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

In re Applications of	)	
White Park Broadcasting, Inc.	)	FRN: 0013319074
For Modification of Facilities for Stations	)	
KBEN-FM, Basin, Wyoming	)	Facility ID No. 165998 File No. BMPH-20070716ABY
KWHO(FM), Cody, Wyoming	)	Facility ID No. 165999 File No. BMPH-20070828AAV
KROW(FM), Lovell, Wyoming	)	Facility ID No. 164288 File No. BPH-20080219ALX

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 2009 **Released: March 23, 2009**

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. We have before us the captioned applications (collectively, the "Applications") of White Park Broadcasting, Inc. ("White Park") for minor modification of construction permit for its authorized but unbuilt stations KBEN-FM, Cowley, Wyoming (the "KBEN-FM Application") and KWHO(FM), Cody, Wyoming (the "KWHO Application"), and for minor modification of the constructed, licensed facilities of station KROW(FM), Lovell, Wyoming (the "KROW Application"). Also before us are (1) an "Informal Objection and Request for Hearing Designation Order" (the "KBEN/KWHO Objection") filed by Legend Communications of Wyoming, LLC ("Legend") on September 20, 2007, and a "Supplemental Informal Objection" ("Supplement") to the KBEN-FM and KWHO(FM) Applications filed by Legend on February 29, 2008;[1] (2) an Informal Objection (the "KROW Objection") to the KROW Application, and (3) related responsive pleadings.[2] Finally, we have before us two separate responses to a staff inquiry

[1] The Informal Objection and Supplement also contest an application by White Park for modification of the construction permit for Station KROW(FM), Lovell, Wyoming, File No. BMPH-20070705AFI (the "2005 KROW Application"). As noted, infra, on January 25, 2008, the staff dismissed that application at the request of the applicant, subsequently dismissing the Objection as it related to that application as moot. We address a subsequently filed application for minor modification to the constructed, licensed facilities of that station, (the "KROW Application") and the Informal Objection to that application (the "KROW Objection") herein.

[2] These include: White Park's November 1, 2007, Opposition to the Informal Objection; Legend's November 13, 2007, Reply to that Opposition, and White Park's December 31, 2007, "Response" to the Reply. Additionally, with respect to the Supplement, White Park filed an Opposition on February 4, 2008, to which Legend replied on February 29, 2008. White Park filed an Opposition to the KROW Objection on March 21, 2008, to which Legend filed a Reply on April 2, 2008. Legend filed an "Informal Objection to Amendments, Reply to Letters, and Continued Request for Hearing Designation Order" on August 6, 2008 ("Objection to Amendments"). White Park filed an Opposition to that pleading on August 22, 2008 ("Opposition to Objection to Amendments"), to which Legend filed a Reply on September 5, 2008 ("Reply to Opposition to Objection to Amendments"). White Park filed a "Petition for Leave to File Response to Reply" and a "Response to Reply" on September 19, 2008.

letter dated April 28, 2008 (the "*Inquiry Letter*"), filed on June 17, 2008, and June 29, 2008, regarding the effects of the proposals on the quality of the human environment. For the reasons set forth below, we: (1) find that no further environmental processing is warranted; (2) grant the KBEN/KWHO Objection and KROW Objection to the extent indicated herein, and otherwise deny them; (3) admonish White Park for its apparent willful violation of Section 1.17 of the Commission's Rules (the "Rules"), and (4) grant the Applications.

II. BACKGROUND

2. White Park was the successful bidder in FM Auction No. 37 for an FM frequency in Lovell, Wyoming,[3] and it was the successful bidder in FM Auction No. 62 for several FM frequencies, including Basin and Cody, Wyoming.[4] White Park's subsequent "long-form" applications for those frequencies were granted by the staff in 2005 (Lovell) and 2006 (Basin and Cody).[5] In July of 2007, White Park filed the subject application for KBEN-FM, proposing to relocate the station from Basin to Cowley, Wyoming, and change the station's transmitter site and technical facilities. Slightly more than one month later, White Park applied to change KWHO(FM)'s frequency from Channel 244C2 (96.7 MHz) to 266C2 (101.1 MHz) and change the station's transmitter site and technical facilities. The Applications propose to collocate the KBEN-FM, and KWHO(FM) antennas on a new 60.5-meter tower to be constructed on McCullough Peak in Park County, Wyoming.[6]

3. Also in July of 2007, White Park filed an application to relocate the transmission facilities of KROW(FM) to the same tower on McCullough Peak proposed for the KBEN-FM and KWHO(FM) antennas.[7] On December 27, 2007, it filed an application to move KROW(FM) to a new transmitter site, requesting dismissal of the 2007 KROW Application.[8] The staff dismissed the 2007 KROW Application and granted the 2008 KROW Application on January 25, 2008.[9] White Park constructed the KROW(FM) facility as authorized and filed an application for covering license on February 14, 2008.[10] Five days later, White Park, in the KROW Application, proposed essentially the same facilities specified in the 2007 KROW Application, *i.e.,* the relocation of KROW(FM) to McCullough Peak on the same tower as that proposed by KBEN-FM and KWHO(FM).

4. The KBEN/KWHO Applications. In the KBEN-FM and KWHO Applications, White Park certified that the proposal was excluded from environmental processing under Section 1.1306 of the Rules, *i.e.*, that the proposed facility would not have a significant environmental impact and complies with the maximum permissible radiofrequency radiation ("RFR") exposure limits for controlled and uncontrolled environments.[11] Each Application contained an explanatory Exhibit specifically addressing compliance with the Commission's RFR exposure guidelines and stating that:

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[3] *See FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Deadlines Established*, Public Notice, 20 FCC Rcd 1021 (MB 2004), Attachment A.

[4] *See Auction of FM Construction Permits Closes, Winning Bidders Announced for Auction No. 62*, Public Notice, 21 FCC Rcd 1071 (MB 2006), Attachment A.

[5] *See* Construction Permit Nos. BNPH-20050103AAG (Lovell) (granted on March 9, 2005), and BNPH-20060310AAG (Basin) and BNPH-20060310AAH (Cody), both of which were granted on June 28, 2006.

[6] White Park indicates, without elaboration, that there are two other antenna towers in the area and that the site constitutes a "de facto antenna farm." Opposition at 2-3.

[7] *See* File No. BMPH-20070705AFI (the "2007 KROW Application").

[8] *See* File No. BMPH-20071228AAF (the "2008 KROW Application").

[9] *See Broadcast Applications*, Public Notice, Report No. 46662 (Jan. 30, 2008) pp. 2, 9.

[10] *See* File No. BLH-20080214AFB. The staff granted the uncontested license application on March 14, 2008.

[11] *See* Applications, Section III-B, Item 18.

> The location of the transmitter site is near an existing tower with no significant sources of rf radiation and does not fall into any of the categories listed in Sections 1.1307(a)(1) through 1.1307(a)(3), and Sections 1.1307(a)(5) through 1.1307(a)(7) of the Commission's Rules; the proposed operation will not involve utilization of high intensity white lights described in Section 1.1307(a)(8) of the Rules.
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> With respect to conformity with the requirements of Section 1.1307(a)(4) of the Rules, the tower structure will not be located in a recreational area frequented by the public. The proposed location is excluded from environmental processing based on the tentative conclusion that there are no properties of historical significance in the area of potential effects, and that the proposed operation therefore will not have an impact on historical properties.[12]

5. In the KBEN/KWHO Objection, Legend states that White Park's affirmative certifications that the proposed facilities were excluded from environmental processing appear to be false because White Park did not have a basis for so certifying. Citing the FCC Form 301 Instructions and Worksheet #3 included in those Instructions,[13] Legend states that, in order to make an affirmative environmental certification, an applicant is required to examine eight factors, spelled out on Worksheet #3, and must submit an Environmental Assessment pursuant to Section 1.1311 if it answers "Yes" to any of them. Legend continues that, in order to answer each of these questions, applicants are required to perform certain "due diligence" with respect to the proposed tower site, which in some cases involves consulting with offices or agencies with expertise in certain areas. Legend states that, in order to make an affirmative certification in the Applications, White Park must "at the very least" have consulted with the Fish and Wildlife Service of the United States Department of the Interior ("FWS") regarding the possible effects of the proposals on endangered species, the Wyoming State Historic Preservation Officer ("SHPO") for the possible effect of the proposals on historic properties, and American Indian Tribes for the possible effects of the proposals on Native American Sacred sites. It states that it hired its own environmental consultant, who concluded that there is "no indication that [White Park] completed its due diligence process regarding FCC rules for . . . Section 7 consultation under the Endangered Species Act, . . . Section 106 of the National Historic Preservation Act, or Tribal Consultation. "[14] Thus, it claims, it appears that White Park falsely certified on the Applications that construction and operation of the

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[12] *See* Applications, Exhibit 31.

