

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

In the Matter of )
STATE OF MARYLAND DEPARTMENT OF ) WTB Tower Registration No. A0191409
BUDGET AND MANAGEMENT )
Application for Antenna Structure Registration )
Ellicott City, Maryland )

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2001

Released: September 27, 2001

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant an application for antenna structure registration, which includes an environmental assessment, filed by the State of Maryland, Department of Budget and Management ("Maryland DBM"), and we deny two petitions to deny the Application. The Application seeks authorization to construct a 340-foot public safety communications tower in Ellicott City, Maryland. Petitions to deny were filed by Dr. Richard D. Bright ("Dr. Bright"), a resident of Ellicott City, on behalf of himself, the Patapsco Heights/Church Road Association, and Friends of the Patapsco Female Institute, and by Preservation Howard County. Dr. Bright and Preservation Howard County contend that the environmental assessment is substantively and procedurally defective, and that the proposed tower would have an adverse effect on various historic properties. Dr. Bright and Preservation Howard County, therefore, argue that grant of the Application and construction of the tower would be inconsistent with the Commission's environmental rules implementing the National Environmental Policy Act of 1969 ("NEPA"), and Section 106 of the National Historic Preservation Act of 1966 ("NHPA").

1 See FCC Application for Antenna Structure Registration File No. A0191409 filed May 16, 2001 ("Maryland DBM Application").

2 Response to Environmental Assessment, dated May 16, 2001, for the Communications Tower at the District Court in Ellicott City, MD 21045, filed June 18, 2001 ("Bright Petition"); Public Response to the Environmental Assessment dated May 16, 2001 FCC Application for Antenna Structure Registration For the State of Maryland, Department of Budget and Management Ellicott City Public Safety Communications Tower 3451 Courthouse Drive, Ellicott City, Howard County, Maryland filed July 2, 2001 ("Bright Supplemental Petition").

3 Letter from Mary Catherine Cochran, President, Preservation Howard County to Federal Communications Commission ("Commission" or "FCC") dated July 2, 2001 ("Preservation Howard County Objection").

4 47 C.F.R. §§ 1.1301-1.1319.

5 42 U.S.C. §§ 4321-4395 (1997).

For the reasons set forth herein, the Commercial Wireless Division (“Division”) of the Wireless Telecommunications Bureau (“Bureau”), acting under delegated authority, denies the petitions filed by Dr. Bright and Preservation Howard County, makes a Finding of No Significant Impact to the Environment, and grants Maryland DBM’s Application.

## II. BACKGROUND

2. In its Application, Maryland DBM seeks antenna structure registration for a 340-foot, self-supporting lattice tower to be located on State of Maryland-owned property adjacent to the Maryland District Court for Howard County, 3451 Courthouse Drive, Ellicott City, Maryland (the “District Court site”).<sup>7</sup> The District Court site is located on a hill overlooking historic Ellicott City, next to two parking lots at the District Court building. It is approximately 700 feet from the nearest residential building and is screened by existing trees and vegetation on three sides of the property. The fourth side of the property, which is open, faces the District Court building.<sup>8</sup> The site is 300 feet from the boundary of the Ellicott City Historic District,<sup>9</sup> which includes the Patapsco Female Institute and the single-family dwellings along Church Road and Sylvan Lane.<sup>10</sup>

3. The proposed tower is intended to support antenna facilities that will expand and upgrade the existing public safety communications systems of the State of Maryland and Howard County. At present, Maryland DBM and the Howard County Department of Public Works (“Howard County DPW”) operate multiple communications networks in Howard County pursuant to Commission licenses. These existing systems, however, are inadequate to support the current communications requirements of the State of Maryland and Howard County.<sup>11</sup> To remedy this situation, the State of Maryland is currently constructing a statewide communications network to link various local public safety organizations. An antenna on the proposed tower would serve as a critical microwave relay station on this network, running westbound through Howard County.<sup>12</sup> The proposed tower would also contain emergency medical services

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<sup>6</sup> 16 U.S.C. § 470f.

