition at 2; Club Petition at 1.

(referred to as “historic properties”)⁶ and, therefore, will have a significant impact on the environment. Accordingly, the petitioners argue that the Application is inconsistent with the Commission’s environmental rules⁷ implementing the National Environmental Policy Act of 1969 (“NEPA”)⁸ and Section 106 of the National Historic Preservation Act of 1966 (“NHPA”).⁹ Petitioners further contend that the State has not explored reasonable alternative sites to the proposed site at Lamb’s Knoll.

3. For the reasons set forth herein, the Spectrum and Competition Policy Division (“Division”) of the Wireless Telecommunications Bureau (“Bureau”), pursuant to delegated authority, denies the petitions, makes a Finding of No Significant Impact on the Environment (“FONSI”), and grants the State’s Application.

II. BACKGROUND

4. On September 12, 2001, the State filed an application with the Commission to modify its WPTM669 license in the microwave service at Lamb’s Knoll from the 2 GHz band to the 6 GHz band.¹⁰ At the time, the State intended to collocate its microwave link on a proposed 340-foot tower at Lamb’s Knoll. On October 31, 2001, the Commission issued to the State the requested microwave license for the State’s emergency service, the Maryland Institute of Emergency Medical Services Systems (MIEMSS). In the Spring of 2002, the State reduced the proposed tower height from 340 feet to 180 feet.

5. The proposed tower would replace the existing 108-foot Fire Lookout Tower (Fire Tower), which houses the State and several other public safety licensees. The proposed tower site is adjacent to the existing Fire Tower. The South Mountain Battlefield Historical Park (Battlefield), which is the site of a Civil War battle, and a portion of the Appalachian Trail (Trail) are near the tower site. Adjacent to the proposed site is a secure Federal Facility, which has an 80-foot concrete silo, other buildings and a parking lot. A 60-foot tower owned by the Federal Aviation Administration (FAA) and a 108-foot tower owned by American Tower Corporation (ATC) are also adjacent to the proposed tower site.

6. On February 25, 2002, the Maryland Historical Trust/State Historic Preservation Officer (MDSHPO), a unit of the Maryland Department of Housing and Community Development, stated “the project will have ‘no effect’ on historic properties and that the federal and/or State historic preservation requirements have been met.”¹¹ On July 16, 2002, HFC submitted a petition to the Commission requesting that we order Maryland to perform an environmental assessment (“EA petition”) for the

⁶ 47 C.F.R. § 1.1307(a)(4); *See also* 36 C.F.R. § 800.5(a).

⁷ *See* 47 C.F.R. §§ 1.1301–1.1319.

⁸ 42 U.S.C. §§ 4321-4395 (1997).

⁹ 16 U.S.C. § 470f.

¹⁰ FCC File No. 000160177. The State applied to change its microwave link, pursuant to a microwave relocation agreement between the State and T-Mobile USA, Inc. (T-Mobile), a Personal Communications Service (PCS) licensee in the area, to avoid interference between the PCS license and the 2 GHz link. *See* 47 C.F.R. §§101.69-101.79.

¹¹ Letter from Rodney Little, Director, Division of Historical and Cultural Programs, Maryland Department of Housing and Community Development (MDSHPO) to Ellis Kitchen, Chief Information Officer, State of Maryland, dated February 25, 2002.

proposed Lamb's Knoll facility.¹² In its EA petition, HFC argued that the proposed tower would have an adverse effect on the South Mountain battlefield and rural historic landscapes in the area of the proposed tower.¹³ HFC further argued that the State had not complied with the Section 106 process and asserted that the State failed to assess potential effects. On July 22, 2002, the former Commercial Wireless Division¹⁴ ordered the State not to commence building the replacement tower until the Division was satisfied that the proposed tower was compliant with the Section 106 review process and the other requirements of the Commission's environmental rules.¹⁵