[13] The Instructions and Worksheet # 3 track the criteria listed in Section 1.1307(b). *See* FCC Form 301 Instructions for Section III, Part C. Worksheet # 3 specifically states as follows:

Commission grant of an application may have a significant environmental impact, thereby requiring an environmental Assessment (EA), if you answer "Yes" to any of the following 8 items:

1.	involves high intensity white lighting located in residential neighborhoods.	Yes	No
2.	is located in an officially designated wilderness area or wildlife preserve.	Yes	No
3.	threatens the existence or habitat of endangered species.	Yes	No
4.	affects districts, sites, buildings, structures or objects significant in American history, architecture, archaeology, engineering or culture that are listed in the National Register of Historic Places or are eligible for listing.	Yes	No
5.	affects Indian religious sites.	Yes	No
6.	is located in a floodplain.	Yes	No
7.	requires construction that involved significant changes in surface features (e.g., wetland fill, deforestation or water diversion).	Yes	No
8.	does not comply with the FCC established guidelines regarding exposure to PT electromagnetic fields as described in OFT Bulletin 65.	Yes	No

[14] Informal Objection at 4-5 and Attachment 3, Letter to Susan K. Patrick from Environmental Resources Management, at 3. ERS states that it: (1) contacted the FWS' Cheyenne Field Office, which has jurisdiction over

proposed facilities will not have a significant environmental impact without performing the due diligence necessary to make this certification. It therefore requests that the Commission "engage in fact finding" and, if it confirms that White Park falsely certified, designate the applications for evidentiary hearing to determine if White Park has the basic qualifications to be a licensee.[15]

6. In its Opposition, White Park indicates that:

> White Park's siting decision was the product of extensive research aimed at minimizing the impact of the new tower on the natural environment. In addition to undertaking its own scouting missions for a suitable site in Park County, White Park solicited the opinion of a local Wyoming official of the Bureau of Land Management ("BLM"), a federal agency responsible for managing significant portions of the land in Northern Wyoming, with respect to potential tower sites in the area, and the Park County Planning and Zoning Commission, the local land use authority.[16]

White Park attaches a declaration from its President, Edward F. Flanagan, which makes unsupported and conclusory assertions regarding compliance with the factors set forth in Section 1.1307(b) of the rules.[17] For example, it states "based upon White Park's own research and giving substantial consideration to [the recommendation of the BLM's Duane Feick]," that:

- McCullough Peak is not a wilderness area;[18]
- There are no endangered species in the vicinity of McCullough Peak and if there were they have already been disturbed by the construction of the two existing towers;[19]
- There is no impact on historic sites [because] McCullough Peak is a mountain peak that is far away from any populated areas and has no historic sites on or near it . . . If there ever were historic sites there, the existing telecommunications users have long ago destroyed them;[20]
- There are no Native American Religious sites on McCullough Peak;[21]

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the project area, and that FWS' search of its data base revealed no record of any tower-related projects submitted for its review at the coordinates specified in the Applications; (2) contacted the Wyoming State Historic Preservation Office, and was informed that there were no Section 106 projects submitted for review for the project location; and (3) consulted the Commission's Tower Construction Notification System ("TCNS") and determined that 14 tribal governments expressed interest in the site location proposed in the Applications, including the Fort Peck Tribes, and that no notification of any of these tribes appears to have occurred.

We acknowledge that these representations concerning ERM's contacts with the FWS and Wyoming SHPO constitute hearsay statements recounting the representations made by ERM as to its contacts with FWS and SHPO employees. However, hearsay evidence may be admissible in administrative proceedings if there are some indicia of reliability. S*ee, e.g. Echostar Communications Corporation v. FCC,* 292 F.3d 749, 753 (D.C. Cir. 2002); *Wine Country Radio*, Memorandum Opinion and Order, 11 FCC Rcd 2333, 2334 (1996). The insufficiency of White Park's response, described in detail in Paragraphs 6 and 26 below, lend significant credence to Legend's allegations.

[15] Informal Objection at 7.

[16] Opposition at 3.

[17] Opposition, Exhibit A, Declaration of Edward F. Flanagan.

[18] Declaration of Edward F. Flanagan, ¶ 8.

[19] *Id*. at ¶ 9. Mr. Flanagan further states that "the BLM's recommendation of the site to White Park was based on the absence of any concerns over harming endangered species." *Id.* White Park 's submission does not include a declaration from Duane Feick or any documentation that might corroborate BLM's recommendation. Nor does it reflect that.Flanagan consulted FWS directly.

[20] *Id.* at ¶ 10.

[21] *Id.* at ¶ 11.

- There is no possibility of McCullough Peak being in a flood plain. The site on McCullough Peak sits 1400 feet above the Shoshone River, at a height of 6200 feet above sea level;[22] and
- There is no intended impact to surface features. White Park will not disturb or move any soil but will merely install anchors, a tower base, and prefabricated building.[23]

7. White Park also attaches a declaration from a White Park employee, Michael Schutta, who describes his discussions with Mr. Feick and the Park County Planning and Zoning Commission. He states that "at no time" was he advised by any public official or private party that it would not be advisable to locate a new transmission tower on McCullough Peak, that BLM manager Mr. Feick identified that site as the "best available" due to its current use as a communications site, and that he was told by the representative of the Park County Planning and Zoning Commission that they had no special concerns about the site. He concludes that "the location of the tower for the White Park stations will, like the other two towers at the McCullough Peak antenna farm, have no adverse effect on the environment and surrounding land."[24]

8. On December 27, 2007, White Park amended the Applications to provide a letter, dated December 20, 2007, from the Wyoming SHPO concurring with the proposed finding that there are no historic properties that will be affected by the proposed tower.[25] Legend's Supplement argues that the very tender of this amendment indicates that White Park has been less than candid in making its certifications. If it truly believed that its proposals would have no significant impact on the environment, Legend asks rhetorically, why would it later hire a reputable environmental consultant, TRC Environmental Corporation ("TRC"), and consult with the Wyoming SHPO?[26] Legend further argues that the Applications are not ripe for processing because White Park has yet to demonstrate that it performed "other due diligence" such as consultation with the FWS and Indian Tribes.[27] In its Opposition to this pleading, White Park states that its amendment containing the SHPO letter is not an "admission" at all, but rather an "urgent reminder" to the Commission that Legend's claims are without merit and that the site proposed in the Applications does not raise any environmental concerns.[28] It reiterates that, prior to filing the Applications it "extensively investigated and confirmed the suitability of the proposed tower site," and claims that "the same set of facts that were true then are true now. According to White Park, the proposed site satisfies all of the conditions set forth in Section 1.1307(a)(1)-1.1307(a)(8) of the Commission's Rules."[29]

9. The KROW Application. In the KROW Application, White Park makes a slightly different representation, taking into account the Wyoming SHPO concurrence:

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[22] *Id.* at ¶ 12.

[23] *Id.* at ¶ 13.

[24] Opposition, Exhibit B, Declaration of Michael R. Schutta, at ¶ 13.

[25] *See* Applications, Amendment of December 27, 2007, at Attachment 31.

[26] Supplement at 4-5. Legend raises similar arguments in its Objection to Amendments. Specifically, Legend argues that White Park's performance of due diligence undercuts its argument that the proposed site is located on an antenna farm. In opposition to that pleading, White Park argues that it continues to believe that the "antenna farm exception" (discussed infra) applies to the proposed site, but that, out of an "abundance of caution" and in an effort to shorten the Commission's review process, it also chose to conduct environmental due diligence. Opposition to Objection to Amendments at 7-8.

[27] *Id.* at 5.

[28] Opposition to Supplement at 2-3.

[29] *Id*. at 3.

> White Park submits that the proposed transmitter site is categorically excluded from environmental processing under the Commission's Rules. Attachment A to this Exhibit 31 evidences that two antenna supporting structures are located in immediate proximity to the antenna supporting structure proposed for KROW. It is White Park's belief that these structures constitute an "antenna farm" because they involve multiple antenna supporting structures that are located in a "clustered" arrangement. Assuming an "antenna farm" exists, the site is categorically excluded from environmental processing under the provisions of Note 3 to Section 1.1306 of the Commission's Rules.
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> In an abundance of caution, owing to the absence of any Commission precedent as to the minimum criteria for an "antenna farm," White Park has reviewed the potential environmental impact of the proposed antenna supporting structure. Based on a review by White Park personnel and a number of consultants retained by White Park, White Park has determined that there is no need for the preparation of an Environmental Assessment or further environmental processing by the Commission as this proposed site, which combines antennas for three stations in the vicinity of existing towers, minimizes any harmful impact on the environment.
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> White Park wishes to make particular note that it has determined that the proposed transmitter site, immediately adjacent to federally managed land on which an existing antenna supporting structure is located, will not affect any historical property of national significance. Appended hereto as Attachment B is a notice from the Wyoming State Historic Preservation Officer confirming the absence of any impact on such properties. Additionally, White Park knows of no impact of this proposal on American Indian religious sites.[30]

10. In its Objection to the KROW Application, Legend acknowledges the Wyoming SHPO's concurrence with White Park's conclusion that no historic properties would be affected by the location of the tower on McCullough Peak, but it argues that White Park's "determination" that there is no need for preparation of an EA does not appear to be based on any objective criteria or proper due diligence.[31] For instance, it claims, White Park has not submitted evidence that the proposed tower would not impact threatened or endangered species or their habitats.[32] It also argues that there is no evidence that White Park has consulted with Indian Tribes as required by Section 1.1307(a)(5) of the Rules, as the Wyoming SHPO's letter is silent on this matter and White Park's statement that "it knows of no impact" of the proposal on American Indian religious sites is unsupported by objective evidence.