<sup>7</sup> Maryland DBM Application. Under the Commission’s rules, any proposed antenna structure that requires notice of proposed construction to the Federal Aviation Administration (“FAA”) must be registered with the Commission prior to construction. 47 C.F.R. § 17.4; *see also* 47 C.F.R. § 17.7 (requiring registration and FAA notification for antenna structures that are greater than 200 feet in height or that are located within range of specified distances from an airport).

<sup>8</sup> Amendment to the FCC Application for Antenna Structure Registration For the State of Maryland, Department of Budget and Management, Ellicott City Public Safety Communications Tower, 3451 Courthouse Drive, Ellicott City, Howard County, Maryland, filed May 16, 2001 as an attachment to the Maryland DBM Application (“Maryland DBM Environmental Assessment”).

<sup>9</sup> Bright Supplemental Petition at 2.

<sup>10</sup> *See* Memorandum of Agreement between the Federal Communications Commission and the Maryland State Historic Preservation Officer Regarding the Joint State/County Public Safety Antenna Tower in Ellicott City, Howard County, Maryland, dated May 16, 2001 (“Memorandum of Agreement”) at 1.

<sup>11</sup> Documentation for Submission to the Advisory Council on Historic Preservation in accordance with 36 C.F.R. 800.11(e), prepared by the State of Maryland and Howard County, Maryland at 1.

<sup>12</sup> *Id.* at 1,5.

antennas serving the communications needs of the Maryland Institute for Emergency Medical Services, the State of Maryland's pre-hospital emergency medical care system.<sup>13</sup> In addition, the proposed tower would be the hub site of an 800 MHz trunked public safety communications system that Howard County is constructing to address the inadequacies of its existing network.

4. Maryland DBM initially planned to locate the proposed tower on the west side of Rogers Avenue, approximately  $\frac{3}{4}$  of a mile from the Ellicott City Historic District. Maryland DBM filed an antenna registration application for this site, known as the "Campus site," on April 26, 2000.<sup>14</sup> However, the Campus Site was subsequently abandoned by Maryland DBM as unsuited to its needs, and the District Court site was selected instead.<sup>15</sup>

5. Under the Commission's rules, an applicant to construct facilities must, in consultation with the relevant expert agencies, determine whether the facility falls within one of eight categories specified in the Commission's rules that may significantly affect the environment and thus requires preparation of an environmental assessment.<sup>16</sup> 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."<sup>17</sup> During its review of the District Court site, the Maryland State Historic Preservation Officer ("Maryland SHPO") informed Maryland DBM and the Commission that the proposed project would "cause adverse effects to historic properties either eligible or listed in the National Register of Historic Places, including the Church Road and Sylvan-Lane houses."<sup>18</sup> In light of this correspondence, the Chief of the Data Management Division of the Bureau set aside the grant of the antenna structure registration for the District Court site<sup>19</sup> and dismissed Maryland DBM's application.<sup>20</sup> At the same time, the Chief of the Public Safety and Private Wireless Division ("PSPWD") of the Bureau directed Maryland DBM to meet with the Maryland SHPO in order to initiate efforts to mitigate the adverse effect or avoid the adverse

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> *See* Antenna Structure Registration number A0122353, granted April 26, 2000.

<sup>15</sup> *See* Technical Analysis prepared by Charles Lacey dated March 6, 2001 ("Lacey March 6, 2001 Study") at 1-5.

<sup>16</sup> *See* 47 C.F.R. § 1.1307(a).

<sup>17</sup> 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.

<sup>18</sup> *See* Letter from J. Rodney Little, State Historic Preservation Officer to G. Edward Ryan II, Telecommunications Division, Department of Budget and Management (dated Jan. 8, 2001) ("Maryland SHPO January 8, 2001 letter").

<sup>19</sup> *See* FCC File No. AO163699 (filed January 26, 2001 and granted January 30, 2001).