7. On March 17, 2003, the Division received a letter from the MDSHPO, which reevaluated the proposed tower and changed the MDSHPO's opinion from "no effect" to "no adverse effect" on historic properties.¹⁶ In its letter, the MDSHPO stated that its office did not have documentation to support or dispute the National Register eligibility of rural historic landscapes in the area.¹⁷ On May 8, 2003, the Division ordered the State of Maryland to file an EA because, based on the record before it, the Division had concerns that the State and the MDSHPO had not adequately evaluated potential effects to historic properties.¹⁸ On August 6, 2003, the State filed a petition for reconsideration of the May 8 Letter.¹⁹ On December 15, 2003, the MDSHPO, after evaluating a report prepared by the State's historical consultant, EHT Tracerics, Inc. (Consultant),²⁰ determined there was no adverse effect on rural historic landscapes and confirmed its no adverse effect recommendation.²¹

8. In accordance with the Division's instruction, the State filed its Application and EA on January 30, 2004, and filed a minor amendment to the Application on February 4, 2004. The Application appeared on public notice as accepted for filing on February 4, 2004.²² On March 5, 2004, petitions to

¹² HFC Petition for Environmental Assessment, dated July 16, 2002. *See* 47 C.F.R. §1.1307(c) (interested person may request the Bureau to determine whether an EA is necessary).

¹³ *Id.* at 1-3.

¹⁴ On November 24, 2003, responsibility for this matter was transferred from the Commercial Wireless Division (CWD) to the Spectrum and Competition Policy Division (SCPD) as part of a Bureau reorganization. As used herein, the term "Division" refers interchangeably to CWD before the reorganization or SCPD after the reorganization.

¹⁵ Letter from Dan Abeyta, Esq., to Ellis Kitchen, dated July 22, 2002.

¹⁶ Letter from Rodney Little, MDSHPO, to Dan Abeyta, Esq., dated March 10, 2003 (March 10 Letter), Attachment 22, State Opposition, April 8, 2004.

¹⁷ *Id.*

¹⁸ Letter from Jeffrey Steinberg, Deputy Chief, Commercial Wireless Division, to Ellis Kitchen, dated May 8, 2003 (May 8 Letter).

¹⁹ Petition for Reconsideration, dated August 6, 2003.

²⁰ *See* Lamb's Knoll Compliance Report, EHT Tracerics, Inc, dated December 1, 2003 (Report).

²¹ Letter from Rodney Little (MDSHPO) to Ellis Kitchen, dated December 15, 2003 (December 15 Letter), EA Supplement, Attachment 23.

²² *Public Notice*, Wireless Radio Service Site-by-Site Applications Accepted for Filing, dated February 4, 2004.

deny and comments on the application were filed.²³ On March 11, 2004, HFC filed a “Supplemental Petition to Deny and Comments on Environmental Assessment.”²⁴ On April 8, 2004, several departments of the State and the surrounding counties, joined by T-Mobile, filed an Opposition to the petitions.²⁵ The State also supplemented its EA (EA Supplement).²⁶ HFC filed a Reply to the Opposition.²⁷

9. On April 8, 2004, the MDSHPO, after reviewing an Addendum to the Report by the State’s consultant²⁸ and numerous pictures, wrote a letter to the State and copied all parties to this proceeding.²⁹ The MDSHPO recommended that the Fire Tower and the adjacent Federal Facility are not eligible for listing in the National Register. The MDSHPO also recommended that the proposed tower would have no adverse effect on the Trail.³⁰ On May 18, 2004, the State informed Division staff that the State’s existing 2 GHz microwave link serving the MIEMSS system was experiencing high levels of interference and degradation, and requested prompt action on the Application.³¹

10. On May 27, 2004, NPS e-mailed to the Division and other parties a copy of a letter from Pamela Underhill, Park Manager, the Appalachian Trail Park Office of the National Park Service, United States Department of the Interior (“ATPO”) to C. Donald Franks, Secretary, State of Maryland, Department of Natural Resources (“Maryland DNR”).³² The letter reiterated the issues that NPS had raised in its

²³ See fn. 2 and 3, *supra.*, See also Letter from Harold Salters, Director, Federal Regulatory Affairs, T-Mobile USA, Inc. to Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, dated March 5, 2004 (commenting in favor of Application).