11. In its Opposition, White Park states that, once again, Legend has failed to point to any obligation that White Park was required – and failed – to satisfy. It states that the tower is in an antenna farm and is therefore categorically excluded from environmental processing. Even assuming *arguendo* that the proposed site is not in an antenna farm, White Park argues, its own independent research, the advice of BLM, consultation with the Wyoming SHPO, the submission of an FCC Form 620 to the

[30] *See* KROW Application, Exhibit 31.

[31] KROW Objection at 4. Legend further argues that the proposed site cannot be considered an antenna farm, given the distances between the two existing towers and their differences in height. *See* Reply to Opposition to Objection to Amendments.

[32] Legend comments that although the Commission's rules do not *require* White Park to contact FWS, White Park must objectively determine that the proposed tower would not affect threatened or endangered species and to date it has provided no objective evidence that it has done so. "The traditional and easiest method for doing this," opines Legend, is consultation with the FWS. *Id.* at 5.

Commission,[33] and the engineering exhibits to the KROW Application all confirm the environmental suitability of the site and provide a sound basis for White Park's certifications.[34] With respect to Indian Tribes, White Park states that Legend did not make an effort to determine what, if any, tribe might have a religious site on McCullough Peak, whereas "White Park's investigation determined that there were no Indian religious sites on McCullough Peak and its communications with Indian Tribes through the Commission's Tower Construction Notification System . . . have not resulted in any objections."[35]

12. Because it was unclear from the pleadings whether the certifications in the Applications had a reasonable basis, the staff sent the *Inquiry Letter* to White Park, requesting White Park provide the specific foundation for its conclusions concerning each of the environmental factors listed in Section 1.1307(a)(1)-(a)(7) when each of the Applications was originally filed.[36] In the *Inquiry Letter,* the staff also invited White Park to provide a discussion and case precedent for its argument that the McCullough Peak site is a "*de facto* antenna farm" exempting the Applications from environmental processing. White Park provided the justification for its position that the McCullough Peak site is an antenna farm on June 17, 2008 (the "*Antenna Farm Letter*"), and it provided its justification for the environmental certifications on June 20, 2008 (the "*Certification Letter*").

III. DISCUSSION.

13. *Antenna Farm*. White Park Argument. In its "white paper" in support of its argument that McCullough Peak is a *de facto* antenna farm and should be categorically excluded from environmental processing, White Park observes that "*de facto*" antenna farms have long been in existence, and the Commission first formally addressed the concept of an "antenna farm" in 1967 in the context of air safety.[37] It states that, in the *Antenna Farm Order,* the Commission defined an "antenna farm as "a geographical location, with established boundaries, designated by the Federal Communications Commission, in which antenna towers with a common impact on aviation may be grouped,"[38] and it established specific procedures for officially designating antenna farms.[39] White Park states that federal courts at that time acknowledged that the concept of an "antenna farm" is simple and straightforward: "there is nothing very technical or difficult about the concept of 'antenna farms': they are simple aggregations of antennas of more than one broadcaster into a relatively limited area."[40] White Park states that in fact the Commission itself has recognized an antenna farm consisting of two towers outside the city limits of Minneapolis and St. Paul;[41] it argues that in so doing, and in fact to this day, the

[33] FCC Form 620 is designed to be submitted initially to the State Historic Preservation Officer, not to the Commission, and there is no reason to submit the form to the Commission if the SHPO concurs in a determination that no historic properties will be affected by the proposal. *See Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission*, § 7A. We have no record of receiving White Park's Form 620 for the KROW(FM) Application.

[34] Opposition at 3.

[35] *Id.* at 4.

[36] It was not necessary to request an explanation with respect to Section 1.1307(a)(8) because on the face of the Applications the towers will not be equipped with high intensity lights.

[37] White Park cites *Amendment of Parts 1, 17, and 73 to Provide for the Establishment and Use of Antenna Farm Areas,* Report and Order, 8 FCC 2d 559 (1967) ("*Antenna Farm Order*"). *Antenna Farm Letter* at 1.

[38] *Id.*, citing *Antenna Farm Order,* 8 FCC 2d at 565 ¶ 14, *codified at* 47 C.F.R. § 17.2(b).

[39] *See* 47 C.F.R § 17.8, "Establishment of Antenna Farm Areas." Under these procedures, antenna farms are to be formally designated *via* rulemaking. White Park observes, correctly, that the Commission has not officially designated any antenna farms using these procedures. *Antenna Farm Letter* at 6.

[40] *Antenna Farm Letter* at 2, citing *Marsh Media v. FCC,* 436 F.2d 132, 134 (D.C. Cir. 1970).

[41] *Antenna Farm Letter* at 2, citing *WTCN Television, Inc.,* Decision, 14 FCC 2d 870 (Rev. Bd. 1968), *aff'd, WTCN Television Inc.,* Memorandum Opinion and Order, 17 FCC 2d 909 (1969).

Commission has never specified any "threshold requirements (such as minimum distance between towers or a minimum number of towers) for *de facto* antenna farms."[42]

14. White Park states that the Commission revisited the concept of the "antenna farm" several years later when it engaged in a rulemaking proceeding to implement the National Environmental Policy Act of 1969 ("NEPA").[43] In so doing, White Park argues, the Commission sought to give the concept utility beyond the specific FAA context discussed in the *Antenna Farm Order*, ultimately concluding that:

> New FM and TV antenna towers can also be located in an "antenna farm" (*i.e.*, an area in which similar towers have already been clustered) and, when so located, are unlikely to alter the character of that area. For these reasons, authorizations involving use of existing structures or location of a new tower in an antenna farm are considered minor actions (requiring no environmental processing).[44]

White Park comments that the Commission again did not associate any numerical or distance requirements with the concept of the *de facto* antenna farm.[45]

15. White Park further indicates that the Commission's environmental rules assumed their current form in 1986, when the agency amended those rules to reflect revisions in federal oversight rules promulgated by the Council on Environmental Quality.[46] The new rules "were designed primarily to reduce paperwork and delays by eliminating unnecessary environmental processing and to improve the quality of agency decisions that affect the environment," and the Commission stated that "the principal effect of the rules we are adopting is to reduce the categories of Commission actions which require environmental processing."[47] Except for cases involving "sensitive site areas (as specified in Section 1.1307(a) of the Rules), high-intensity lighting, and RF radiation," the Commission wrote, "environmental processing will generally not be required."[48] White Park points specifically to Note 3 of Section 1.1306, which states that applicants proposing to locate in an antenna farm are categorically excluded from environmental processing unless the provisions of Section 1.1307(b) of the Rules (regarding RF radiation exposure guidelines) are implicated:

> The construction of an antenna tower or supporting structure in an established "antenna farm": (*i.e.,* an area in which similar antenna towers are clustered, whether or not such area has been officially designated as an antenna farm) will be categorically excluded unless one or more of the antennas to be mounted on the tower or structure are subject to the provisions of § 1.1307(b) and

[42] *Antenna Farm Letter* at 2.

[43] 42 U.S.C. §§ 4321-4335.

[44] *Antenna Farm Letter* at 2-3, citing *Implementation of the National Environmental Policy Act of 1969*, Report and Order, 49 FCC Rcd 1313, 1324 (1974).

[45] *Antenna Farm Letter* at 3.

[46] *Antenna Farm Letter* at 3, citing *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, Memorandum Opinion and Order, 60 RR 2d 13 (1986) ("*1986 Environmental Rules Revision*").

[47] *Antenna Farm Letter* at 3, citing *1986 Environmental Rules Revision* at ¶¶ 2, 20.

[48] *Antenna Farm Letter* at 4, citing *1986 Environmental Rules Revision* at ¶ 13.