<sup>20</sup> *See* Letter from John A. Chudovan, Chief, Data Management Division, Wireless Telecommunications Bureau, to Geoffrey J.C. Boyd, Assistant Attorney General, State of Maryland Office of the Attorney General (dated Feb. 15, 2001) ("Chudovan February 15, 2001 letter").

effect by relocating the tower to an alternate site.<sup>21</sup> PSPWD further instructed Maryland DBM not to initiate construction of the tower until the matter was resolved.<sup>22</sup>

6. On February 23, 2001, a public meeting was held to discuss the proposed tower construction.<sup>23</sup> This public meeting was attended by representatives of Maryland DBM, Howard County DPW, the National Trust For Historic Preservation (“National Trust”), the general public (including Dr. Bright and Preservation Howard County) and the Commission staff.<sup>24</sup> The public meeting focused on whether there was any reasonable alternative to locating the tower at the District Court site; and, if not, whether mitigation measures were available to minimize, mitigate or avoid the adverse effect upon the identified historic sites. Consulting parties were identified, including Dr. Bright and Preservation Howard County, and a public comment period was established to further develop the record. In order to facilitate this process, as well as minimize expense while maximizing information flow, certain parties were identified as principal consulting parties, charged with the responsibility of keeping other participants fully informed about matters in the proceeding.

7. Thereafter, on February 26, 2001, Commission staff formally established the public comment period up to and including March 12, 2001.<sup>25</sup> In addition, Commission staff formally alerted the Advisory Council on Historic Preservation (“Advisory Council”) about the on-going Section 106 proceeding involving the proposed tower, affording the Advisory Council the opportunity to participate.<sup>26</sup> In response to the request for public comment, approximately 50 comments were received.<sup>27</sup>

8. During the course of the public meeting, and in the weeks that followed, Maryland DBM and the tower opponents disagreed on whether the proposed tower could alternatively be located at the Campus site. On March 2, 2001, the Maryland SHPO requested further investigation regarding the possibility of constructing the tower at an alternate location.<sup>28</sup> In addition, the parties offered technical

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<sup>21</sup> See Letter from D’wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Ruth Newman Fahrmeier, Senior Assistant County Solicitor, Howard County Office of Law, and Geoffrey J.C. Boyd, Assistant Attorney General, State of Maryland Office of the Attorney General (dated Feb. 15, 2001). See also 36 C.F.R. § 800.6(a) (agency shall consult with consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects).

<sup>22</sup> *Id.*

<sup>23</sup> See 36 C.F.R. § 800.2(d) (agency shall seek and consider views of the public).

<sup>24</sup> See Meeting Sign-In Sheet dated February 23, 2001.

<sup>25</sup> See Memorandum from Dan Abeyta, Commercial Wireless Division, to the Consulting Parties, dated February 26, 2001.

<sup>26</sup> See Letter from Dan Abeyta, Commercial Wireless Division, to Don L. Klima, Office of Planning and Review, Advisory Council on Historic Preservation, dated February 26, 2001; 36 C.F.R. § 800.6(a)(1) (requiring that notice be sent to the Advisory Council).

<sup>27</sup> These comments are available in the public record.

<sup>28</sup> Letter from J. Rodney Little, State Historic Preservation Officer, to Dan Abeyta, Commercial Wireless Division (dated Mar. 2, 2001).

analyses prepared by their respective experts.<sup>29</sup> Based upon the request in the Maryland SHPO's letter and upon meetings with Dr. Bright, Maryland DBM and Howard County DPW, the Division agreed that the Commission would conduct a technical analysis to determine the feasibility of the Campus site.

9. After the period for filing written comments closed, the Division convened two teleconferences among the principal parties to discuss either relocating the tower or developing mitigation measures acceptable to the parties. The teleconferences were conducted on April 19, 2001, and April 25, 2001.<sup>30</sup> At each of the teleconferences, Division staff explained that findings from an internal engineering analysis did not support the Campus site as a reasonable alternative for constructing the tower because achieving comparable coverage at the Campus site would require a structure of much greater height, which in turn would create harmful interference. The Division's conclusions, which were discussed in great detail at each of the teleconferences, were later distributed to the parties in a written memorandum.<sup>31</sup>

10. In light of the Division's determination that the Campus site was not a reasonable alternative for the proposed tower location, discussions during the two teleconferences focused upon the negotiation of measures designed to minimize, mitigate, and /or avoid the adverse effect recommended by the Maryland SHPO. Throughout the Section 106 process, various parties offered mitigation measures designed to address the adverse effect upon the various historic sites identified by the Maryland SHPO.<sup>32</sup> After extensive discussion among the parties, and full consideration by Division staff, the Commission, the Maryland SHPO, Maryland DBM, and Howard County entered into a Memorandum of Agreement containing specific measures to be taken by Maryland DBM and Howard County DPW to mitigate the tower's impact.<sup>33</sup> Dr. Bright and Preservation Howard County declined the opportunity to sign the Memorandum of Agreement as concurring parties.