²⁴ HFC Supplemental Petition to Deny and Comments on Environmental Assessment.

²⁵ The Departments of Budget and Management (“DBM”), Natural Resources (“DNR”) and State Police (“MSP”), the Maryland Institute of Emergency Medical Services Systems (“MIEMSS”), the Maryland counties of Frederick and Washington, and T-Mobile (hereinafter, collectively, the “State”) filed a consolidated opposition (“Opposition”). The Division had previously granted an extension of time to file oppositions to the supplemental petition until April 8, 2004.

²⁶ Supplement to Environmental Assessment (EA Supplement), dated April 8, 2004.

²⁷ HFC Reply to Opposition, dated April 27, 2004.

²⁸ Lamb’s Knoll Compliance Report, Addendum, EHT Tracerics, March 2004, EA Supplement, Attachment 19.

²⁹ Letter from Rodney Little, MDSHPO, to Ellis Kitchen, dated April 8, 2004 (April 8 Letter), EA Supplement, Attachment 24.

³⁰ *Id.*

³¹ 47 C.F.R. §1.1204(a)(3) (exempting from the Commission’s *ex parte* rules a presentation when the presentation relates to an emergency, provided a summary of the presentation is promptly placed in the record and disclosed to other parties). See Letter from Ed Ryan, Maryland DBM, to Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, dated May 18, 2004.

³² Letter from Pamela Underhill, NPS Park Manager, the Appalachian Trail Park Office of the National Park Service, United States Department of the Interior to C. Donald Franks, Secretary, State of Maryland, Department of Natural Resources, State of Maryland, dated May 27, 2004 (May 27 Letter).

comments on the EA. On June 1, 2004, the State filed a response to the May 27 Letter.³³ On June 3, 2004, Division staff met with Pamela Underhill, NPS Park Manager, and Donald Owens of NPS.³⁴

11. On June 30, 2004, the State and NPS filed a Request for Acknowledgement of Withdrawal of ATPO Comments and Letter (“Request”) and an attached Memorandum of Understanding (“MOU”) between the Maryland DNR and the ATPO.³⁵ The MOU memorializes that, as soon as reasonably possible, Maryland DNR will execute and forward for approval by the Maryland Board of Public Works an Agreement of Lease (“lease”) with ATC. The lease will terminate ATC’s lease to maintain a 108-foot tower on land owned by the Maryland DNR near the proposed tower site, effective December 31, 2005, with one potential three month extension. The MOU further states that Maryland DNR will require removal of the tower within 120 days after 1) the expiration of the lease agreement with ATC, and 2) when the Federal Facility no longer requires the use of the AT&T microwave facility mounted on the ATC tower for secure communications. In addition, the MOU references the State’s agreement to 1) replace vegetation removed during construction at the proposed tower site; 2) place green plastic coating on the fencing around the tower; 3) paint all shelters; 4) plant additional vegetation to screen the ground facilities serving the tower; and 5) discuss with the Conference helping it to relocate part of the Trail, if the Conference decides to move the Trail near the proposed tower.³⁶ In recognition of these commitments, NPS agrees to withdraw its comments and objections to the proposed tower, dated March 2, 2004, and its May 27 Letter to the Secretary, Maryland DNR.

III. DISCUSSION

12. Under the Commission’s rules, an applicant to construct facilities must, in consultation with relevant expert agencies, determine whether the facility falls within any of the eight categories specified in the Commission’s rules that may significantly affect the environment.³⁷ One of these categories is “[f]acilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places.”³⁸ Section 1.1308 of the Commission’s rules requires applicants to prepare an EA for

³³ State Response to May 27, 2004 Letter from the National Park Service, dated June 1, 2004.