> the additional radiofrequency radiation from the antenna(s) on the new tower or structure would cause human exposure in excess of the applicable health and safety guidelines cited in § 1.1307(b).[49]

White Park indicates that the Commission essentially has retained the definition of "antenna farm" devised in the 1967 *Antenna Farm Order*, but expanded it into broader contexts while simultaneously stripping it of any requirement that an antenna farm be formally designated by the Commission.[50]

16. Examining the Commission's definition of "antenna farm" – "an area in which similar antenna towers are clustered, whether or not such area has been officially designated as an antenna farm" – White Park identifies two "definitional elements": that there must be more than one tower, and the towers must be "clustered" or grouped together with a number of similar things in association or physical proximity.[51] White Park states that no reported decision has concluded that any criteria other than "two or more towers located near each other" are necessary for an "antenna farm" determination; the relatively few references to "antenna farms" in reported Commission decisions "hew to the same plain-language, common-sense approach."[52] In those instances where the question of the existence of an antenna farm has arisen, states White Park, the Commission has declined to set numerical or distance limits, but instead has recognized that two or more towers located in close proximity constitute an antenna farm.[53] White Park then posits that "if two or more towers exist close or near to each other then they constitute an 'antenna farm.'"[54] It provides an Exhibit providing a diagram of the McCullough Peak site, indicating the two constructed towers and White Park's proposed third tower. One of the constructed towers (the "Qwest Tower") is 500 feet from the proposed tower, and the other (the "Tri State Generation Tower") is 1000

[49] *Antenna Farm Letter* at 5, citing 47 C.F.R. § 1.1306 Note 3.

[50] *Antenna Farm Letter* at 6.

[51] *Antenna Farm Letter* at 7, citing Webster's Third New International Dictionary (1976).

[52] *Id.* White Park relies on the following: *Procedures for Reviewing Request for Relief from State and Local Regulations Pursuant to Section 332(c) of the Communications Act of 1934; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities*, Report and Order, 12 FCC Rcd 13494, Appendix C, Part VI, ¶ 6 (1997) ("We have always allowed multiple transmitter sites, *i.e.,* antenna farms, to pool their resources and have only one study done for the entire site."); *Definition of Congested Areas in the Broadcast Auxiliary Services and the Cable Television Relay Service*, Memorandum Opinion and Order, 6 FCC Rcd 5658, 5659 (1991) (". . . the studio-transmitter links are more or less parallel and aimed toward a common mountaintop transmitter site or 'antenna farm'. . . . "); *First Century Broadcasting, Inc.,* Memorandum Opinion and Order, 100 FCC 2d 761, 762 (1985) ("In designating the mutually exclusive applications . . . for comparative hearing, the Bureau declined to specify an environmental issue, because it found the proposed site to be near several other antenna towers, thereby making grant of [the] proposal a minor environmental action . . . (antenna farm exception)"); *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Memorandum Opinion and Order, 11 FCC Rcd 15123, Appendix A, Part IV (1996) (" . . . in a few cases involving multiple transmitters at large antenna farms detailed measurement studies may be necessary").

[53] *Antenna Farm Letter* at 8. White Park cites *First Century Broadcasting,* 100 FCC Rcd at 768-769, where "the Commission found that a proposed location with 'several 90-foot towers' constituted an 'antenna farm,'" and *Canyon Area Residents for the Environment Request for Review of Action Taken Under Delegated Authority on a Petition for Environmental Impact Statement*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8160 (1999), in which "the Commission confirmed that an 'antenna farm' is premised on the existence of similar towers, once again evidencing that the crucial factor is two or more existing towers, just as in the case of McCullough Peak." *Id.*

[54] *Antenna Farm Letter* at 8.

feet from the White Park tower.[55] White Park concludes that this information is sufficient to demonstrate that McCullough Peak constitutes an antenna farm, and therefore the proposed tower is categorically excluded from environmental processing.[56]

17. Staff Analysis. White Park correctly traces the development of the concept of the "antenna farm" from its origin in the desire to improve air safety through to its expansion into the Commission's environmental rules. The location of a broadcast antenna in a proposed or existing antenna farm, as discussed below, also became a factor in evaluating requests for waiver of the Commission's spacing rules,[57] and much of what case law there is on the topic arose in the context of spacing rule waiver requests. It also is correct that: (1) the Commission has not formally designated any antenna farms using the procedures in Section 17.8 of the Rules; and (2) in discussing *de facto* antenna farms, the Commission has not imposed threshold requirements for number of towers and spatial proximity. However, in recognizing *de facto* antenna farms, the Commission has been guided by several principles. As our review of relevant case law, below reveals, we believe that reducing those cases to a statement that "if two or more towers exist close or near to each other then they constitute an 'antenna farm'" oversimplifies the Commission's analytic framework.[58]

- In *WTCN Television, Inc.,* cited by White Park, the Review Board found, in the context of a request for waiver of the Commission's spacing rules for television stations, that a two-tower site at Shoreview between Minneapolis and St. Paul constituted an antenna farm. The Review Board granted a spacing waiver for these two towers, finding the waiver would result in the public interest benefit of improved air safety because it would locate all tall television towers in the Minneapolis-St. Paul area at a single location. A waiver was necessary because there was no single location from which all Minneapolis/St. Paul stations could meet the Commission's spacing requirements.

[55] At the request of the staff, White Park supplemented its response to indicate that the Quest Tower height is 49 meters above ground level ("AGL"), and the height of the Tri State Generation Tower is 21 meters AGL. *See Letter to Marlene H. Dortch from Barry A. Friedman, Esq.* (Sep. 2, 2008).

[56] *Id.* at 9.

[57] *See Antenna Farm Order,* 8 FCC 2d at 566:

> [T]he establishment of antenna farms ... does not mean that the Commission will approve mileage shortages to accommodate a particular applicant to locate in such a farm, unless the public interest so indicates. However, if extraordinary reasons of aeronautical safety indicate that a particular antenna structure should be located within the antenna farm, the Commission may authorize a short-spacing to accommodate a particular antenna. Such an action will not be considered as a justification for the filing of other requests for short separations.

Under the spacing waiver policy, the three key elements to be considered in a licensee's request for waiver of the spacing rules were: (1) the suitability of the present site; (2) the availability of other non-short-spaced sites; and (3) consideration of all public interest factors concerning the short-spacing. The Commission considered an applicant's relocation to a *de facto* antenna farm to be a positive public interest factor. *See Edens Broadcasting, Inc.*, Decision, 2 FCC Rcd 689, 695 (Rev. Bd. 1987), *aff'd* 5 FCC Rcd 2576 (1990) ("*Edens Broadcasting*"), citing *Beasley Broadcasting of Philadelphia, Inc.*, Memorandum Opinion and Order, 100 FCC 2d 106, 109 n.6 (1985).

[58] The Commission and staff appear to have recognized several antenna farms without discussion or elaboration regarding the number or proximity of towers at those sites. *See, e.g.,* the "Bithlo" antenna farm outside Orlando, Florida, *Clermont and Cocoa, Florida*, Memorandum Opinion and Order, 5 FCC Rcd 6566 ¶ 5 (1990); the "Hallendale" antenna farm; the "Tucson Mountain" antenna farm, *Tucson Community Broadcasting, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 2625 (1990); and the Cheyenne Mountain antenna farm near Pueblo, Colorado, *Pueblo, Colorado*, Memorandum Opinion and Order, 11 FCC Rcd 19649 (1996).

After extensive hearings before the Federal Aviation Administration, the two towers were approved at heights of 2,349 feet above mean sea level ("AMSL").[59] Five Minneapolis-St. Paul area television stations applied to locate their antennas on the towers. In order to carry out the plan to have all local television stations operate from those tall towers and thus improve air safety, the Commission granted the applications on the condition that the antenna structures be made available to all present and future permittees and licensees of television stations in the Minneapolis-St. Paul market on a fair and equitable basis. In treating these towers as a proposed antenna farm, the Review Board took into account not only the close proximity of the two towers, but also the size, purpose (particularly the number of broadcast stations using the towers), and proximity of the towers.[60] Finally, it gave weight to the public interest benefit created by the two towers.

In *WTCN Television*, *Inc.,* the Review Board also recognized "*de facto* or informal antenna farms in important communities which have been established by the amicable efforts of licensees." It specifically referenced "the joint use of the Empire State Building by all of the New York City television stations, as well as FM stations and other services," as one of the best examples of a *de facto* antenna farm.[61] It also stated that "there are other examples such as Los Angeles [the Mt. Wilson site],[62] Baltimore, and Dallas-Fort Worth [the Cedar Hill antenna farm]."[63]

- In *Beasley Broadcasting of Philadelphia,*[64] again in the context of a request for waiver of the spacing rules (this time for FM stations), the Commission found that a *de facto* antenna farm existed in Roxboro, Pennsylvania, where there were 12 towers in an area of less than one-half square mile, six of which were taller than 1000 feet above ground level, plus a three-tower AM directional array.