11. On May 16, 2001, Maryland DBM filed the Application, accompanied by an environmental assessment and the Memorandum of Agreement. The Application appeared on Public

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<sup>29</sup> Dr. Bright submitted technical studies by Charles Lacey dated March 6, 2001, April 18, 2001 and June 26, 2001. Maryland DBM and Howard County DPW submitted a technical analysis by Motorola Corporation dated March 28, 2001.

<sup>30</sup> See Letter from Dan Abeyta, Commercial Wireless Division, to Elizabeth S. Merritt, Associate General Counsel, National Trust for Historic Preservation and Dr. Richard D. Bright, Citizen Coordinator (dated Apr. 20, 2001); and electronic mail message from Frank Stilwell, Commercial Wireless Division, to the Consulting Parties (dated Apr. 16, 2001).

<sup>31</sup> See Memorandum from Commercial Wireless Division, Wireless Telecommunications Bureau, to the Consulting Parties (dated June 26, 2001).

<sup>32</sup> See Letters from Elizabeth S. Merritt, Associate General Counsel, National Trust for Historic Preservation, to Dan Abeyta, Commercial Wireless Division (dated Mar. 12, 2001 and Apr. 30, 2001); Robert C. Brown, counsel to Richard D. Bright, to Dan Abeyta, Commercial Wireless Division (dated Apr. 20, 2001); Alan M. Ferragamo, Deputy Director, Department of Public Works, Howard County, to Dan Abeyta, Commercial Wireless Division (dated Apr. 23, 2001 and Apr. 30, 2001).

<sup>33</sup> Memorandum of Agreement. These mitigation measures include, among other things, (1) tower design specifications, including limitations on height, number of antennas, location, advertising logos, and lighting, (2) establishment of a buffer of deciduous and evergreen plant materials outside the perimeter security fence of the tower facility, and reforestation of the area at the base of the tower, and (3) the monitoring and reporting of changes in technology that would permit reduction of the visibility of the tower.

Notice on May 17, 2001, as accepted for filing.<sup>34</sup> Dr. Bright filed a petition to deny the Application on June 18, 2001,<sup>35</sup> followed by a supplementary filing on July 2, 2001.<sup>36</sup> Preservation Howard County likewise filed an objection on July 3, 2001.<sup>37</sup> Maryland DBM filed a brief opposition on July 13, 2001, arguing that the record is sufficient to address all issues raised by the petitioners.<sup>38</sup> Neither petitioner filed a reply.

### III. DISCUSSION

12. Section 1.1308 of the Commission's rules requires applicants to prepare an environmental assessment ("EA") for actions that may pose a significant environmental impact.<sup>39</sup> 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.<sup>40</sup> In performing this independent review, we consider the entire record, including all petitions and objections filed against the environmental assessment. Here, Dr. Bright and Preservation Howard County have raised both substantive challenges to the environmental assessment and objections to the procedures followed in this matter. For the reasons discussed below, we find that these objections are without merit, and we further conclude that the proposed construction, as conditioned in the Memorandum of Agreement, will not have a significant environmental impact. We therefore deny the petitions to deny and grant Maryland DBM's application.

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<sup>34</sup> Public Notice, Report Number: CWS-01-58, May 17, 2001.

