

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

In the Matter of)	
)	
County of Albemarle)	File No. 0000986878
Informal Objections against Application)	
for Wireless Radio Station Authorization)	
(FCC Form 601) with Environmental)	
Assessment)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 2003

Released: May 27, 2003

By the Deputy Chief, Commercial Wireless Division:

I. INTRODUCTION

1. In this Order, we grant an Application for Wireless Radio Station Authorization (application) filed by the County of Albemarle (Albemarle) for a proposed 800 MHz public safety facility on Peter’s Mountain, Albemarle County, Virginia, FCC File No. 0000986878. Because the proposed construction falls within a category of potential significant environmental impact under Sec. 1.1307 of the Federal Communications Commission (Commission) rules,¹ Albemarle filed an Environmental Assessment (EA) with the application, pursuant to Sections 1.1308 and 1.1311 of the Commission’s rules.² The National Trust for Historic Preservation (Trust) and the Piedmont Environmental Council (PEC) sent to the Deputy Chief of the Commercial Wireless Division (Division) objections, both contending that the EA is insufficient to establish that the proposed tower will have no significant impact on historic properties, and therefore the grant of the Application and construction of the tower would be inconsistent with the Commission’s Environmental rules³ implementing the National Environmental Policy Act of 1969 (“NEPA”)⁴ and Section 106 of the National Historic Preservation Act of 1966 (“NHPA”).⁵

¹ 47 C.F.R. § 1.1307.

² 47 C.F.R. §§ 1.1308, 1.1311.

³ 47 C.F.R. §§ 1.1301–1.1319.

⁴ 42 U.S.C. §§ 4321-4395 (1997).

⁵ 16 U.S.C. § 470f.

2. For the reasons set forth herein, we dismiss the Trust's and PEC's objections as improperly filed. Even considering the issues raised in the improperly filed pleadings of the Trust and PEC, moreover, we find that the record supports a Finding of No Significant Impact to the Environment (FONSI). We therefore grant Albemarle County's Application.

II. BACKGROUND

3. On August 5, 2002, Albemarle filed its application for a license to provide public safety communications service from an antenna mounted on a 105-foot antenna structure to be located on Peter's Mountain in Northeastern Albemarle County. Albemarle seeks to provide service on the reserved band for Public Safety in the 800 MHz frequency band.

4. Prior to filing its application, Albemarle, as required by the Commission's rules, considered whether its proposed construction might significantly affect the environment.⁶ The public and interested parties were notified of the proposed application, and had the opportunity to comment in public meetings.⁷ In addition, public notices were published in a local newspaper.⁸ On February 25, 2002, the Virginia State Historic Preservation Officer (VASHPO) advised Albemarle and the Commission that the proposed antenna structure would have an adverse effect on historic properties listed or eligible for listing in the National Register of Historic Places (National Register). Specifically, the VASHPO advised that Peter's Mountain is within the boundaries of the Southwest Mountains Historic District, a historic district listed in the National Register, and that historic properties within that district would be adversely affected.

5. In the fall of 2002, Albemarle, the Commission, VASHPO and several consulting parties, including PEC,⁹ negotiated a Memorandum of Agreement (MOA) under which Albemarle agreed to mitigate the adverse effects of the proposed structure on historic properties in accordance with Section 106 of the National Historic Preservation Act (NHPA) and the rules of the Advisory Council on Historic Preservation (ACHP).¹⁰ The Commission, VASHPO and Albemarle executed the MOA on September 11, 2002, October 7, 2002, and October 18, 2002, respectively. The consulting parties were offered the opportunity to sign the MOA but declined to do so.

⁶ See 47 C.F.R. § 1.1307(a).

⁷ An informal public informational meeting was held on April 16, 2001, at Grace Episcopal Church in Albemarle County. The Albemarle County Board of Supervisors and Planning Commission held public meetings on November 15, 2001, November 27, 2001, December 18, 2001, and January 9, 2002. In addition, the Board of Supervisors met with the County and representatives of the PEC on November 27, 2001. See EA, exhibit c, p.1.

⁸ Public Notice, *The Daily Progress* newspaper, November and December 2001.

⁹ In addition to PEC, three local residents participated as consulting parties in the Section 106 process. The Trust did not participate as a consulting party.

¹⁰ Mitigation includes, among other things: 1) Antennas and other equipment shall be limited to those needed by Albemarle to provide public safety radio service; 2) the top of the antenna structure shall not exceed 105 feet above ground level, excluding two whip antennas and grounding rods; 3) guy wires shall not be permitted; 4) the structure and appurtenances shall be painted dark brown; 5) outdoor lighting shall be shielded and limited to periods of maintenance, unless otherwise required by a government agency; 6) Albemarle shall not remove existing trees within 200 feet of the structure; and 7) trees shall be planted within a 200-foot buffer of the structure.

6. On November 26, 2002, Albemarle amended its application and filed its EA. The EA was placed on public notice on December 4, 2002, as accepted for filing.¹¹ The Licensing and Technical Analysis Branch of the Division reissued the public notice on December 11, 2002, to correct a staff error.¹² On January 10, 2003, the Trust filed its objection with the Deputy Chief of the Division. PEC sent its comments by facsimile to the Deputy Chief on January 10, 2003. On February 3, 2003, Albemarle filed its Opposition. On February 11, 2003, the Trust filed its Reply.

III. DISCUSSION

7. Albemarle initially argues that the Trust's and PEC's pleadings should not be considered due to procedural deficiencies. First, Albemarle argues in its Opposition that the Trust and PEC filings should not be treated as petitions to deny because they were filed more than 30 days after the initial public notice on December 4, 2002. The Trust responds that its objection was timely filed because it was within 30 days after the Division issued its corrected public notice listing the application as accepted for filing. Section 309(b) of the Communications Act of 1934, as amended, provides that applications subject to that Section shall not be granted earlier than thirty days following issuance of public notice of their acceptance for filing.¹³ In this case, the Licensing and Technical Analysis Branch placed Albemarle's application on public notice twice, on December 4, 2002, and again on December 11, 2002. Under the circumstances, we find that correctly filed formal objections within 30 days of the second public notice, i.e., by January 10, 2003, would have been timely.

8. We agree however, with Albemarle's second procedural argument that the objections were improperly filed as petitions to deny because they were filed with the Deputy Chief instead of the Secretary's office, as required by Sec. 1.939 of the Commission's rules. In the case of an application to which Section 309(b) of the Communications Act applies, formal objections based on environmental considerations shall be filed as petitions to deny.¹⁴ Petitions to deny filed against an application placed on public notice as accepted for filing must be filed either electronically in the Universal Licensing System or manually with the Secretary's office in accordance with Sec. 1.939 of the Commission's rules.¹⁵ It is important for the orderly processing of applications and petitions that parties adhere to the Commission's pleading practices outlined in Part I of the Commission's rules. Therefore, we dismiss the Trust's and PEC's objections for failure to file their pleadings as petitions to deny in accordance with the Commission's rules.¹⁶

¹¹ *Public Notice*, rel. December 4, 2002, Report No. 1352.

¹² *Public Notice*, rel. December 11, 2002, Report No. 1358.

¹³ 47 U.S.C. § 309(b); *see also* 47 C.F.R. § 1.945(b) (applications subject to Section 309(b) and not subject to competitive bidding will not be granted prior to the thirty-first day following public notice).

¹⁴ *See* 47 C.F.R. § 1.1313(a). We note that PEC's letter is styled as "comments" rather than an "objection" or "petition to deny." Nonetheless, in substance it constitutes an objection to Albemarle's application, and we therefore treat it as such.

¹⁵ *See* 47 C.F.R. § 1.939(b).

¹⁶ Because we dismiss the objections for improper filing, it is not necessary to determine whether the parties demonstrate standing to file their objections. *See Friends of the Earth*, 17 FCC Rcd. 201(CWD 2002), *app. for review pending*. In addition, because we would grant Albemarle's application even considering PEC's and the (continued....)

9. Our determination that the Trust's and PEC's pleadings were improperly filed does not, however, end our consideration of Albemarle's application and EA. 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.¹⁷ 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."¹⁸ Section 1.1308 of the Commission's rules requires applicants to prepare an environmental assessment ("EA") for actions that may have a significant environmental impact under any of these categories.¹⁹ 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.²⁰ In performing this independent review, we consider the entire record, including all petitions and objections filed against the environmental assessment.

10. In this case, we find that the proposed construction will have no significant environmental impact. Albemarle filed an EA because it determined, consistent with the NHPA, that the construction may affect historic properties.²¹ As part of its EA, Albemarle filed an MOA that included measures to mitigate the adverse effect on historic properties under the NHPA. We find that, as mitigated, the construction will not have a significant environmental impact on historic properties within the meaning of NEPA. We further find, based on independent review of the EA, that the project will have no other significant environmental impact.

11. Although, as noted above, we dismiss PEC's and the Trust's objections as improperly filed, nothing in these pleadings changes our conclusions. First, both PEC and the Trust assert that the EA does not adequately depict the visual appearance of the proposed tower, including the location and appearance of antennas and other equipment to be located on the tower. As Albemarle notes, however, schedules D and H attached to the EA specify the size of the tower and antennas, with a site area photograph with digital representation of the antennas.²² We agree with Albemarle that the application, EA and MOA fully describe the visual effects of the proposed tower.

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Trust's objections, *see* paras. 11-13, *infra*, we need not consider whether, or under what circumstances, these pleadings could have been properly filed as informal objections. *See* 47 C.F.R. § 1.1313(b).

¹⁷ *See* 47 C.F.R. § 1.1307(a).

¹⁸ 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.

¹⁹ 47 C.F.R. § 1.1308. In addition, the Bureau may 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).

²⁰ *Id.* If a Commission action will have a significant environmental impact, an Environmental Impact Statement must be prepared. 47 C.F.R. § 1.1305.

²¹ *See* 47 C.F.R. § 1.1307(a)(4).

²² *See* letter from Robert M. Guss to Marlene H. Dortch, FCC Secretary, dated February 3, 2003.

12. PEC and the Trust also believe further mitigation is necessary before the tower is built. Specifically, PEC and the Trust believe that the tree buffer specified in the MOA is insufficient to shield the antenna structure from view, and PEC suggests that Albemarle obtain the rights to maintain a tree buffer on the adjoining property. Nothing in these comments persuades us that the proposed tree buffer, agreed to by the VASHPO in the MOA, is insufficient mitigation. Moreover, the Commission does not have any jurisdiction over adjoining property owners. In addition, the Trust asks the Commission to restrict the number of dishes and antennas that can be added to the tower. However, the MOA already requires that Albemarle notify the SHPO and consulting parties and provide them with the opportunity to comment if Albemarle proposes to add additional equipment to the tower site.²³

13. In addition to measures directly related to the effect of Albemarle's proposed facility, PEC and the Trust also request action to mitigate the visual effect caused by an AT&T microwave facility that is also located on Peter's Mountain. However, Albemarle has no control over the AT&T facility, and these comments are beyond the scope of this proceeding. Finally, PEC and the Trust request that the Commission impose a license condition that, in the event any future application is filed for an additional tower site to enhance Albemarle's 800 MHz public safety radio system, the applicant will be required to conduct a formal technical reevaluation of the need for the Peter's Mountain Tower and due consideration will be given to its removal. We decline to impose any condition based on this speculative argument. We also note that the MOA includes a provision requiring Albemarle to dismantle the structure within six months after its abandonment.

IV. CONCLUSION

14. We dismiss PEC's and the Trust's objections as improperly filed. Nonetheless, we have considered the issues raised in these pleadings in evaluating the EA. 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 Albemarle discussed herein, as provided in the Memorandum of Agreement, will have no significant effect on the human environment²⁴ within the meaning of NEPA and Section 1.1307 of the Commission's Rules, nor an unmitigated adverse affect pursuant to NHPA. We further conclude that allowing Albemarle to construct a tower needed for public safety radio communications on Peter's Mountain, Albemarle County, Virginia, would serve the public interest, convenience, and necessity. Accordingly, we grant Albemarle's application.

V. ORDERING CLAUSES

15. 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 Objection and Comments filed by the National Trust for Historic Preservation and the Piedmont Environmental Council ARE DISMISSED.

16. 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,

²³ See Memorandum of Agreement p. 2.

²⁴ See 47 C.F.R. §1.1308(d).

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.

17. 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 90.149 of the Commission's rules, 47 C.F.R. § 90.149, that the application for Wireless Radio Station Authorization, filed by the County of Albemarle, IS HEREBY GRANTED.

18. 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 Albemarle County is to provide to the community to be served by this facility notice of the finding herein of no significant impact.

19. 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, Commercial Wireless Division
Wireless Telecommunications Bureau