[59] The cities of Minneapolis and St. Paul are approximately 850 feet AMSL. Thus, the *WTCN Television* towers were approximately 1500 feet above ground level.

[60] Specifically, the Review Board stated that "a common antenna farm constitutes the grouping of towers where multiple antenna or closely spaced antenna towers are located *for purpose of maximizing air safety while at the same time maximizing broadcast coverage to the public*." *WTCN Television, Inc.,* 14 FCC 2d 870 n.3 (emphasis added). The *WTCN Television* towers were subsequently recognized as a *de facto* antenna farm in *D&D Broadcasting, Inc.,* Memorandum Opinion and Order, 7 FCC Rcd 8082, 8083 (1992).

[61] *WTCN Television,* 14 FCC 2d 870 n. 3. *But see GAF Broadcasting Company, Inc.,* Hearing Designation Order, 8 FCC Rcd 1742, 1744-45 (MMB 1993) (proposal to mount broadcast antenna on the Chrysler Building in New York City, which would be visible to pedestrians, was not categorically excluded from environmental processing because the Chrysler Building is not an established "antenna farm" for broadcast antennas and the only antennas presently mounted on the structure were relatively small "whip type" private radio antennas that were not visible from the street level: "In this regard, the broadcast antenna which [the applicant] proposes to sidemount on the building differs from the private radio antennas presently located on the structure").

[62] *See, e.g., Radio One License, LLC,* Memorandum Opinion and Order, 21 FCC Rcd 14271 (2006) (Notice of Apparent Liability upheld for violations of RF radiation exposure limits at the "Mt. Wilson antenna farm").

[63] *See, e.g., Advanced Television Systems and Their Impact upon the Existing Television Broadcast* Service, Memorandum Opinion and Order on Reconsideration and Sixth Report and Order, 13 FCC Rcd 7418, 7607-08 (1998) ("Univision states that nearly every television station in the market operates from the Cedar Hill antenna farm, located between Dallas and Fort Worth.") The staff has also recognized a Houston-area antenna farm near Missouri City, Texas. *See, e.g., Paxson Houston License, Inc.*, Letter, 19 FCC Rcd 21816, 21817 (MB 2004).

[64] *Beasley Broadcasting of Philadelphia,* Memorandum Opinion and Order, 100 FCC 2d 106 n.4 (1985) ("*Beasley*").

- In *Edens Broadcasting*,[65] the Review Board found that waiver of the spacing rules would be inappropriate for a Tampa, Florida station, even considering its proposal to locate in the "Riverview" antenna farm outside Tampa. This site contained five towers taller than 1000 feet, another that is 915 feet tall, and for which the FAA had approved the addition of three more 1000-foot towers.

- In *First Century Broadcasting, Inc.,*[66] the Commission considered a proposal to increase the overall height of a television tower for KFCB(TV), Concord, California, from 90 to 140 feet above ground level on the North Peak of Mt. Diablo in Mt. Diablo State Park.[67] Among others, the Native American Heritage Preservation Project ("NAHPP") challenged the proposal on environmental grounds, arguing that "development of the [Mt. Diablo] mountain peak would have a significant religious and cultural impact on ten Native American tribes living in five states."[68] The Commission observed that:

> There are four other towers [on the North Peak of Mt. Diablo] ranging in height from 70 to 90 feet and in facing width from 18 to 48 inches. Some of the towers are guyed and one, that of the Standard Oil Company of California, supports nine parabolic antennas measuring between four and ten feet in diameter. In addition, although FCBI's 140-foot structure is the highest above ground level by 50 feet, another 90-foot tower further up the mountain is actually 26 feet above mean sea level higher than FCBI's.[69]

  The issue, according to the Commission, was "whether the added height and other changes are so great that the structure can no longer be considered similar to the others on the mountain." Citing the factors listed above, the Commission concluded that the proposed tower was still similar to the others in the area and therefore it properly qualified for the antenna farm exception.[70]

- Lookout Mountain near Golden, Colorado, was recognized by the Commission as "an 'antenna farm' that for many years has been the location for many radio and television towers for stations licensed to Denver and its surrounding areas."[71] By one account, there were as many as 30 separate communication towers located at Lookout Mountain, seven of them over 300 feet high, the tallest tower being approximately 850 feet above ground level.[72]

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[65] *Edens Broadcasting,* 2 FCC Rcd at 690.

[66] *First Century Broadcasting, Inc.,* Memorandum Opinion and Order, 100 FCC 2d 761 (1985).

[67] The proposal would replace the existing 90-foot structure with a 140-foot structure, consisting of a 90-foot tower and a 50-foot antenna, and increase its facing width at the base from 18 to 48 inches. *Id.* at 762.

[68] *Id.*

[69] *Id.* at n.4.

[70] *Id.* at 769.

[71] *Canyon Area Residents for the Environment Request for Review of Action Taken Under Delegated Authority on a Petition for an Environmental Impact Statement,* Memorandum Opinion and Order, 14 FCC Rcd 8152 (1999) ("*CARE*").

[72] *See* website of *Colorado City & Mountain Views,* http://www.citymtnviews.com/AntLMchart.php4 (last checked September 23, 2008).

> There are at least five tall towers supporting television and radio services, which five towers are to be replaced by a single 850-foot tower which will hold digital television transmission facilities of six Denver television stations, plus a number of FM station antennas.[73]

- In *Universal Broadcasting of Indiana, Inc.*,[74] the Commission rejected an applicant's request for waiver of the FM spacing requirements under the "designated antenna farm" exception then listed in Section 73.209(c) of the Rules. The Commission first indicated that there were no officially designated antenna farm areas. Citing *WTCN and Beasley*, the Commission then refused to consider the proposal to be located within a *de facto* antenna farm, writing that:

> > In marked contrast to the situation presented here, Beasley's inadequate coverage of its community of license was a significant factor, and the *de facto* antenna farm comprised twelve towers, six of which were 1,000 feet or higher, all located in an area less than a half mile square. Here, Universal's claim that its proposed site is an "antenna farm" because the local fire department has expressed an interest in using the same site lacks merit.[75]

18. As evidenced by the cases discussed above, the Commission has not prescribed any numerical or distance requirements with respect to the concept of *de facto* antenna farms. We disagree with White Park's assertion that the existence of two or more towers located within close proximity, standing alone, necessarily requires the Commission to conclude that the site constitutes an antenna farm. Indeed, case law and common sense both dictate that, in most instances, multiple towers of comparable height and physical appearance are needed to comprise an antenna farm.[76] In the one case in which the Commission has expressly concluded that two towers could constitute an antenna farm, the issue did not arise in an environmental context and the antenna farm designation was supported by special circumstances and conditions that are not present here. Specifically, *WTCN Television, Inc.* involved two 1500-foot towers on which five television stations, as well as some FM stations in the Minneapolis-St. Paul area, were to locate their facilities.[77] Consistent with the considerations that had led to the issuance of the *Antenna Farm Order*, the Review Board found that designation of this two-tower cluster as a *de facto* antenna farm would promote aeronautical safety.[78] Moreover, the applications were granted on the condition that the antenna structures be made available to all present and future television permittees and licensees in the Minneapolis-St. Paul area.

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[73] This tower, proposed by a consortium of Denver television stations called the Lake Cedar Group, encountered significant opposition on environmental grounds from local residents. *See generally CARE, supra.* Ultimately, Congress resolved the controversy, enacting legislation stating that any person that holds an approved FCC DTV construction permit for a tower located on Lookout Mountain may construct its tower if such tower is "of the same height or lower than the tallest existing analog broadcast antenna or tower at such location." *See* Pub. L. No. 109-466 (2006).

[74] *Universal Broadcasting of Indiana, Inc.*, Memorandum Opinion and Order, 102 FCC 2d 1457 (1986) ("*Universal Broadcasting*").

[75] *Id.* at 1459.

[76] *See Beasley*, 100 FCC 2d at 106 n.4 (12-tower antenna farm); *Edens Broadcasting,* 2 FCC Rcd at 690 (6-tower antenna farm); *First Century*, 100 FCC 2d at 762 (4-tower antenna farm). *See also* http://www.citymtnviews.com/AntLMchart.php4 (last checked September 23, 2008) (discussing 30-tower antenna farm at Lookout Mountain).

[77] *See also Universal Broadcasting*, 102 FCC 2d at 1457. There, the Commission rejected the licensee's argument that the proposed site was an antenna farm simply because another party also expressed an interest in using the site, finding that the licensee failed to demonstrate that the designation of the proposed site as an antenna farm would have public interest benefits.

[78] We note that at the time *WTCN Television, Inc.,* was decided, the Commission did not have environmental rules, so environmental effects were not considered in the decision.