<sup>35</sup> Bright Petition. Dr. Bright requested additional time to file his petition to deny, arguing that he had not been notified that the environmental assessment was filed on May 16, 2001. *See* letter from Richard D. Bright to Dan Abeyta, Commercial Wireless Division, dated June 14, 2001. An opposition to Dr. Bright's request was filed by Howard County DPW. *See* letter from Ruth Newman Fahrmeier, Senior Assistant County Solicitor, to Dan Abeyta, Commercial Wireless Division, dated June 15, 2001. Although rejecting Dr. Bright's argument that he should have received personal notification that the environmental assessment was filed, the Division granted Dr. Bright additional time to file, up to and including July 3, 2001, based upon technical irregularities with the Commission's Universal Licensing System that had hampered Dr. Bright's ability to access the environmental assessment. *See* Letter from William Kunze, Chief, Commercial Wireless Division, to Richard D. Bright and Mrs. Sally Bright, dated June 26, 2001 ("Kunze June 26, 2001 letter"). For the same reason, requests for extension of time filed by Mary Catherine Cochran and Preservation Howard County (Letter from Mary Catherine Cochran to Dan Abeyta, Commercial Wireless Division (dated June 18, 2001)); and Jennifer Held Matthaei of the Patapsco Female Institute (Letter from Jennifer Held Matthaei to Dan Abeyta, dated June 18, 2001) were likewise granted. *See* Letter from William W. Kunze, Chief, Commercial Wireless Division to Jennifer Held Matthaei and Mary Catherine Cochran, dated June 26, 2001.

<sup>36</sup> Bright Supplemental Petition.

<sup>37</sup> Preservation Howard County Objection.

<sup>38</sup> *See* letter from G. Edward Ryan, II, Assistant Director, Wireless Communications, Maryland Department of Budget and Management, to Ms. Magalie Salas, Office of the Secretary, Commission, dated July 13, 2001 ("Maryland DBM Opposition").

<sup>39</sup> 47 C.F.R. § 1.1308.

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

### A. Challenges to the Environmental Assessment

13. Dr. Bright first contends that the environmental assessment contains several errors and omissions in identifying affected historic sites and the potential effect of the tower on those sites. In this regard, Dr. Bright argues that the Church Road-Sylvan Lane historic district was erroneously identified as an eligible historic site rather than a listed historic site.<sup>41</sup> Moreover, the Maryland SHPO, he contends, failed to identify a number of other historic sites within the Area of Potential Effects (“APE”) for the tower construction.<sup>42</sup> He further notes that the Maryland SHPO, the Maryland DBM, and the Commission have failed to acknowledge that the upper Church Road-Sylvan Lane historic area was identified by Preservation Howard County as one of the most endangered historic sites in Howard County and that the tower may be near a scenic road.<sup>43</sup> In addition, Dr. Bright argues that Maryland DBM should have prepared a photo simulation of the tower to fully assess its impact.

14. Dr. Bright is correct to note that the Church Road-Sylvan Lane historic district is listed on the National Register of Historic Places. This fact, however, is immaterial to the sufficiency of the environmental assessment. Regardless of whether a site is listed or eligible for listing, the inquiry under the NHPA is whether and how it would be affected by the proposed undertaking, and how any adverse effect can be mitigated or avoided. In this case, consistent with the Advisory Council’s rules, Maryland DBM and the Commission consulted with the Maryland SHPO regarding the identification of listed or eligible sites within the APE and the effects of the proposed undertaking on those sites.<sup>44</sup> Indeed, the environmental assessment adopts the Maryland SHPO’s recommendation on these matters.<sup>45</sup> Nothing in the petitions persuades us that the Maryland SHPO failed to consider relevant factors or otherwise erred in making its determinations. We further note that the record is replete with photo documentation of this site, so preparation of a photo simulation would, at best, have been duplicative.

15. Dr. Bright next argues that the Campus site is, in fact, a reasonable alternative to the District Court site.<sup>46</sup> Dr. Bright initially notes that Maryland DBM originally planned to locate at this site and, indeed, even registered the site with the Commission.<sup>47</sup> Citing the reports of his expert, Charles Lacey, Dr. Bright argues that the Campus site would provide comparable coverage to the Ellicott City area.<sup>48</sup> Finally, Dr. Bright states that the Campus site would have none of the same historic and other

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<sup>41</sup> Bright Supplemental Petition at 2; Bright Petition at 3.