³⁴ See 47 C.F.R. § 1.1204(a)(5)(exempting from the Commission’s *ex parte* rules a presentation by an agency of the federal government with which the Commission shares jurisdiction over a matter).

³⁵ Request for Acknowledgement of Withdrawal of ATPO Comments and an attached Memorandum of Understanding, filed by the State, June 30, 2004.

³⁶ The State proposed these measures in its EA Supplement, dated April 8, 2004. The State filed a copy of a letter, dated May 21, 2004, from Ed Ryan, Maryland DBM to the Conference, which outlines these measures for the Conference to discuss at its next meeting.

³⁷ See 47 C.F.R. § 1.1307(a).

³⁸ 47 C.F.R. § 1.1307(a)(4). The relevant expert agency with respect to this criterion is the appropriate State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO). See *id.*; see also 36 C.F.R. § 800.5(a); Memorandum from John Fowler, Executive Director, Advisory Council on Historic Preservation to the Federal Communications Commission, State Historic Preservation Officers, Tribal Historic Preservation Officers, dated September 21, 2000.

actions that may have a significant environmental impact under any of these categories.³⁹ The Bureau or Commission conducts an independent review of the EA to determine whether the proposed construction would have a significant impact on the human environment.⁴⁰ In performing this independent review, we consider the entire record, including all petitions and objections filed against the environmental assessment.

13. The petitioners challenge the historic preservation review contained in the EA on both substantive and procedural grounds. First, we consider objections to the finding that the tower would not have an adverse effect on historic properties, and we conclude that there will not be an adverse effect. Second, we address HFC's allegations that the State failed to consider alternatives to the proposed tower. Finally, we reject HFC's challenge to the public notice and public participation processes followed in this case.

A. Challenges to the Finding of No Adverse Effect

14. The petitioners disagree with the State's assertion that the proposed tower would have no adverse effect on historic properties.⁴¹ As a preliminary matter, HFC argues that the State's analysis utilizes an inappropriately small Area of Potential Effects (APE), and therefore may overlook potentially affected properties.⁴² In addition, petitioners contend that the State fails to acknowledge adverse effects on various specific historic properties, including the Battlefield, the Trail, the Fire Tower, the Federal Facility, and certain Rural Historic Landscapes.

15. For the reasons discussed below, we disagree with the petitioners, and concur with the MDSHPO that the tower would have no adverse effect on historic properties.⁴³ We therefore further find that the tower will have no significant impact on the environment. In making these findings, we have reviewed the entire record, including the EA and supporting Consultant's reports, the petitioners' pleadings and cultural resources report prepared by Dr. David Rotenstein, the MDSHPO's recommendations, and records of comments made by the public. Collectively, these documents provide a sizable body of information to support our findings. In particular, we note that the MDSHPO has reviewed the undertaking three times, including a visit to the site, and has advised the Applicant that the undertaking would not pose an adverse effect to any site listed or eligible for listing on the National Register. Given the SHPO's central role in the Section 106 process under the rules of the Advisory Council on Historic Preservation (ACHP),⁴⁴ we afford substantial deference to the MDSHPO's reasonably supported recommendation within the context of the record.

³⁹ 47 C.F.R. § 1.1308. In addition, the Bureau shall require an EA, either on its own motion or in response to a petition, where it determines that an action not within one of the specified categories may have a significant environmental impact. *See* 47 C.F.R. § 1.1307(c), (d).

⁴⁰ *Id.* If an action will have a significant environmental impact, an Environmental Impact Statement must be prepared. 47 C.F.R. § 1.1305.

⁴¹ *See* HFC Petition at 1-5; Club Petition at 1-2.

⁴² HFC Petition at 33; HFC Reply at 10.

⁴³ Because we reject the petitions on the merits, it is not necessary to determine whether each one of the parties demonstrates standing to challenge the EA. *See* Friends of the Earth, *Memorandum Opinion and Order*, 18 FCC Rcd. 23622 (2003).

⁴⁴ 36 C.F.R. § 800.4.

16. As the first step in identifying potentially affected historic properties, the ACHP rules direct an agency (or its authorized delegate), “[i]n consultation with the SHPO/THPO... to (1) Determine and document the area of potential effects.”⁴⁵ HFC, relying on Dr. Rotenstein’s report, argues that the State inappropriately used an APE encompassing locations within a 2-mile radius of the proposed tower site, and that it should have considered effects within a larger area.⁴⁶ We disagree. In particular, we note that in its published instructions, the MDSHPO establishes a one-mile APE as the usual standard for towers under 200 feet in height.⁴⁷ In this instance, the State, in consultation with the MDSHPO, specifically considered particular characteristics of the location and doubled the standard APE radius.⁴⁸ Petitioners provide no evidence to persuade us that this expansion of the APE is inappropriate.

17. Having determined that the two-mile APE is appropriate, we focus the remainder of our analysis on the effects of the proposed undertaking on historic properties within the APE. For this reason, we reject petitioners’ claims that the proposed tower would have an adverse effect on rural historic landscapes. Petitioners do not identify the rural historic landscapes within the APE that they say would be adversely affected. Nor do petitioners show that landscapes, identified by the MDSHPO in his letter dated December 15, 2003,⁴⁹ would be adversely affected by the proposed tower. Moreover, the MDSHPO has specifically recommended that the tower would not have an adverse effect on rural historic landscapes, after evaluating the State Consultant’s Report and photo simulations of any potential visual effects of the proposed tower on historic properties, including rural historic districts.⁵⁰ We therefore cannot find that the tower would have an adverse effect on rural historic landscapes within the meaning of Section 106.

18. Petitioners identify four properties within the APE which they claim are properties eligible for listing in the National Register that would be adversely affected. The four properties are the South Mountain Battlefield (“Battlefield”), the Fire Tower, the Federal Facility, and the Trail.⁵¹ The MDSHPO states that two of these properties, the Fire Tower and the Federal Facility,⁵² are not eligible for listing in the National Register.⁵³ Specifically, the MDSHPO concludes that the integrity of the Fire Tower has been lost due to the removal of the observation deck and steps plus the addition of telecommunications

⁴⁵ 36 C.F.R. § 800.4(a).

⁴⁶ HFC Petition at 33-34.

⁴⁷ See Maryland SHPO, FCC Licensees and Applicants Section 106 Submittal Form, <http://www.marylandhistoricaltrust.net/index2.html> (one-mile APE); see also *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, Notice of Proposed Rulemaking, 18 FCC Rcd. 11664, 11688 (2003) (*Programmatic Agreement NPRM*) (proposing presumed APE of ½ mile for towers under 200 feet).

⁴⁸ See EA, Sec. 106 Compliance Report at 3.

⁴⁹ See December 15 Letter, Attachment 23, EA Supplement.

⁵⁰ *Id.*

⁵¹ HFC Petition at 19-21, and 36; Club Petition at 2.

⁵² The MDSHPO refers to the Federal Facility as the U.S. Army facility.

⁵³ April 8 Letter.

antennas to the structure. The MDSHPO further advises that it is not possible to determine if the Federal Facility is eligible given the secrecy surrounding that property and its mission. We concur with the MDSHPO that these properties are not eligible, and therefore any effects on these properties are not cognizable under Section 106. Furthermore, even if the Federal Facility were eligible, we conclude that given the nature of its physical expression (*i.e.*, a concrete silo topped with antennas), an additional tower in the area would not have an adverse effect on its historically significant characteristics.

19. With respect to the Battlefield, the HFC Petition attaches a National Register –Nomination Form (“Nomination Form”),⁵⁴ which nominates the Battlefield as eligible for listing under Criterion A due to its association with important events and broad patterns of American history. Based on the information in the Nomination Form and the record, we agree that the Battlefield is a property eligible for listing on the National Register. We therefore consider whether the undertaking “may alter, directly or indirectly, any of the characteristics of [the Battlefield] that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”⁵⁵ The record, however, does not present any evidence that the tower would significantly diminish the Battlefield’s association with historical events or its ability to convey that association. We are aware of no indication that the Battlefield is significant under Criterion C due to its cultural landscape or other distinctive physical characteristics that might possibly be adversely affected by the introduction of a tower into the viewshed.⁵⁶ In sum, our evaluation of the record yields no new or reinterpreted evidence to cause us to disagree with the MDSHPO’s recommendation of no adverse effect with respect to the Battlefield.

20. The final historic property that Petitioners argue would be adversely affected by the proposed tower is the Trail, which passes within several hundred feet of the tower compound.⁵⁷ The Petitioners assert that the new tower will adversely affect the Trail because the tower will be visible from several sections of the Trail. We note that NPS also made similar arguments in pleadings that it has requested to withdraw.⁵⁸ We have reviewed the Request and MOU, in accordance with Section 1.935 of the Commission’s rules,⁵⁹ and grant the request to withdraw the NPS comments and May 27 letter. We therefore do not consider these pleadings with respect to this or any other issue.

21. The State does not dispute, and we concur with, the MDSHPO’s recommendation that the Trail is eligible for inclusion on the National Register.⁶⁰ The MDSHPO further recommends that subject to the landscape and screening measures stated in the EA Supplement, the tower would not have an adverse

⁵⁴ National Register-Nomination Form, completed by Dennis Frye, Hagerstown Civil War Roundtable, dated February 19, 1986.

⁵⁵ 36 C.F.R. § 800.5(a)(1).

⁵⁶ 36 C.F.R. §60.4. *Cf. Programmatic Agreement NPRM*, 18 FCC Rcd at 11689 (proposing standard that construction of a facility “will not cause a visual adverse effect except where visual setting or visual elements are character-defining elements of eligibility”).

⁵⁷ HFC Petition at 1, 12; Club Petition at 1-3.

⁵⁸ NPS Comments at 1-3; May 27 Letter.

⁵⁹ 47 C.F.R. §1.935.

⁶⁰ April 8 Letter.

effect on the Trail.⁶¹ We concur with this recommendation. The proposed tower will add only 60 feet in height to the tower that currently exists at the same location, and it will be adjacent to other existing towers and the Federal Facility. We note that the State will be removing the existing Fire Tower and will be removing the ATC tower, pursuant to its MOU with NPS. In addition, the MOU reiterates the State's commitment to undertake the landscaping and screening measures included in the EA Supplement. Moreover, the State's EA Supplement contains numerous pictures from the Trail showing that the proposed tower would not be visible. Therefore, we find that the proposed tower will have no significant environmental impact on the Trail, based on our review of the record, the recommendation of the MDSHPO, and the withdrawal of the comments raised by NPS regarding the State's EA.

22. We note that in addition to their arguments under the NHPA, the Petitioners contend that the proposed tower is inconsistent with Maryland's Rural Legacy program and with the state legislation establishing the South Mountain Battlefield Park. The Commission does not have any jurisdiction over Maryland land use legislation. Our inquiry only concerns whether the proposed tower may have a significant impact on the environment under NEPA,⁶² including but not limited to any adverse effect to historic properties under the NHPA.⁶³ Therefore, we do not evaluate whether the proposed tower is consistent with these state land use laws.

B. Consideration of Alternatives

23. In addition to challenging the State's contention that the proposed tower will not have an adverse effect on historic properties, HFC also alleges that the State did not evaluate alternatives that might eliminate the need for the proposed tower or reduce its height.⁶⁴ Because we find that the proposed tower will have no adverse effect on historic properties or other significant environmental impact, the State is not required to consider the feasibility of alternatives.⁶⁵ Nevertheless, we briefly discuss HFC's arguments that the State has not studied reasonable alternatives and find them without merit.

24. HFC identifies four specific alternatives that it says the State should have considered.⁶⁶ First, according to HFC, the State could construct a fiber optics line from Lamb's Knoll to the State's MIEMSS towers at Hagerstown, MD instead of a microwave link. Second, the State could relocate antennas to a nearby commercial tower. Third, the State could build multiple shorter towers. Fourth, the State could modify the proposed tower's height to the approximate heights of the nearby FAA tower and the cement silo in the adjacent Federal facility.⁶⁷

⁶¹ *Id.*; see EA Supplement at 31.

⁶² 47 C.F.R. § 1.1307(a).

⁶³ 47 C.F.R. § 1.1307(a)(4).

⁶⁴ HFC Petition at 24.

⁶⁵ See Application of Scana Communications, Inc., *Order*, 16 FCC Rcd. 9990, 9995 (2001). See also 36 C.F.R. § 800.5.

⁶⁶ HFC Petition at 40-42, Reply at 37.

⁶⁷ *Id.*

25. Under Section 1.1311(a)(4) of the Commission's rules, applicants are required to discuss in an EA their grounds for rejecting alternatives to their proposal based on both environmental and other considerations.⁶⁸ Determining reasonable alternatives thus involves a balancing test of environmental factors and several other factors, including but not limited to cost, feasibility, technological requirements, the need for service, and the public interest. In this instance, the State has identified several compelling needs that its construction must serve.⁶⁹ The proposed tower will be used primarily as a public safety tower, which will collocate public safety licensees from the existing Fire Tower.⁷⁰ Of most immediate importance, the State needs to mount a microwave dish on the tower for a 6 GHz microwave path to deliver emergency communications. In the future, the State will also be collocating 700 MHz antennas as part of a statewide interoperable public safety system. Several additional public safety licensees, including the surrounding counties, will also be able to collocate on the replacement tower because there will be new space for those licensees.⁷¹ All of these licensees must maximize coverage to provide wide area communications while meeting site-specific interference protection requirements under the Commission's rules.⁷² In its Opposition, the State indicates that the current Fire Tower cannot structurally hold the proposed microwave dish and any further licensees.⁷³

26. Given the important public safety needs that the proposed tower must serve, we find that the State reasonably considered and rejected alternatives to its proposal. First, the record is clear that the State did consider alternatives and implemented those alternatives where feasible. Thus, the State has reduced the proposed tower height from 340 feet to 180 feet, a reduction of almost 50 percent. More recently, in its Supplement to the EA,⁷⁴ the State has modified its proposal by providing green screening of all fences, restoring vegetation, and planting new vegetation as necessary to screen supporting structures.

27. We also find that the State reasonably rejected the four alternatives that HFC proposes. First, a fiber optics connection from Lamb's Knoll to Hagerstown would not serve the public interest as effectively as a microwave link because a microwave link is not susceptible to power outages or accidents that could disrupt fiber optic lines. Second, collocation on a nearby commercial tower would not be reasonable because the State Police and other public safety entities need control over the facilities for security reasons and to ensure 24-hour operability. Moreover, the State could incur substantial monthly leasing costs on the commercial tower. Third, the State after careful study concluded that multiple shorter towers are not a reasonable alternative because there would be substantial costs, more land needed, and a large amount of trees removed. Finally, the suggestion that the State reduce the height of the proposed tower to conform to the nearby FAA tower and Federal Facility ignores the State's need for the proposed height to accommodate multiple public safety operations, including its own planned 700 MHz system. Thus, we concur with the State that none of the proposed alternatives are suitable to satisfy the important needs for which this tower is proposed.

⁶⁸ 47 C.F.R. § 1.1311(a)(4); *see also* 40 C.F.R. §1508.9(b); 36 C.F.R. §800.4(a)(3).

⁶⁹ *See* Attachment 22, Opposition.

⁷⁰ Opposition at 21.

⁷¹ *Id.*

⁷² *See* 47 C.F.R. Part 90.

⁷³ Opposition at 5.

⁷⁴ EA Supplement at 16.

C. Public Participation Procedures

28. HFC also alleges that the EA is procedurally deficient because there was not proper public notice and public participation.⁷⁵ We disagree. The application with attached EA appeared on public notice⁷⁶ allowing thirty days for public comment, providing for public participation as required by NEPA and NHPA.⁷⁷ In addition, the State conducted public hearings to discuss the proposed tower construction.⁷⁸ We note that HFC has been an active participant both at the local level and before the Division. Moreover, interested parties had sufficient opportunity to comment on the EA. We conclude that these processes amply satisfy the relevant legal requirements.

IV. CONCLUSION

29. We have determined, consistent with the NHPA, that the proposed construction will have no adverse effect on historic properties. Upon an independent review of the EA, and based on the entire administrative record, we conclude that the construction and operation of the facility proposed by the State discussed herein will have no significant effect on the human environment⁷⁹ within the meaning of NEPA and Section 1.1307 of the Commission's rules.⁸⁰ We further conclude that allowing the State to construct a tower needed for public safety radio communications on Lamb's Knoll, South Mountain, Maryland, would serve the public interest, convenience, and necessity. Accordingly, we grant the State's application. We grant the request to withdraw the comments and May 27, 2004 letter filed by NPS. We deny the HFC Petition and the Club Petition. We also dismiss as moot the Petition for Environmental Assessment, filed by HFC, dated July 16, 2002, and the State's Petition for Reconsideration of the Division's May 8, 2003 Letter.

V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 1.939(b) and 1.1313(a) of the Commission's Rules, 47 C.F.R. §§ 1.939(b) and 1.1313(a), the separate Petitions to Deny, filed by the Harpers Ferry Conservancy and the Potomac Trail Club, ARE DENIED.

31. IT IS FURTHER ORDERED, pursuant to Section 1.935 of the Commission's Rules, 47 C.F.R. §1.935, that the Request for Acknowledgement of Withdrawal of ATPO Comments and Letter, filed by the Appalachian Trail Park Office of the National Park Service, IS GRANTED and the Comments and Letter ARE DISMISSED.

⁷⁵ HFC Petition at 6.

⁷⁶ *Public Notice*, Wireless Radio Service Site-by-Site Applications Accepted for Filing, dated February 4, 2004.

⁷⁷ See 40 C.F.R. §1503.1; 36 C.F.R. §800.3(e).

⁷⁸ On May 15 and June 4, 2003, the State held meetings with consulting parties. On November 26, 2003, the State held a public meeting. See Opposition at p. 25.

⁷⁹ See 47 C.F.R. §1.1308(d).

⁸⁰ See 47 C.F.R. §1.1307.

32. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.3, 1508.9 and 1508.13, Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and Sections 1.1308 and 1.1312 of the Commission's Rules, 47 C.F.R. §§ 1.1308 and 1.1312, that the Division finds grant of the Application will have no significant impact on the environment.

33. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(a), and Section 1.929(a)(4) of the Commission's rules, 47 C.F.R. § 1.929(a)(4), that the application for Wireless Radio Station Authorization, filed by the State of Maryland, IS GRANTED.

34. IT IS FURTHER ORDERED that the Petition for Environmental Assessment, filed by Harpers Ferry Conservancy, dated July 16, 2002, IS DISMISSED as MOOT.

35. IT IS FURTHER ORDERED that the Petition for Reconsideration, filed by the State of Maryland, dated August 6, 2003, IS DISMISSED as MOOT.

36. IT IS FURTHER ORDERED, pursuant to Sections 1501.4(i) and 1506.6 of the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.4(i) and 1506.6, and Section 1.1308 of the Commission's Rules, 47 C.F.R. § 1.1308, that applicant State of Maryland is to provide to the community to be served by this facility notice of the finding herein of no significant impact.

37. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

Federal Communications Commission

Jeffrey S. Steinberg
Deputy Chief, Spectrum and Competition Policy Division
Wireless Telecommunications Bureau