19. Here, the physical traits and configuration of the existing and proposed towers are very different from those in *WTCN Television, Inc.* As described above, the Quest Tower is 500 feet from the proposed tower and 49 meters AGL, and the Tri State Generation Tower is 1000 feet from the proposed tower and 21 meters AGL. The proposed White Park tower, which will stand at 60.5 meters AGL, is almost 25 percent taller than the Quest Tower and over 50 percent taller than the Tri State Generation Tower. Moreover, no broadcast stations operate from this location, as the two existing towers serve two-way radio and telephone companies.[79] White Park has not demonstrated that local broadcasters are, or will be, required to use the McCullough Peak site in the future, or that other public benefits, such as those demonstrated in *WTCN Television, Inc.* and *Twenver, Inc*., which White Park also cites, would flow from designation of the site as a *de facto* antenna farm.[80] Given the paucity of towers at the site, the varying height and spatial separation between the towers, the fact that they are not used by any broadcast stations, and the lack of any special public interest considerations, we cannot conclude that the McCullough Peak site is a *de facto* antenna farm for purposes of our FM processing rules.[81] Accordingly, we find that White Park is not exempt from environmental processing under the "antenna farm exception."

20. *Environmental Certification*. White Park Argument. In responding to the staff inquiry regarding the basis for its certification in the Applications that the proposals were categorically excluded from environmental processing, White Park initially argues that it "exercised due diligence in evaluating the environmental impact of the proposed site" and has received a "no effect" determination from the Wyoming SHPO, no indications of interest from any Native American tribe, and a "no effect" determination from the United States Fish and Wildlife Service.[82] It then provides an "overview" of the self-proclaimed "comprehensive effort" to select a site that would minimally impact the environment, noting that its due diligence efforts "all pointed toward McCullough Peak."[83] White Park states that it: (1) solicited the opinion of Mr. Duane Feick, a local official with the Bureau of Land Management, with respect to potential tower sites in the area, and Mr. Feick specifically advised White Park to look at private land on McCullough Peak as the "optimum site to locate a new antenna structure";[84] and (2) spoke with Ms. Nikki Burnett, an Assistant Planner with the Zoning Commission, who advised White Park that "the Zoning Commission had reviewed and confirmed that use of a *de facto* antenna farm on McCullough Peak was consistent with local requirements."[85] White Park states that it selected McCullough Peak

[79] Reply to Opposition to Informal Objection, Attachment 1, Declaration of W. Lawrence Patrick.

[80] *Twenver, Inc*., 3 FCC Rcd 5907 (MMB 1988) (rejecting a section 1.1307(c) challenge to a proposed tower on Mt. Morrison outside of Denver because there were already two more obtrusive towers and the proposed multi-user tower would be beneficial in terms of reducing the number of towers, given that it would accommodate the City's emergency and public safety equipment and up to six FM broadcast stations and would permit the City to dismantle its present tower). Notably, the Bureau had no reason to consider whether the *Twenver* tower fell within the antenna farm categorical exclusion because it determined that the proposed tower complied fully with section 1.1307(a). Although *Twenver, Inc*. did not involve any finding of a *de facto* antenna farm, we note that the two existing towers in that case were of greater height above mean sea level or greater in bulk than the proposed tower, and that the towers collectively hosted facilities of several broadcasters as well as other Commission licensees.

[81] *See, e.g., Beasley*, 100 FCC 2d at 106 n.4 (noting that 12 towers were located in less than a square mile)*; Twenver, Inc*., 3 FCC Rcd at 5909 (finding the proximity between the two existing towers and the proposed tower - 900 and 650 feet, respectively – supported a finding that the cluster of towers would be "beneficial" to the environment where the proposed tower would be less obtrusive than the existing towers, would replace an existing tower, and would accommodate public safety communication equipment as well as many as six broadcast stations).

[82] *Certification Letter,* Transmittal Letter from Counsel at 2.

[83] *Certification Letter* at 1-2.

[84] *Id.* at 2.

[85] *Id.*

because, as an antenna farm, it "would ensure minimal impact on the environment through construction of a single tower for three radio stations at a location where antenna towers were clustered."[86]

21. With respect to each specific environmental factor which White Park was to consider before making its environmental certifications, White Park relies heavily in each of its responses on the Declaration of its Vice President, Edward P. Flanagan, which was originally submitted as Exhibit A to White Park's November 1, 2007, Opposition to Legend's initial Informal Objection.[87] White Park states as follows:

- Location in an officially designated wilderness area or wildlife preserve (Sections 1.1307(a)(1), 1.1307(a)(2)). With respect to White Park's investigation of whether the proposed site was in an officially designated wilderness area or wildlife preserve, Mr. Flanagan states that McCullough Peak "is a mountain peak where two radio towers already exist . . . Rather than being a wilderness area it is what is known in the tower industry as an antenna farm."[88]

    - White Park supplements this *non-sequitur* by describing the analysis of its engineering director, Jon Hosford, and its land consultant, Michael Schutta, confirming that the McCullough Peak site was private land and not an officially designated wilderness area or wildlife preserve. It submits copies of material used by Messrs. Hosford and Schutta, including maps provided to Mr. Schutta by BLM, maps displayed on BLM's website, and USGS topographic maps.[89]

- Facilities that may affect listed threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of and proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats (Section 1.1307(a)(3)). White Park references the declaration of Mr. Flanagan, who opines that the nature of the multiple tower site at McCullough Peak effectively precluded the present-day habitation of any endangered species in the vicinity of the proposed site; if there were any endangered species in the area at one time, he states, "they have already been disturbed by the construction of the two existing towers."[90]

    - Additionally, White Park indicates that Mr. Hosford reviewed the lists of endangered species and critical habitats contained in the Code of Federal Regulations.[91] Based on this review, Mr. Hosford concluded that there was only one endangered animal in Wyoming (Prebles Meadow Jumping Mouse), and that its habitat was entirely in South Wyoming nowhere near the proposed site.[92]

    - White Park also submits a June 5, 2008, letter from the FWS stating that there are "no threatened, endangered, or candidate species" likely to occur in the area,

[86] *Id.*

[87] As noted above, Section 1.1307(a)(8) is not at issue because the tower will not be equipped with high intensity white lights.

[88] *Id*. at 3, citing Flanagan Declaration at 2 ¶ 8.

[89] *Id.* at 3-4 and Exhibits B (Declaration of Jon Hosford) and C (copies of maps).

[90] *Id.* at 4, citing Flanagan Declaration at 2 ¶9.

[91] White Park does not provide the specific provisions Mr. Hosford claims to have reviewed.

[92] *Certification Letter* at 4 and Exhibit B (Hosford Declaration) at ¶3. White Park states that Mr. Hosford also noted several species of plants, but none were listed as being within Park County, in which the proposed site is located. *Id.*

although it cautioned White Park regarding work that could lead to the "taking" of any migratory birds.[93] White Park obtained this letter after the Applications were filed.

- Facilities that may affect districts, sites, buildings, structures, or objects, significant in American history, architecture, archaeology, engineering, or culture that are listed, or eligible for listing, in the National Register of Historic Places (Section 1.1307(a)(4)). White Park indicates that, based on the existence of a multi-tower site at McCullough Peak, it determined that there were no protected historical sites at McCullough Peak.[94] It also references Mr. Flanagan's statement that "[i]f there ever were historical sites there, the existing telecommunications users have long ago destroyed them."[95]

    - White Park also provides a December 20, 2007, letter from the Office of the Wyoming SHPO indicating that no historic properties would be affected by the project as planned.[96] White Park obtained this letter after the KBEN and KWHO Applications were filed.

- Facilities that may affect Indian religious sites (Section 1.1307(a)(5)). White Park references the Flanagan Declaration indicating that it chose the McCullough Peak site in part because BLM expressed no concerns about Indian religious sites there, but had informed White Park that another (unspecified) site under consideration did have significance to Native Americans. Mr. Flanagan also states that "if there were Native American religious sites on McCullough Peak, the existing tower construction on the site destroyed them beyond repair."[97]

    - White Park also submits several letters from its environmental consultant, TRC Environmental, dated January 7, 2008, and April 24, 2008, to the Commission's Federal Preservation Officer regarding the status of its contacts with Indian tribes *via* the Commission's Tower Construction Notification System ("TCNS") and the absence of objections from any tribes to the proposed use of the McCullough Peak site.[98] These letters were obtained after the KBEN and KWHO Applications were filed.

- Facilities located in a flood plain (Section 1.1307(a)(6)). White Park cites the Flanagan Declaration to the effect that McCullough Peak is a mountain peak rising 1400 feet above the Shoshone River and, by its very nature, cannot be a flood plain.[99] Nevertheless, White Park indicates that Mr. Hosford reviewed the relevant floodplain map provided by the Federal

[93] *Certification Letter* at 5 and Exhibit E (FWS Letter) at 1.