<sup>42</sup> Bright Supplemental Petition at 8.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *See* 36 C.F.R. §§ 800.4, 800.5.

<sup>45</sup> *See* Maryland SHPO January 8, 2001 letter (identifying the Church Road-Sylvan Lane District as an eligible district and concluding the project would have an adverse effect on this site); Memorandum of Agreement at 1 (concluding that sites identified in the Memorandum of Agreement were the only sites “adversely affected”).

<sup>46</sup> Bright Supplemental Petition at 4-6; Bright Petition at 2-3.

<sup>47</sup> Bright Supplemental Petition at 4,5.

<sup>48</sup> *Id.* at 4-6.

environmental effects as the District Court site.<sup>49</sup> Preservation Howard County similarly argues that the analysis of the Campus site as an alternative was insufficient. We disagree.

16. The subject of constructing the tower at the Campus Site has been frequently discussed throughout our consideration of this matter. Maryland DBM and Howard County DPW have offered substantial testimony, including original documentation from their contractor, Motorola Corporation, tending to show that the Campus site is insufficient for their needs.<sup>50</sup> Charles Lacey, on behalf of Dr. Bright, argues that the Campus site would afford adequate coverage to the target area.<sup>51</sup> After reviewing certain documentation supplied by Howard County,<sup>52</sup> however, he notes that, at its originally proposed height of 340 feet, there might be an interference problem at the Campus site.<sup>53</sup> He further notes that Maryland DBM, while initially choosing this site, elected instead to use the District Court site.<sup>54</sup>

17. The analysis conducted by Division staff explains why Maryland DBM abandoned the Campus site and why it is not a satisfactory alternative. A 340-foot tower at the Campus site would be inadequate to serve the multiple needs to be addressed by the proposed construction. In particular, due to topography, a 340-foot tower at the Campus site would not provide adequate signal strength for public safety coverage in the Ellicott City historic district. These needs could only be satisfied at the Campus site by a 500-foot tower. However, antennas at this height would encounter interference caused by distant co-channel signals, which itself might compromise the health and safety of Ellicott City residents, and would create interference to distant signals.<sup>55</sup> In addition, as Preservation Howard County concedes, the Campus site would require additional expense in the form of longer fiber optic cable connections.<sup>56</sup> We also note that the record does not permit us to conclude with certainty there are no environmental or historic preservation issues in connection with possible construction at the Campus site. In sum, the petitioners have offered nothing to persuade us that the Campus site is a reasonable alternative to the District Court site, or that further investigation is necessary.

18. Dr. Bright and Preservation Howard County also argue that the mitigation measures adopted in the Memorandum of Agreement are inadequate to “minimize, mitigate and/or avoid” the adverse effect finding by the Maryland SHPO.<sup>57</sup> Trees planted near the site, Dr. Bright states, cannot possibly

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<sup>49</sup> *Id.* at 4.

<sup>50</sup> Letter from James N. Robey, Howard County Executive, to Dan Abeyta, Commercial Wireless Division (dated Mar. 12, 2001).

<sup>51</sup> Bright Supplemental Petition at 5; Bright Petition at 3.

<sup>52</sup> As explained in the Lacey analysis, Howard County, in response to a Freedom of Information Act request from the Patapsco Heights-Church Road Association, released documentation regarding the Campus Site. Lacey March 6, 2001 Study at 1.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> Memorandum to Consulting Parties dated June 26, 2001.

<sup>56</sup> Preservation Howard County Objection at 2.

<sup>57</sup> Bright Supplemental Petition at 3; Bright Petition at 2.



buffer the tower's impact on the neighborhood nor avoid the tower's intrusive lights.<sup>58</sup> Reasonable mitigation measures suggested by the parties were ignored, he argues, resulting in a tower that completely disrupts the environment of the historic district.<sup>59</sup> Preservation Howard County argues that the Commission should require Maryland DBM to include in the environmental assessment the amount of revenue it will save if it constructs at the District Court site, and then use this revenue to promote historic preservation in the County.<sup>60</sup> Preservation Howard County also argues that the environmental assessment has to consider that the proposed tower is a controversial matter in the community.<sup>61</sup>

19. During the course of the February 23, 2001 public meeting, during the public comment process, and before and during the various teleconferences, mitigation measures were solicited, and always considered by the Commission and the other parties involved. While it is important for all mitigation measures to be considered, there is no requirement that all of them be adopted as part of a Memorandum of Agreement. Here, the Maryland SHPO, the Commission, Maryland DBM and Howard County DPW agreed to a reasonable solution under the circumstances. We conclude that neither petitioner suggests additional mitigating measures that would better address any adverse effects of the project. In particular, we consider unwarranted and beyond the scope of mitigation Preservation Howard County's suggestion that Maryland DBM devote the money that it would have spent to construct at the Campus site to historic preservation. In addition, to the extent that the environmental assessment fails to address the controversial nature of this proceeding, we note that the Division has reviewed the news articles identified by Preservation Howard County and incorporates them into the record of this proceeding.

20. Finally, Dr. Bright raises certain challenges to the environmental assessment that are not related to historic preservation. Specifically, Dr. Bright argues that the environmental assessment fails to address the adverse effect caused by the tower's lighting and the adverse impact on the community caused by radio frequency emissions from transmitters at the tower site.<sup>62</sup> However, the Commission's rules require the filing of an environmental assessment only when high intensity white lights are to be employed in a residential neighborhood.<sup>63</sup> Here, the tower is to be equipped with a dual medium-intensity lighting system,<sup>64</sup> not high intensity white lights, and will employ the least intrusive lighting permitted by the FAA in terms of candela (luminescence) and number of light tiers.<sup>65</sup> With respect to radio frequency emissions, the Maryland DBM Environmental Assessment certifies compliance with the Commission's rules, and we

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<sup>58</sup> *Id.*

<sup>59</sup> Bright Supplemental Petition at 7-9.

<sup>60</sup> Preservation Howard County Objection.

<sup>61</sup> *Id.* at 1.

<sup>62</sup> Bright Supplemental Petition at 10,11; Bright Petition at 3.

<sup>63</sup> 47 § C.F.R. 1.1307(a)(8).

<sup>64</sup> See Maryland DBM Application question 38; FAA study number 00-AEA-3082-0E (dual medium intensity lighting; white lights by day and red lights by night)

<sup>65</sup> See Memorandum of Agreement at 3.

have no reason to believe that the Commission's radio frequency emissions guidelines will be exceeded.<sup>66</sup> Therefore, we find that the facility will have no significant environmental impact in either of these respects.

21. An Environmental Impact Statement is required only when an undertaking will have a significant effect upon the quality of the human environment.<sup>67</sup> Because we find no adverse impact caused by lighting or radio frequency emissions, and because the adverse effect upon historic sites will be mitigated, an Environmental Impact Statement need not be prepared for this project. We therefore reject Dr. Bright's argument to the contrary.<sup>68</sup>

#### B. Procedural Arguments

22. In addition to his substantive challenges to the environmental assessment, Dr. Bright contends that he and other members of the public were denied due process because no draft environmental assessment was prepared upon which they could comment;<sup>69</sup> they were not notified, except via the Commission's Universal Licensing System ("ULS") network, that the environmental assessment had been filed;<sup>70</sup> and the extension of time afforded the parties herein was too short to be meaningful.<sup>71</sup> Moreover, he argues, due process was not afforded to the parties because the Advisory Council did not participate in the negotiation of the Memorandum of Agreement.<sup>72</sup> We disagree.

23. Dr. Bright and other members of the public have had ample opportunity to participate throughout the process surrounding this proposed tower. As discussed above, Dr. Bright participated in numerous meetings and teleconferences, and filed pleadings, during the negotiation of the Memorandum of Agreement and prior to filing of the environmental assessment. In the course of this process, he had the opportunity to address virtually all of the issues later raised in the environmental assessment. Nothing in the Commission's rules or guidelines of the Council on Environmental Quality ("CEQ") requires the Commission to publish a draft environmental assessment as part of this preliminary process. Moreover, once the environmental assessment was filed, we promptly issued a public notice establishing a 30-day comment period and made the filing available on ULS. This 30-day comment period is clearly consistent with CEQ guidelines and is sufficient here. Moreover, nothing in the rules of the Commission nor the CEQ requires individual notice to members of the public when an environmental assessment is filed. Indeed, we note that the Memorandum of Agreement, with which Dr. Bright was intimately familiar, placed him on

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<sup>66</sup> See 47 C.F.R. §§ 1.1307(b), 1.1310. The Maryland DBM tower will be used by public safety licensees. Each licensee is required to certify on FCC Form 601 (FCC Application for Wireless Telecommunications Bureau Radio Service Authorization) that the licensee's operation complies with the Commission's limits on radio frequency emissions.

<sup>67</sup> 47 C.F.R. § 1.1305.

<sup>68</sup> See Bright Supplemental Petition at 2.

<sup>69</sup> Bright Supplemental Petition at 7; Bright Petition at 3.

<sup>70</sup> Bright Supplemental Petition at 7,8.

<sup>71</sup> *Id.* at 1.

<sup>72</sup> *Id.*

notice that an environmental assessment was to be filed within “thirty days . . .”<sup>73</sup> Failure on Dr. Bright’s part to exercise due diligence is not justification for an extension of time.<sup>74</sup> Nonetheless, the Division granted Dr. Bright and other parties a 15-day extension of time in recognition that temporary technical irregularities with ULS may have hampered Dr. Bright’s ability to access the environmental assessment during the period immediately preceding the initial filing deadline.<sup>75</sup> Under the circumstances, this extension of time was more than enough to afford all the parties a fair opportunity to comment.

24. Finally, as required in the Advisory Council’s rules,<sup>76</sup> Commission staff informed the Advisory Council that negotiations in this matter were on-going.<sup>77</sup> After receiving this notice, the Advisory Council determined not to participate in the consultation.<sup>78</sup> The Advisory Council’s rules state that where the Advisory Council does not join in a consultation, the agency shall proceed directly with the consulting parties, as was done here.<sup>79</sup> Thus, non-participation by the Advisory Council is not a violation of Dr. Bright’s right to due process.

#### IV. CONCLUSION

25. Upon independent review of the environmental assessment, and based on the entire administrative record, we conclude that the construction and operation of the facilities proposed by Maryland DBM and discussed herein, as conditioned in the Memorandum of Agreement, will have no significant effect on the human environment (47 C.F.R. § 1.1308(d)) within the meaning of NEPA and Section 1.1307 of the Commission’s Rules, nor an adverse effect pursuant to NHPA. We further conclude that allowing Maryland DBM to construct a public safety tower in the Ellicott City, MD area would serve the public interest, convenience, and necessity. Accordingly, we grant the Maryland DBM application, and deny the petitions of Dr. Bright and Preservation Howard County.

#### V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 309(a), Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470f, Sections 1.1308 and 1.1312, and 17.4 of the Commission’s rules, 47 C.F.R. §§ 1.1308, 1.1312, 17.4 and Part 800 of the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. §§ 800.1-800.16, that the application for antenna structure registration at 3451 Courthouse Drive, Ellicott City, Maryland, filed by Maryland DBM, IS HEREBY GRANTED.

27. IT IS FURTHER ORDERED that the Division finds the proposed antenna structure will

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<sup>73</sup> Memorandum of Agreement at 4,5.

<sup>74</sup> See Kunze June 26, 2001 letter.

<sup>75</sup> *Id.* We note that ULS is utilized by thousands of Commission customers on a weekly basis.

<sup>76</sup> See 36 C.F.R. § 800.6(a)(1).

<sup>77</sup> See Footnote 28, *supra*.

<sup>78</sup> See 36 C.F.R. § 800.6(a)(1)(iii) and Appendix A.

<sup>79</sup> See 36 C.F.R. § 800.6(a)(1)(iv), (b)(1).

have no significant impact on the Ellicott City community.

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

29. IT IS FURTHER ORDERED, pursuant to Section 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(2), that the petitions to deny the application filed by Richard D. Bright and by Preservation Howard County ARE HEREBY DENIED.

30. 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