[94] *Certification Letter* at 5.

[95] *Id.*, citing Flanagan Declaration at 3 ¶ 10.

[96] *Id.* at Exhibit F.

[97] *Id.* at 5, citing Flanagan Declaration at 3 ¶ 11.

[98] *Id.* at 6 and Exhibit G. White Park also submitted a February 13, 2008, "update" letter from TRC to White Park summarizing the responses to TCNS notifications; this letter indicates that "all tribes" expressed the concern that construction cease and the proper tribal and federal authorities be notified if any unanticipated human or archaeological remains are discovered during construction. *Letter to Mr. Ed Flanagan from James A. Lowe* (dated Feb. 13, 2008), submitted in Exhibit G to the *Certification Letter.* Legend argues that the interest expressed by the Indian tribes demonstrates the inadequacy of White Park's previous due diligence efforts. *See* Reply to Opposition to Objection to Amendments at 3-4.

[99] *Certification Letter* at 6, citing Flanagan Declaration at 3 ¶ 12.

Emergency Management Agency ("FEMA"), which revealed no Flood plains within 2000 feet of the site.[100] Mr. Hosford does not state specifically that he examined the flood plain map prior to the filing of the Applications.

- Facilities that will involve significant change in surface features (*e.g.* wetland fill, deforestation, or water diversion) (Section 1.1307(a)(7)). White Park states that McCullough Peak is mostly a rock ledge, and it references Mr. Flanagan's declaration that "as a mountain peak already used for an antenna farm, there are no wetlands, forests, water, or other natural resources to disturb or affect."[101]

22. Analysis. Section 1.17(a)(2) of the Rules provides that no person may provide, in any written statement of fact, "material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading."[102] In expanding the scope of Section 1.17 in 2003 to include written statements that are made without a reasonable basis for believing the statement is correct and not misleading, the Commission explained that this requirement was intended to more clearly articulate the obligations of persons dealing with the Commission, ensure that they exercise due diligence in preparing written submissions, and enhance the effectiveness of the Commission's enforcement efforts.[103] Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if it is provided without a reasonable basis for believing that the statement is correct and not misleading.[104]

23. Given the record we now have before us, we find that the proposals set forth in the Applications will have no significant environmental impact on the quality of the human environment, and no further environmental processing is warranted. However, we find that the environmental certifications in the KBEN and KWHO Applications were made without a reasonable basis for believing they were correct *at least* with respect to the criteria specified in Sections 1.1307(a)(3) (endangered or threatened species/critical habitat), 1.1307(a)(4) (historic properties) and 1.1307(a)(5) (Indian religious sites). We also find that the environmental certification in the KROW Application was made without a reasonable basis for believing they were correct *at least* with respect to the criteria specified in Sections 1.1307(a)(3) and 1.1307(a)(5). We believe it is clear from White Park's response that it sought no pertinent information to support its environmental certification on these factors.

24. With respect to endangered or threatened species and critical habitat, we acknowledge that the Rules do not require that applicants contact and consult with FWS. Section 1.1307(a)(3) of the rules[105] and the Commission's July 2003 Letter to the Director of FWS[106] do, however, require that

[100] *Id.* at 6, citing Exhibit B (Hosford Declaration) at 3.

[101] *Id.* at 6, citing Flanagan Declaration at 3 ¶ 13. Mr. Flanagan states that White Park will not disturb or move any soil but will merely install anchors, a tower base, and a prefabricated building. *Id.* We question how the anchors and tower base will be installed without moving any soil.

[102] 47 C.F.R. § 1.17(a)(2).

[103] *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016, 4016-4017, 4021 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 5790, *further recon. denied*, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004).

[104] *See In the Matter of Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd at 4017 (stating that the revision to Section 1.17 is intended to "prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive").

[105] *See* Note to 47 C.F.R. § 1.1307(a)(3).

applicants make a meaningful evaluation of the effects of their proposals on listed and threatened species and habitats before filing the application. For this purpose the Commission would consider the opinion of a qualified biologist using the most current data available *in lieu* of a statement from FWS, insofar as it provides a basis for evaluating the effects of a proposal on endangered or threatened species or their critical habitats. Mr. Hosford's statement that he reviewed the Code of Federal Regulations and Mr. Flanagan's conclusory and unsupported statement that any existing threatened or endangered species or critical habitats "have already been disturbed by the construction of the two existing towers" falls far short of the meaningful evaluation of environmental effects necessary to provide a reasonable basis upon which to base its certifications in the Applications.

25. With respect to Section 1.1307(a)(4), the Rules do set forth specific procedures that are to be followed to ascertain whether a proposed action will affect any historic properties.[107] While White Park received a letter from Wyoming SHPO prior to the filing of the KROW Application, White Park provides no evidence that these procedures were followed prior to the environmental certification in the KBEN and KHWO Applications. In these circumstances we are not persuaded that the certifications in these applications were based on the identification, evaluation and assessment of effects of White Park's proposals on historic properties in accordance with Section VI of the *Programmatic Agreement,* as required by Section 1.1307(a)(4). Accordingly, we find that, with respect to the KBEN and KWHO Applications, the record does not reflect that White Park had a reasonable basis for believing it was in compliance with Section 1.1307(a)(4) of the Rules mandating that an applicant must follow the procedures set forth in that Agreement "[t]o ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places."

26. With respect to Section 1.1307(a)(5), the Programmatic Agreement sets forth specific procedures for identifying and contacting any Indian tribe that may attach religious or cultural significance to historic properties that might be affected by a proposal.[108] Mr. Flanagan's conclusory and unsupported statements that any historic sites or Indian religious sites that may have been present on McCullough Peak have been destroyed by construction and operation of the two existing towers are woefully insufficient to constitute a reasonable basis for White Park's certification. Moreover, the recounting of a conversation with a BLM employee who "expressed no concerns about Indian religious sites" on McCullough Peak does not ameliorate White Park's lack of diligence. The record does not contain an affirmative statement from the BLM employee or representations from any other individual with relevant experience in the Section 106 process and the McCullough Peak area that might lend credence to Mr. Flanagan's unsupported supposition regarding the presence of historic properties or

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[106] *See Letter to Mr. Steve Williams, director, U.S. Fish and Wildlife Service from Susan H. Steiman* (Jul. 9, 2003) (noting that the Rules require licensees, applicants, and tower companies to determine, in the first instance, the environmental effects of their proposed towers).

[107] 47 C.F.R. § 1.1307(a)(4) & Appendix C (to ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register for Historic Places an applicant shall follow the procedures set forth in the rules of the Advisory Council for Historic Preservation, 36 C.F.R. Part 800, as modified by the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review). *See also Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004), Appendix B (Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission) ("Programmatic Agreement").

[108] *See* Programmatic Agreement, Section IV. Neither the Programmatic Agreement nor the Rules require use of the Commission's TCNS notification system, although the Commission believes that TCNS provides the easiest and most comprehensive means for identifying and contacting tribes with an interest in the property on which the tower site is located. *See, e.g., Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement,* Declaratory Ruling, 20 FCC Rcd 16092, 16093 ¶ 3 (2005).

Indian religious sites on McCullough Peak.[109] Accordingly, we find that, with respect to all three Applications, the record does not reflect that White Park had a reasonable basis for believing it was in compliance with Section 1.1307(a)(5) of the Rules.

27. Given the above discussion, we are not persuaded that White Park made the environmental certifications in the KBEN and KWHO Applications with a reasonable basis for believing they were correct with respect to the criteria specified in Sections 1.1307(a)(3), 1.1307(a)(4), and 1.1307(a)(5) of the Rules.[110] Similarly, White Park has not shown that it made the environmental certification in the KROW Application with a reasonable basis for believing it was correct with respect to the criteria specified in Sections 1.1307(a)(3) and 1.1307(a)(5) of the Rules.[111] The Commission and the courts have recognized that "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."[112] Full and clear disclosure of all material facts in every application is essential to the efficient administration of the Commission's licensing process, and proper analysis of an application is critically dependent on the accuracy and completeness of information and data which only the applicant can provide. The choice of remedies and sanctions is an area in which we have broad discretion.[113]

28. While the record does not reflect that White Park made a meaningful evaluation of the environmental effects of its proposals that would have provided a reasonable basis for White Park to conclude that it was in compliance with our environmental processing rules, our consideration of all of the facts leads us to conclude that White Park's actions in this regard do not rise to such a level or pattern of misconduct so as to warrant designation for evidentiary hearing.[114] In particular, we find nothing in the record that evidences an intent to mislead the Commission. White Park has demonstrated that it did in fact make some effort prior to the filing of the Applications to determine whether it was in compliance with our environmental processing rules, as evidenced by its discussions with the Park County Planning and Zoning Commission and the Bureau of Land Management, its own independent research, and with respect to the KROW Application, consultation with Wyoming SHPO. As discussed above, however, with the exception of the Wyoming SHPO, the entities and individuals White Park consulted before submitting its Applications were not qualified to render reasoned and informed opinions that could allow White Park to meaningfully make its environmental certification.

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[109] *See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd at 1125-26 ¶¶ 145-48 (mandating the use of Secretary of Interior-qualified experts to identify and evaluate properties within the APE for direct effects and for the assessment of historic properties generally; encouraging the use of Secretary-qualified experts to identify historic properties within the APE for visual effects; encouraging and expecting that applicants will use experts with relevant experience in the Section 106 process and the specific geographic area); Programmatic Agreement, Sections VI.D.I.d, 2.b; E.5.

[110] 47 C.F.R. § § 1.1307(a)(3), 1.1307(a)(4), and 1.1307(a)(5).

[111] 47 C.F.R. § § 1.1307(a)(3) and 1.1307(a)(5).

[112] *See Commercial Radio Service, Inc*., Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006) (*citing, e.g., Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000)).

[113] *See, e.g., RKO General, Inc. v. FCC*, 670 F. 2d 215, 237 (D.C. Cir. 1981); *Leflore Broadcasting Co. Inc. v. FCC*, 636 F. 2d 454, 463 (D.C. Cir. 1980); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965); *USA Broadcasting, Inc.,* Memorandum Opinion and Order, 19 FCC Rcd 4253, 4256 (2004).

[114] *See, e.g., Dan Alpert, Esq.,* Letter, 23 FCC Rcd 10202 (MB 2008) (found that licensee's financial certification was false, but given that the licensee was currently financially qualified and the certification was made in good faith, concluded that designating the application for hearing would serve no useful purpose); *Citicasters Licenses, L.P.,* Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324 (MB 2007) (finding licensee's certification false with respect to its previous violations of the of the Act or Rules, but concluding that licensee's actions in this regard did not rise to such a level or pattern of misconduct so as to warrant designation for evidentiary hearing).

29. Upon considering all the facts and circumstances presented in this case, we believe that a monetary forfeiture would be warranted for White Park's violations with respect to its certifications in the KBEN and KWHO Applications. We note, however, that because White Park has not been issued a covering license for KBEN-FM and KWHO(FM), the statute of limitations for proposing a forfeiture is one year from the date of violation.[115] The Commission has held that a false or misleading statement made at one point in time is not a "continuing violation" for purposes of Section 503(b) simply because it was not corrected.[116] Therefore, because the false certifications here occurred on July 16, 2007 (for the KBEN Application), and August 28, 2007 (for the KWHO Application), we are barred by Section 503(b)(6) of the Act from issuing a Notice of Apparent Liability to White Park for its false certifications in the KBEN and WKHO Applications. However, we will admonish White Park for its violation of Section 1.17 of the Rules by making the environmental certifications in the KBEN and KWHO Applications without a reasonable basis for believing they were correct with respect to the criteria specified in Sections 1.1307(a)(3), 1.1307(a)(4), and 1.1307(a)(5) of the Rules.[117] We remind White Park that we expect it to provide full disclosures in its communications with the Commission and caution it that we will not hesitate to impose appropriate sanctions against it for any further violations.

30. Additionally, we believe that a monetary forfeiture would be warranted for White Park's false certification in the KROW Application. White Park's certification in the KROW Application was largely based on its interpretation of Commission precedent regarding antenna farms, and that it purportedly investigated its proposals with respect to the criteria specified in Sections 1.1307(a)(3), 1.1307(a)(4), and 1.1307(a)(5) out of an abundance of caution.[118] White Park's reliance on the categorical exclusion under Section 1.1306(b)(Note 3) does not excuse its certification without the evaluation of its proposals required by Section 1.1307(a) because, as noted above, Commission precedent does not clearly establish that McCullough Peak would qualify as an antenna farm so as to exempt all of White Park's proposals from environmental processing. We believe, therefore, that White Park made a certification, without a meaningful evaluation of its proposal or a reasonable basis for believing that the certification was correct, that the KROW Application was categorically excluded from environmental processing *vis-a vis* the criteria specified in Sections 1.1307(a)(3) and 1.1307(a)(5) of the environmental Rules. However, as with the KBEN and KWHO Applications, we are barred from issuing a Notice of Apparent Liability by Section 503(b)(6) of the Act. When the KROW Application was filed, White Park held only a construction permit for that Station. The fact that the staff granted a covering license for KROW(FM) several weeks after the KROW Application was filed[119] does not extend the statute of limitations imposed by Section 503(b)(6).[120] Accordingly, we will not issue a Notice of Apparent Liability and instead will only admonish White Park for falsely certifying that the KROW Application was excluded from environmental processing.

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[115] *See* 47 U.S.C. § 503(b)(6). *See also American Family Association,*, Order on Reconsideration, 21 FCC Rcd 6880, 6881-82 (EB 2006), *reversed in part,* Order, 21 FCC Rcd 8044 (EB 2006) (Because [American Family Association] was a permittee, rather than a licensee . . . the applicable statute of limitations was one year, pursuant to section 503(b)(6)(B).)

[116] *Lutheran Church-Missouri Synod,* Memorandum Opinion and Order, 12 FCC Rcd 2152, 2167 (1997), rev'd on other grounds, *Lutheran Church-Missouri Synod v. FCC*, 141 F 3d 344 (D.C. Cir. 1998).

[117] *T-Mobile Northeast*, *L.L.C.,* Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 11799, 11806 (EB 2006) (proposing a forfeiture of $11,000 against licensee for its failure to comply with the historic preservation review requirements prior to constructing its facility in apparent willful violation of Section 1.1307(a)(4) of the Rules).

[118] With respect to KBEN and KWHO – and the original KROW application – there is no evidence that White Park's certification was based on its assessment that the McCullough Peak was antenna farm. That theory appeared only after the objections were filed.

[119] *See* n. 10, *supra*.

[120] *American Family Association,* 21 FCC Rcd at 6882.

31. *Strike Pleadings.* White Park alleges that pleadings filed by Legend were in the nature of a strike petition.[121] The crucial consideration in determining whether any pleading is in the nature of a strike petition is whether it was filed for the primary purpose of delay.[122] In making such a determination, the Commission considers a number of factors, including the absence of any reasonable basis for the allegations raised in the pleadings.[123] For the reasons set out above, we find that White Park has failed to establish that Legend's actions lacked a reasonable basis. Further, White Park has not provided any evidence establishing that Legend's sole purpose was to delay construction of the proposed tower at McCullough Peak. We will not infer the existence of a primary purpose to delay from the mere filing of pleadings that a party has a statutory right to file.[124] Accordingly, we will not consider this issue further.

IV. CONCLUSION

32. We have reviewed the Applications and conclude that their grant will serve the public interest, convenience, and necessity. We further conclude that it is appropriate to admonish White Park with respect to its violations of Section 1.17(a)(2) of the Rules for making environmental certifications in the Applications without having a reasonable basis for believing they were correct.

V. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that White Park Broadcasting, Inc., is hereby ADMONISHED for its apparent willful violations of Section 1.17(a)(2) of the Commission's Rules.

34. IT IS FURTHER ORDERED IT IS ORDERED, that the Informal Objections filed by Legend Communications of Wyoming, LLC, ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

35. IT IS FURTHER ORDERED, that the Applications (File Nos. BMPH-20070716ABY, BMPH-20070828AAV, and BPH-20080219ALX) filed by White Park for minor modification of construction permit for its authorized but unbuilt stations KBEN-FM, Cowley, Wyoming and KWHO(FM), Cody, Wyoming, and for minor modification of the constructed, licensed facilities of station KROW(FM), Lovell, Wyoming, ARE GRANTED.

[121] *See* Opposition to Informal Objection to Amendments, Reply to Letters, and Continued Request for Hearing Designation Order at 11.

[122] *Radio Carrollton*, Memorandum Opinion and Order, 69 FCC 2d 1139 (1978), *recon. denied*, 72 FCC 2d 264 (1979).

[123] *Greater Portland Broadcasting Corp*., Letter, 3 FCC Rcd 1953, 1954 (1988).

[124] *Id.*

36. IT IS FURTHER ORDERED that copies of this letter shall be sent, by First Class and Certified Mail, Return Receipt Requested, to White Park Broadcasting, Inc., 288 South River Road, Bedford, New Hampshire 03110, and its counsel, Barry A. Friedman, Esquire, Thompson Hine L.L.P., Seventh Floor, 1920 N Street, N.W., Suite 800, Washington, DC 20036; and to Legend Communications of Wyoming, LLC, 5074 Dorsey Hall Drive, Suite 205, Ellicott City, Maryland 21042, and its counsel, Mark Lipp, Esquire, Wiley Rein, L.L.P., 1776 K Street, N.W., Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau