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Washington, D.C. 20554

May 30, 2008

DA 08-1272

In Reply Refer to:

1800B3-MFW

Released: May 30, 2008

Mr. Andrew Skotdal, President
S-R Broadcasting Co., Inc.
2707 Colby Avenue, Suite 1380
Everett, Washington 98201

In re: KRKO(AM), Everett, WA
Facility ID No. 62056
Application No. BP-20000308ABU

Finding of No Significant Impact
Informal Objections

Dear Mr. Skotdal:

This letter concerns the referenced application, as amended (the "Application"), of S-R Broadcasting Co., Inc. ("S-R" or the "Licensee") for minor modification of the facilities of Station KRKO(AM), Everett, Washington. Additionally, we have before us numerous objections to the proposal filed by area residents. For the reasons set forth below, we find that the S-R proposal will have no significant impact on the quality of the human environment, we deny the objections, and we grant the Application.

Background. On March 8, 2000, S-R filed the Application, seeking to relocate KRKO(AM)'s facilities to a new site. As initially filed, the Application proposed increasing power from 5 kW to 50 kW unlimited time, utilizing four towers for its nighttime directional antenna array, two of which also would be used for its daytime directional antenna operation. The technical proposal in the Application was subsequently amended several times,¹ most recently to specify a daytime power of 34 kW and a nighttime power of 50 kW; the amended application specifies a 106.4-meter tower for KRKO(AM)'s nondirectional daytime operation and four towers (including the 106.4-meter daytime tower) for KRKO(AM)'s directional nighttime operation.²

¹ The four towers initially proposed were 59.4 meters in overall height. See original Application, Section III-A. The Application was amended on August 9, 2000, to specify a 59.4-meter daytime nondirectional tower with a daytime power of 50 kW and three additional 59.4-meter towers for nighttime directional operation with 50 kW. The Application was amended on August 17, 2001, to specify three 59.1-meter towers and one 129.5-meter (425-foot) tower, to reduce daytime power to 27 kW nondirectional, and to retain the directional nighttime operation at 50 kW. Finally, on November 12, 2004, the Application was amended again to specify nondirectional daytime operation with 34 kW and directional nighttime operation of 50 kW, proposing three 59.4-meter towers and reducing the height of the fourth tower to 106.4 meters (349 feet).

² The remaining three towers are 59.4 meters above ground level. See November 12, 2004, Amendment, Section III-A. A subsequent amendment, filed July 12, 2007, made no changes in the technical facilities specified in the November 12, 2004, Amendment.

From January of 2001 through April of 2002, we received numerous objections to the KRKO(AM) proposal from local residents, based on their concerns about the deleterious environmental effects of the planned KRKO(AM) towers. Most of these objections concerned the possible effects of the KRKO(AM) proposal on migratory birds, endangered species, and bald eagles.³ Two objectors complain that construction of the towers will lower their real estate values,⁴ and one objector observes that the application for conditional use permit filed with the Snohomish County government did not match the application filed with the Commission.⁵ One objection, subsequently withdrawn, expressed concern about the proximity of the proposed KRKO(AM) towers to the Harvey Airfield a private, “FAA-designated general aviation reliever airport.”⁶

Because the Application proposed to construct the KRKO(AM) towers in a flood plain, the Staff requested S-R to submit an environmental assessment (“EA”) pursuant to Section 1.1307(a)(6) of the Commission’s Rules (the “Rules”).⁷ The EA was to contain the information specified in Section 1.1311

³ See, e.g., *Letter from Mark L. Swyer, M.D.* (rec’d Jan. 25, 2001) (towers will be between two natural areas, the Bob Heirman Wildlife Refuge and the Lord Hill (wildlife) Park, creating a “high probability” of taking endangered, threatened, and migratory birds); *Letter from Jacqueline Swyer, Vice President, Citizens to Preserve the Upper Snohomish River Valley* (rec’d Feb. 23, 2001) (towers will be responsible for the “taking” of bald eagles in contravention of the Bald Eagle Act of 1940, 16 U.S.C. § 668a, as well as the routine killing of trumpeter swans, migratory waterfowl, and songbirds”); *Letter from the Trumpeter Swan Society* (rec’d Apr. 20, 2001) (proposed tower site is near the Bob Heirman Wildlife Park, “a major night roost” for trumpeter and tundra swans, as well as ducks and geese); *Letter from Pilchuck Audobon Society* (rec’d May 16, 2001) (tower will potentially interfere with roosting areas of trumpeter swans, gyrfalcons, and bald eagles, and will be in the middle of a migratory pathway for birds coming to and from Eastern Washington); *Letters from Daniel A. Stearns, Russell E. Newman and Reynold Howard* (rec’d Jun. 28, 2001, July 3, 2001, and Aug. 7, 2001, respectively) (towers are on the main east-west migratory pathway between Eastern Washington and Puget Sound and could endanger bald eagles, gyrfalcons, trumpeter swans, and thrushes, vireos, and warblers are endangered by the proposed towers’ guy wires); *Letter from Marshall S. Crisp* (rec’d July 12, 2001) (tower will “interfere with several species of birds by entangling their wings and killing them”); *Letter from Robert Hackney* (rec’d Sep. 25, 2001) (towers pose danger to numerous falcons, hawks, and bald eagles that make their homes in the area).

⁴ See *Letter from Francine Nelson* (rec’d Feb. 28, 2002); *Letter from John A. Beeman* (rec’d Apr. 5, 2002). These letters also express concern about the effects of the towers on the birds that frequent the Snohomish River Valley.

⁵ See *Letter from Janice E. Ellis* (rec’d June 22, 2001). Ms. Ellis indicates that the application to Snohomish county indicated that S-R asked the county for permission to build five 466-foot towers and three additional 425-foot towers, but the Application proposes only four towers, each less than 200 feet tall.

⁶ *Letter from Kandace Harvey-Stiffler, Owner, Harvey Airfield* (rec’d Apr. 3, 2001). By letter received April 18, 2002, Harvey Airfield officially withdrew its objection, as S-R had agreed to lower the height of the towers and “there is no evidence at this time that [the Application] will negatively impact aircraft radio or navigation equipment operations or instrument procedure guidance systems.” *Letter from Kandace A. Harvey* (rec’d Apr. 18, 2002).

⁷ 47 C.F.R. § 1.1307(a)(6). As part of the local zoning approval process, the KRKO(AM) towers underwent review pursuant to the Washington State Environmental Policy Act (Revised Code of Washington Section 43.21C.030) and a hearing process conducted under the authority of Snohomish County. During that review, the presiding Snohomish County Hearing Examiner determined that the eight-tower proposal could have a significant effect on the aesthetic environment. Therefore, S-R was ordered to prepare a limited-scope environmental impact statement (“EIS”). A draft EIS was prepared in December of 2003 (a copy was received by the Commission on December 15, 2003) and the final EIS was prepared in January of 2005 (a copy was received by the Commission on February 1, 2005). Over the opposition of the Citizens to Preserve the Upper Snohomish River Valley (“Snohomish Citizens”), the Snohomish County Council approved S-R’s proposal for a conditional use permit to construct the facilities on

of the Rules, and it was to address each of the factors set forth in Section 1.1307 of the rules to support the Licensee's contention that the project is categorically excluded from environmental processing.⁸

S-R submitted the EA, prepared by LSI Adapt, Inc., on August 17, 2001. In an amendment to the EA filed on July 13, 2007, at the request of the Media Bureau Staff (the "Staff"), S-R indicates that the representations made when the EA was filed in 2001 apply equally to the KRKO(AM) modification application as most recently amended.⁹ The Bureau released a *Public Notice* announcing the acceptance of the EA on July 25, 2007,¹⁰ providing a 30-day period to comment on the EA.

The EA indicated that S-R was proposing to construct up to seven towers below 200 feet above ground level ("AGL") and one 425-foot tower (exclusive of the 16-foot foundation needed to elevate the structure out of the reach of flood waters). The towers were to be self-supported/freestanding towers without guy wires. In an amendment to the EA filed on July 13, 2007, S-R indicates that although the EA contemplated up to seven towers below 200 feet and one tower of 425 feet (tower number 4), only four towers were actually to be used by Station KRKO(AM). Additionally, although the Application was again amended on November 11, 2004, to reflect a reduction in the height of tower number 4 from 425 feet to 349 feet, S-R represents that "the information (including the Attachments), the conclusions, and the 'Finding of No Significant Impact' rendered in connection with the EA eight-tower project description . . . are equally applicable to the proposal set forth in the amended KRKO FCC application."¹¹

We received no timely comments on the EA specifically in response to the *Public Notice* although, commencing in March of 2007, we began to receive additional letters from local residents objecting to construction of KRKO(AM)'s modified facilities in the Snohomish Valley. These letters

June 7, 2006, and the Snohomish County Planning and Development Services office granted S-R a permit pursuant to the Washington State Shoreline Management Act of 1971. See *Letter from Robert B. Jacobi, Esq. to Ms. Marlene H. Dortch* (rec'd July 19, 2006). Snohomish Citizens appealed the County Council's decision to the King County (Washington) Superior Court, which affirmed the Council. See *Citizens to Preserve Upper Snohomish River Valley, et al. v. S-R Broadcasting, et al.*, Case No. 06-2-20748-3 SEA (King County Superior Court, Jan. 18, 2007). This decision was not appealed and is now final. Similarly, Snohomish Citizens appealed the Planning and Development Service decision to the State Shoreline Hearing Board, which affirmed the issuance of the permit. *Citizens to Preserve the Upper Snohomish River Valley, Al Highberger, Suzanne and Frank Fenimore, and John Wolf v. S-R Broadcasting, Skotdal Bros. LLC, and Snohomish County*, Findings of Fact, Conclusions of Law, and Order, Case SHB No. 06-022 (Shoreline Hearings Board, Dec. 26, 2006). Snohomish Citizens appealed this decision to the Superior Court of Thurston County on January 25, 2007, but voluntarily requested dismissal of its appeal on February 15, 2007; the court granted the request and dismissed the appeal on February 16, 2007. See *Citizens to Preserve the Upper Snohomish River Valley, Al Highberger, Suzanne and Frank Fenimore, and John Wolf v. S-R Broadcasting, Skotdal Bros. LLC, and Snohomish County*, Case No. 07-2-00172-4 (Thurston County Superior Court, Feb. 16, 2007). The Planning and Development Service issued all requested and necessary permits to S-R on April 6, 2007. See *Letter from Richard A. Helmick, Esq. to Ms. Marlene H. Dortch*, (rec'd Apr. 25, 2007).

⁸ See original Application, Section III-A, Question 11.

⁹ See Amendment dated July 13, 2007, Exhibit 1.

¹⁰ See *Environmental Assessment Accepted for Filing/Environmental Action*, Public Notice, Report No. MB/AD-07-02, DA 07-3391 (July 25, 2007).

¹¹ July 13, 2007 amendment, Attachment 18, Statement of Daryl Petrarca, President of Adapt Engineering and author of the KRKO(AM) EA.

have continued through April of 2008.¹² The majority of these letters object to the KRKO(AM) towers on aesthetic and “appropriate land use” grounds, concerns over effects on birds and other wildlife, and/or concern over the effects of the tower on local property values.¹³ However, several letters express concern that construction of the KRKO(AM) facilities had begun prior to issuance of a construction permit for those facilities,¹⁴ and several other letters express concern regarding the perceived unhealthy exposure of local residents to radiofrequency (“RF”) radiation from KRKO(AM)’s facilities. Several of these letters

¹² S-R filed its “Reply Comments” to the existing comments on August 27, 2007. *See Letter from Robert B. Jacobi, Esq.* (rec’d Aug. 27, 2007). We have also received dozens of electronic mail communications from local residents objecting to the Application. These e-mail comments were addressed directly to a member of the Media Bureau staff and were not served on S-R or its counsel. We believe it appropriate to treat these e-mails as the comments of individual listeners pursuant to 47 C.F.R. § 1.1204(a)(8). The authors of these e-mails do not become parties to this proceeding by virtue of their comments. *See Note 4 to Paragraph (d) of Section 1.1202 of the Rules, 47 C.F.R. § 1.1202.* These e-mails add nothing substantive to the existing record in this proceeding. Accordingly, they need not and will not be considered.

¹³ *See, e.g.,* the essentially identical *Letter from Albert C. Highberger* (rec’d Mar. 2, 2007); *Letter from Linda Romanelli*, (rec’d July 9, 2007); *Letter from Jim and Cathy Hooper* (rec’d July 9, 2007); *Letter from Lloyd and LeeAnne Wold* (rec’d July 9, 2007); *Letters from Suzanne D. Fenimore* (rec’d July 9, 2007, and Sep. 5, 2007); *Letter from Jilene Bosman* (Rec’d July 10, 2007); *Letters from Cole and Wendy Dalton* (rec’d July 10, 2007, and Sep. 5, 2007); *Letter from Christine Goff* (rec’d July 10, 2007); *Letter from Natasha Petroff* (rec’d July 10, 2007); *Letter from Michael J. Kozak* (rec’d July 10, 2007); *Letter from Steve Cross* (rec’d July 11, 2007); *Letter from Brad Gommoll*, (rec’d July 16, 2007); *Letter from Lisa Swisher* (rec’d July 19, 2007); *Letter from Kim Brook* (rec’d July 16, 2007); *Letter from Dave and Marla Hamilton Lucas, Event Horizon Farm* (rec’d July 13, 2007); *Letter from Lisa Swisher* (rec’d July 19, 2007); *Letter from Robert & Janet Bacon* (rec’d July 27, 2007); and *Letter from A.G. Atworth* (rec’d July 30, 2007). *See also separate Letter from the Trumpeter Swan Society*, (rec’d July 9, 2007); *Letter from the Trumpeter Swan Society*, (rec’d July 9, 2007); four separate *Letters from Bob Harrison*, ((1)dated Jun. 2, 2007, (2) rec’d July 16, 2007, (3) rec’d August 15, 2007 and transmitted by e-mail on September 18, 2007, and (4) rec’d Oct. 17, 2007); *Letter from LeeAnne Wold* transmitted by electronic mail on August 27, 2007); *Letter from Robert and Janet Bacon*, (rec’d Sep. 11, 2007); *Letter from Roger and Doris Vallo* (rec’d Sep. 7, 2007); *Additional Letter from Brad Gommoll*, (rec’d Sep. 7, 2007); *Letter from Harry E. Bohren* (rec’d Sep. 5, 2007); *Letter from Larry and Cathy Graf* (rec’d Sep. 5, 2007); *Letter from Chris and LeeAnne Wold* (rec’d Sep. 5, 2007); *Letter from Alfred C. Highberger* (rec’d Sep. 5, 2007); *Additional Letter from Suzanne D. Fenimore* (rec’d Sep. 5, 2007); *Additional Letter from Cole and Wendy Dalton* (rec’d Sep. 5, 2007); *Letter from Jason and Francine Nelson* (rec’d Sep. 4, 2007); *Letter from Dorothy Beeman* (rec’d October 4, 2007); *Letter from Isabella Sime* (Rec’d Jan. 9, 2008).

¹⁴ *Letter from Angela Day* (rec’d Aug. 30, 2007), which includes pictures purportedly taken of the site. *See also* the nearly identical *Letter from Jason and Francine Nelson* (rec’d Sep. 4, 2007); *Letter from Steve Cross* (rec’d Sep. 5, 2007); *Letter from Harry E. Borhen* (rec’d Sep. 5, 2007); *Letter from Larry and Cathy Graf* (rec’d Sep. 5, 2007); *Letter from Jim and Cathy Hooper* (rec’d Sep. 5, 2007); *Letter from Suzanne D. Fenimore* (rec’d Sep. 5, 2007); also including purported pictures of the site allegedly indicating the presence of a pile driver; *Letter from Chris and LeeAnne Wold*, (rec’d Sep. 5, 2007); *Letter from Cole and Wendy Dalton* (rec’d Sep. 5, 2007); *Letter from Robert and Janet Bacon* (rec’d Sep. 11, 2007); *Letter from Janelle Farley-Beyer* (rec’d Oct. 16, 2007); each of these indicate that, while the Commission has not granted a construction permit for the KRKO(AM) project, “construction has begun at this site.” Additionally, three additional and identical letters also indicate that “construction has begun at the site” and inquire, among other things, why construction was allowed to commence prior to issuance of the Commission authorization. *Letter from LeeAnne Wold* (rec’d by e-mail Aug. 29, 2007); *Letter from Jim and Cathy Hooper* (rec’d Sep. 5, 2007); and *Letter from Brad Gommoll* (rec’d Sep. 7, 2007). The licensee responded to the *Letter from Angela Day* on September 5, 2007, including an affidavit from Licensee President Andrew P. Skotdal describing exactly what preconstruction activities had occurred at KRKO(AM)’s proposed antenna site. *Letter from Robert B. Jacobi, Esq.* (rec’d Sep. 5, 2007).

question whether the Commission's RF exposure limits are satisfactory.¹⁵ Finally, one letter raises concerns about both the alleged "health risks" of the KRKO(AM) proposal to nearby residents and schoolchildren and indicates that, due to the location of the towers in a flood plain and the fact that "dirt fill and concrete [tower] bases are required, flood water will impact other areas of the [Snohomish River] valley."¹⁶ More recently, one objector invokes the Endangered Species Act in arguing that the radiofrequency radiation emanating from the proposed KRKO(AM) tower will adversely affect migrating salmon and may adversely affect birds that reside in or migrate through the Snohomish River valley.¹⁷ The Stewards of Snohomish reference a recent decision by the Court of Appeals for the District of Columbia Circuit which, they state, criticized the Commission for failing to sufficiently involve the public in its tower approval process and for refusing to consult with the United States Fish and Wildlife Service when approving such towers.¹⁸

¹⁵ *Letter from Angela Day* (rec'd Aug. 28, 2007); *Letter from Karen Guzak* (transmitted by e-mail on Sep. 4, 2007); *Letter from Dave and Marla Hamilton Lucas, Event Horizon Farm* (rec'd October 16, 2007); *Letter from Dorothy Beeman* (rec'd Oct. 4, 2007); *Letter from Daniele Rosford* (rec'd Jan. 3, 2008); *Letter from the Stewards of the Land & Community* (rec'd April 10, 2008) ("Stewards of Snohomish Letter"). Ms. Day and Ms. Guzak submit a 2007 article from the American Journal of Epidemiology by Mina Ha *et al.* entitled, "Radio-Frequency Radiation Exposure from AM Radio Transmitters and Childhood Leukemia and Brain Cancer," based on studies done in South Korea, and a 2002 article from the American Journal of Epidemiology by Paola Michelozzi *et al.* entitled, "Adult and Childhood Leukemia near a High-Power Radio Station in Rome, Italy." See *AM J Epidemiol* 2007; 166:270-279; *Am J Epidemiol* 2002; 155:1096-1103. Additionally, Ms. Guzak and Mr. and Mrs. Day sent additional letters expressing concerns about the potential health risks to citizens "within a 6 kilometer radius" of the proposed towers and stating that the towers "could feasibly be sited in a less-populated area several miles east of [the] proposed location. *Letter from Karen Guzak* (rec'd Nov. 29, 2007); *Letter From Robert and Angela Day* (rec'd Dec. 26, 2007). They attach to their letters materials including a letter from Professor Henry Lai of the University of Washington's Department of Bioengineering. Dr. Lai concludes that "[b]roadcast antenna should be located at a significant difference from populated areas, schools, day-care centers, and hospitals," and he attaches *présis* of 39 different studies relating to the effects of exposure to low-level exposure to radiofrequency radiation such as that emitted by broadcast towers. Dr. Lai comments that "some recent studies have suggested that exposure to RFR within proximity of broadcast towers is not completely safe."

¹⁶ *Letter from J.A. Callebert*, (rec'd Feb. 20, 2008). We also note that on December 29, 2007, Mr. Albert Highberger submitted a letter arguing essentially that the subsequent application filed by commonly-owned company CAAM Partnership, LLC for a new AM broadcast station at Snohomish, Washington, File No. BNP-20071010ABZ (the "CAAM Application") is "redundant" because the existing KRKO(AM) facilities already serve the city of Snohomish without interference both day and nighttime. Thus, he argues, KRKO(AM) could be redesignated a Snohomish station without the necessity of filing an additional application to serve that community. He states that this inefficient spectrum use will unnecessarily inflict higher RF emissions on Snohomish County Residents. *Letter from Albert C. Highberger* (rec'd Dec. 29, 2007) at 2-3. These matters are properly considered in connection with the CAAM Application and warrant no further consideration here.

¹⁷ *Letter from Angela Day* (Rec'd Mar. 7, 2008). Ms. Day indicates that the Snohomish River, which lies within several hundred feet of the proposed KRKO(AM) tower site, is "a designated critical habitat for endangered Chinook salmon and Steelhead trout." Ms. Day also submits several articles "suggesting" that migratory birds are affected behaviorally and physiologically by electromagnetic fields. *Id.* at 3-4 and Exhibits 4 and 5. The articles are Kimberly J. Fernie and David M. Bird, "Evidence of Oxidative Stress in American Kestrels Exposed to Electromagnetic Fields," *Environmental Research* Vol. 86, 198-207 (2001) and E.E. Bryan and R.P. Gildersleeve, "Effects of Nonionizing Radiation on Birds," *Comp. Biochem. Physiol.*, Vol. 89A at 511-530 (1988).

¹⁸ *Letter from Stewards of Snohomish* at 1 (rec'd Apr. 10, 2008), referencing *American Bird Conservancy and Forest Conservation Council v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008).

Discussion. Pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”), informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹⁹ For the reasons discussed below, the objectors and others filing comments in this proceeding do not carry that burden.

Under the Commission’s Rules implementing the National Environmental Policy Act of 1969, as amended, (“NEPA”),²⁰ licensees, permittees and applicants (collectively, “Licensees”) are required to assess proposed facilities to determine whether the facilities may significantly affect the environment, as defined in Section 1.1307 of the Rules.²¹ For actions that may have significant environmental effects, Licensees must prepare and submit to the Commission an EA²² and undergo environmental review and any mandatory consultation with expert agencies, prior to initiating construction.²³ 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. If the Commission or staff finds, after reviewing an EA and any comments received, that a proposed facility will not have a significant environmental effect, it will issue a Finding of No Significant Impact (“FONSI”) and grant the application.²⁴ If the Commission finds that a proposed action will have a significant environmental effect and the applicant does not choose to amend its application,²⁵ Licensees may not commence construction until the Commission concludes further environmental processing, including the preparation of environmental impact statements (“EISs”).²⁶

The EA and Subsequent Information. According to the EA, the KRKO(AM) antenna towers will be located at the southwest corner of the intersection of 132nd Street, S.E. and Shorts School River Road in Snohomish. The area is described as “rural in nature, and comprised primarily of agricultural fields.”²⁷ All towers will be self-supported, freestanding towers without guy wires, and the towers and equipment building²⁸ will be on a 16-foot foundation to elevate the structures out of possible flood waters.²⁹ The EA

¹⁹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested) (“*Area Christian*”).

²⁰ 42 U.S.C. §§ 4321-4335.

²¹ 47 C.F.R. § 1.1307.

²² See 47 C.F.R. § 1.1311.

²³ See *id.* § 1.1308.

²⁴ See *id.* § 1.1308(d).

²⁵ See *id.* §§ 1.1308(c), 1.1309.

²⁶ See *id.* §§ 1.1305, 1.1314, 1.1315, 1.1317.

²⁷ EA at Section 1.1.

indicates that all proposed development activities will occur more than 300 feet from any wetlands and streams³⁰ and will be physically separated from these areas by an earthen dike.³¹ There will be a ground system consisting of 120 copper wires, each roughly 1/16 of an inch thick, extending 200 feet from the central base of each tower in a “bicycle spoke pattern;” these will be buried approximately 18 inches deep and will likely be “planted” by a small farm tractor pulling a spool of copper wire, feeding it in behind the plow.³²

With respect to the specific factors set forth in Section 1.1307, the EA contains the following information and documentation:

Officially Designated Wilderness Area (Section 1.1307(a)(1)): The EA states, and no parties disagree, that the proposed KRKO(AM) tower site does not lie within the boundaries of an officially designated wilderness area.³³

Officially Designated Wildlife Preserve (Section 1.1307(a)(2)): The EA states, and no parties disagree, that the proposed KRKO(AM) tower site does not lie within the boundaries of an officially designated wildlife preserve.³⁴

Endangered Species or Designated Critical Habitats (Section 1.1307(a)(3)): The EA indicates that LSI Adapt sought and received information from the Washington State Department of Fish & Wildlife, the United States Department of Fish & Wildlife (“USFWS”), the National Marine Fisheries Service, and the Federal Register, yielding the following state and federal list of threatened species in the vicinity of the site:³⁵

- Bald Eagle (*Haliaeetus leucocephalus*), threatened (and ultimately de-listed)³⁶
- Marbled Murrelet (*Brachyramphus marmoratus*), threatened

²⁸ S-R proposes to construct a 12-foot x 10-foot steel equipment platform at the base of each sub-200-foot tower and that the 425-foot tower will have a prefabricated equipment shelter measuring 24 feet x 36 feet, which also will be placed on a platform elevated 16 feet above ground level. EA at Section 1.2.2

²⁹ EA at Section 1.2. The towers will be fabricated in 20-foot sections away from the site and assembled on site. *Id.* at Section 1.2.4.

³⁰ The EA notes that the Snohomish River, a “nearby wetland and ditched tributary creek, are located off site to the west” and that there are no bodies of water or wetlands on the site. EA at Section 1.1.

³¹ *Id.* at Section 1.2.

³² *Id.* at Section 1.2.7.

³³ *Id.* at Section 4.1; *see also* EA, Figure 1, Site Location Map.

³⁴ *Id.*

³⁵ No endangered species were found to be present in the vicinity of the site.

³⁶ The bald eagle was de-listed by the USFWS on June 28, 2007. *See Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife*, 72 Fed. Reg. 37346 (July 9, 2007); *see also* USFWS website: <http://www.fws.gov/migratorybirds/BaldEagle.htm>.

- Bull Trout (*Salvelinus confluentus*), threatened
- Dolly Varden (*Salvelinus malma*), threatened
- Chinook Salmon (*Oncorhynchus tshawytscha*), threatened
- Coho Salmon (*Oncorhynchus kisutch*), candidate for listing as threatened.

Additionally, the EA addresses concerns raised by interested parties about possible impacts to other migratory birds.

To assess the impact of the proposed KRKO(AM) towers on the listed species and migratory birds, the EA contains a Biological Assessment (“BA”) prepared by Derek Marks and William Railton of Wetland Resources, Inc. on March 22, 2001, and an Avian Risk Assessment (“ARA”) prepared by Dr. Paul Kerlinger of Curry & Kerlinger, LLC. The BA concludes that there will be “No Effect” on any listed species identified as potentially occurring in the vicinity of the site.³⁷ The ARA – including as it did at the time seven towers less than 200 feet in height and one tower 425 feet in height, all self supporting – concludes that by amending the proposal to decrease the tower height of seven towers and eliminating the use of guy wires, S-R had “eliminated virtually all risk to birds.”³⁸

The applicant ultimately submitted the BA and the ARA to the USFWS for its concurrence. By letter dated April 11, 2007, USFWS (1) informed S-R’s local counsel it did not need to seek USFWS concurrence for the “no effect” finding; and (2) stated that, while finding that some birds will likely be killed by colliding with the tower over the life of the station and that the Migratory Bird Treaty Act³⁹ does not provide for permitting of “incidental take” of migratory birds, “the [USFWS] recognizes that some birds may be killed at structures such as radio towers even if all reasonable measures to avoid it are implemented.”⁴⁰ USFWS continued that although it is not possible to absolve individuals, companies, or agencies from liability even if they follow recommended siting guidelines, the USFWS’ Office of Law Enforcement and the Department of Justice have used enforcement and prosecutorial discretion regarding individuals, companies, and agencies who have made good-faith efforts to avoid the incidental take of migratory birds.⁴¹ USFWS required S-R to report any incidents or migratory bird “takings,” and ultimately it “commends” S-R for redesigning the proposed towers to conform more closely to USFWS siting guidelines.⁴²

³⁷ See EA, Attachment E, Biological Assessment, at 27. The BA also concludes that “[n]o species were identified as proposed. No species were identified as endangered. No Jeopardy determination is made for Puget Sound Coho [salmon].” *Id.*

³⁸ BA, Attachment E, Avian Risk Assessment, at 23.

³⁹ 16 U.S.C. §§ 703-712.

⁴⁰ *Letter to Ms. Linda White Adkins from Ken S. Berg, Manager, Western Washington Fish and Wildlife Office, Fish and Wildlife Service, United States Department of the Interior* (Apr. 11, 2007) at 1, attached to *Letter from Robert B. Jacobi* (Apr. 25, 2007).

⁴¹ *Id.* at 2.

⁴² *Id.* USFWS observes that “[f]ewer and shorter towers, free-standing rather than guyed, and only one lighted tower with a slower blink rate, are improvements that will likely reduce potential collisions by birds.” *Id.*

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)): The EA indicates that, because the proposed KRKO(AM) towers will be constructed near an urban area (the City of Snohomish) with buildings constructed more than 50 years ago, the Washington Department of Community, Trade, and Economic Development's ("WDCTED") Office of Archaeology and Historic Preservation ("OAHP") requested that a Preservation Professional conduct a file review and field survey of the site and surrounding area. LSI Adapt contacted Dr. Caroline Galacci to conduct the review. She concluded that the construction and operation of the proposed antenna will not affect districts, sites, buildings, structures, or objects listed in, or eligible for listing in, the National Register of Historic Places. On May 14, 2001, Dr. Galacci submitted a "no effect" opinion letter to the Washington OAHP, which provided a written concurrence letter on May 21, 2001 for the four-tower configuration and an additional concurrence letter on July 9, 2001, for the possible four future towers.⁴³

Indian Religious Sites (Section 1.1307(a)(5)): The EA indicates that, because the proposed KRKO(AM) towers may be located near Native American religious sites, WDCTED and OAHP requested that a Preservation Professional conduct a field review, field survey, and a letter of inquiry to any Native American tribes owning land in the area of the proposed facility and surrounding area for possible eligible religious sites. Dr. Galacci's review of the literature and record search indicated that the construction and operation of the proposed antenna would not affect any federally recognized Native American religious sites.⁴⁴

Subsequently, at the request of the Staff, S-R supplemented its outreach to tribes that might be interested in the KRKO(AM) tower site area using the Commission's Tower Construction Notification System ("TCNS"). S-R initiated the notification on October 24, 2007. TCNS identified nine tribes with an interest in the property: Muckleshoot, Sauk Suiattle, Stillaguamish, Suquamish, Tulalip, Yakama Nation, Coeur d'Alene, Snoqualmie, and Seattle. Of those nine tribes:

- Four (Sauk Suiattle, Tulalip, Yakama Nation, and Snoqualmie) established response parameters in TCNS that if there is no tribal response within 30 days after notification, the Tribe has no interest in participating in pre-construction review and requests notification only if archaeological artifacts or remains are found on-site during or after construction. These Tribes did not respond within 30 days, and S-R pledged to provide notification to them following issuance of a construction permit by the Commission and if any archaeological items are found on site;⁴⁵

⁴³ See EA, Section 4.3 and Attachment D, *Letters from Steven A. Mathison, Historical Architect, Office of Community Development, Washington State Office of Archaeology and Historic Development* (dated May 21, 2001, and July 9, 2001).

⁴⁴ See EA, Section 4.4. The EA continues that, as a courtesy, Dr. Galacci contacted the Snohomish Tribe, a local Native American Tribe headquartered in Edmonds, Washington, on May 14, 2001, to request Tribal concurrence or, alternatively, any available information on the potential effects of the proposed facility. See EA, Attachment D, *Letter to The Honorable William E. Matheson, Chair, Snohomish Tribe of Indians, from Caroline Galacci, Ph.D.* (dated May 14, 2001).

⁴⁵ See *Letter from Robert B. Jacobi, Esq.* (rec'd Nov. 27, 2007) at 1-2. This correspondence was served on Snohomish Citizens.

- the Suquamish Tribe indicated that it deferred to the wishes of the Tulalip and Snoqualmie Tribes listed above; S-R states that it interprets that response to mean that the Suquamish Tribe has no interest in pre-construction review;⁴⁶
- the Coeur d'Alene Tribe indicated “no interest”;⁴⁷
- the Muckleshoot Tribe indicated “no comment at this time,” and no further response has been received;⁴⁸
- The Spokane Tribe indicated “no interest”;⁴⁹ and
- The Stillaguamish Tribe indicated “no cultural concerns at this time” and submitted no further responses.⁵⁰

TCNS notification was also provided to the OAHF, which submitted no response.⁵¹

Flood Plain (Section 1.1307(a)(6)): The EA indicates that the proposed KRKO(AM) tower site is in a 100-year floodplain and must comply with all applicable local Snohomish County Master Planning guidelines for commercial construction in a floodplain.⁵² The EA indicates that an equipment platform, approximately 12 feet x 10 feet, will be situated at the base of each antenna and will be elevated 16 feet above ground level. A prefabricated equipment building measuring 24 feet x 36 feet will be placed on its own platform, also 16 feet above ground level. These platforms are designed to keep the equipment above the 100-year flood levels.⁵³

Ultimately, after the hearings and litigation described in Note 8 above, on April 6, 2007, the Snohomish County Department of Planning and Development Resources issued to S-R all requisite conditional use permits for completing construction in a flood plain.⁵⁴ Additionally, S-R received an Elevation Certificate from the National Flood Insurance Program, Federal Emergency Management Agency, United States Department of Homeland Security.⁵⁵

⁴⁶ *Id.* at 2 (citing November 14, 2007, e-mail response from the Tribe).

⁴⁷ *Id.* (citing October 24, 2007, e-mail response from the Tribe).

⁴⁸ *Id.* (citing October 25, 2007, e-mail response from the Tribe).

⁴⁹ *Id.*, (citing November 5, 2007, e-mail response from the Tribe).

⁵⁰ *Id.* (citing October 29, 2007, e-mail response from the Tribe).

⁵¹ As indicated above, that office had previously concurred with the Licensee’s proposed finding of “no adverse effect” on any historic properties. *See* Note 44, *supra*.

⁵² *See* EA, Attachment F, FEMA Firm Map and Army Corps Flood Depth Analysis. The EA indicates that the Snohomish County permits for construction within a 100-year floodplain are issued for the structure foundation, not for the tower itself. EA at Section 4.5.1.

⁵³ *See* EA at Section 4.5.1 and Exhibit F, Army Corps Flood Depth Analysis, which measures flood depths from 10 to 13 feet across the site.

⁵⁴ *See* attachments to *Letter from Robert B. Jacobi, Esq.* (rec’d Apr. 25, 2007). These include a Flood Hazard Permit and Commercial Structural Permits.

⁵⁵ *Id.*

Change in Surface Features (Wetland Fill, Deforestation, Water Diversion, etc.) (Section 1.1307(a)(7): The EA indicates that the proposed KRKO(AM) towers will have no effect on any wetlands.⁵⁶

With respect to the specific information that is to be included in an EA pursuant to Section 1.1311 of the Rules, the EA submitted by S-R describes the tower, supporting structures, and construction methodology, as well as the surrounding area and uses.⁵⁷ The site is zoned “A-10” and the proposed use as a radio tower site is consistent with applicable zoning code requirements.⁵⁸ It is not in a residential area.⁵⁹ Additionally, S-R has described and thoroughly documented the proceedings undertaken to secure local zoning approval, ultimately receiving all the necessary permits from state and local authorities.⁶⁰

Section 1.1311(a)(3): Local Controversy: The EA acknowledges that, as originally proposed, the project was a source of local controversy on environmental grounds, as individuals, organizations, and federal and state agencies filed over 100 letters and comments on the proposal for guyed towers. The commenters expressed concern about protected species, migratory birds, aesthetics, recreational opportunities, and radiofrequency (“RF”) interference.⁶¹ The EA states that the configuration of the antennas has been significantly changed in response to the comments.⁶²

It appears that the proposal remains a source of local controversy on environmental grounds, as evidenced by the appeals taken of the local land use authorities’ decision to grant permits for the modified KRKO(AM) facilities and by the letters and comments that have been continuously submitted in response to the amended proposal.⁶³ Opposition to a project does not establish that a project is controversial and

⁵⁶ See EA at Section 4.5.2 and Exhibit E, Wetland Determination Report prepared by Wetland Resources, Inc. The Report indicates that there are no jurisdictionally covered wetlands on the site, although a wetland exists to the west of the site, between a 15-foot earthen dike and the Snohomish River.

⁵⁷ See 47 C.F.R. § 1.1311(a)(1).

⁵⁸ See EA, Attachment B, Snohomish County Zoning Map; and Attachment G, Washington State Environmental Policy Act Checklist, Page 16. The proposed use of the site is a “Utility” under Washington state law, which is defined as an entity whose principal purpose is to provide electricity, water, sewer, storm drainage, gas, radio, television, telephone and other forms of communication utilizing the electromagnetic communication. SCC 18.90.870. A “Utility Facility” is permitted as a conditional use in an A-10 zone. SCC 18.32.040.

⁵⁹ 47 C.F.R. § 1.1311(a)(1).

⁶⁰ 47 C.F.R. § 1.1311(a)(2). See Note 11, *supra*.

⁶¹ See EA at Section 5.1. The EA also observes that other commenters have expressed support for the project because of the expected increase in radio coverage and dependability for public service announcements and emergency information. *Id.*

⁶² *Id.*

⁶³ S-R attempts to minimize the scope and level of the controversy in a September 10, 2007, letter in which it states that the influx of letters “could create the impression and/or mislead the Commission into believing that the [Application] is universally opposed and that opposition is widespread.” To the contrary, writes S-R, “the opposition consists primarily of a small but highly organized cluster of property owners proximate to the proposed transmitter site.” *Letter from Robert B. Jacobi, Esq.* (rec’d Sep. 10, 2007). The letter indicates that of the 17 known

that it will have a significant environmental impact.⁶⁴ Controversy regarding an issue that is relevant to the existence of a significant environmental impact may be a factor in favor of preparing an Environmental Impact Statement, but mere opposition in the absence of such a legitimate issue is not.⁶⁵

Section 1.1311(a)(4): Environmental and Other Considerations Leading to Selection of Proposed Site. The EA also contains an extensive discussion of the site selection process, and alternatives considered, including a “No Action Alternative” under which KRKO(AM) would continue to operate with its presently licensed facilities.⁶⁶ The EA indicates that the availability of alternate sites was limited due to (1) the Commission’s medium-wave interference spacing requirements for AM stations; (2) the Commission requirement that the station’s community of license be provided with at least a 5 mV/m daytime and nighttime signal contour; (3) Commission regulations designed to encourage transmitter sites to be located in rural areas, away from concentrated population areas; (4) the limited real estate market for sites with appropriately sized parcels of land with suitable signal propagation characteristics; (5) Snohomish County zoning requirements; and (6) the Harvey Field, a local airfield which must be protected under Federal Aviation Administration Regulations. The EA indicates that, utilizing a matrix of site-selection criteria,⁶⁷ S-R was able to identify six site alternatives; each but the current proposal was rejected for a variety of reasons.

authors opposing the Application at the time, only two lived beyond the immediate vicinity; one of those served as an “expert witness” for CPUSRV, and the other is a “known cell tower opponent.” *Id.* The letter provides a list of 57 emergency service providers, nonprofit organizations, school districts, and businesses that filed comments supporting the proposal during the local zoning hearings and appeals.

⁶⁴ 40 C.F.R. § 1508.27(b)(4) (degree to which effects are likely to be highly controversial is relevant in defining “significantly” as used in NEPA).

⁶⁵ *T-Mobile and Pierce Archery Proposed Antenna Tower*, Memorandum Opinion and Order, 18 FCC Rcd 24993 (WTB 2003) (citing *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1557 (2^d Cir. 1992)) (holding that there is a difference between “controversy” and “opposition” and that an EIS would be needed if “a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.”); see also *Indiana Forest Alliance, Inc v. United States Forest Service*, 325 F.3d 851, 858 (7th Cir. 2003) (establishing “a two-step approach to determining whether an agency has acted arbitrarily or capriciously in deciding not to prepare an EIS in the face of *scientific controversy*” (emphasis added)).

⁶⁶ See EA at Sections 2.1-2.4.5.

⁶⁷ The Site Selection Criteria applied by S-R were:

1. Ground electrical conductivity necessary for optimal AM transmission;
2. Expansion of signal coverage into underserved regions and important commuter routes;
3. Topographic or building obstructions (to avoid sources of signal interference);
4. Protection of co-channel stations from interference;
5. Compliance with local zoning restrictions;
6. Population density considerations (attempting to locate antenna in sparsely populated area);
7. Parcel size and availability (20-acre lot minimum necessary for antenna configuration);
8. Avoiding sensitive environmental areas;
9. FAA airspace protection;
10. Site accessibility;
11. High-tension power lines (to avoid negative effects of high-tension power lines on AM signal)
12. Available electric power;
13. Construction limitations; and
14. The possibility of co-locating at existing sites

- The “No Action Alternative” was rejected because it prevented KRKO(AM) from achieving its expanded signal transmission goals and would stall the station’s transition to digital broadcasting and “limit the level of emergency broadcast services available to remote areas located in Snohomish and Island Counties”;⁶⁸
- The “Shorts River Road Site” (original proposed antenna configuration) “generally met” all site selection criteria, but was rejected because the original antenna configuration type and size might have increased the potential for visual and possible migratory bird impacts;⁶⁹
- The “Larimer Road Site” (the current KRKO(AM) transmitter site) was rejected because “it is not large enough to install a four-tower directional array and is too far north to allow KRKO to cover South Snohomish County at night”;⁷⁰
- The licensed site for the nighttime facilities for station KCIS(AM), Edmonds, Washington, was rejected because the existing towers are not oriented in a manner that would facilitate a nighttime directional signal for KRKO(AM) and because the site does not have enough area for additional towers;⁷¹
- The “Tualco Valley Site,” along Crescent Lake Road north of the Snoqualmie River was rejected because of the low ground conductivity in the direction of Everett, Washington KRKO(AM)’s community of license;⁷²

Therefore, the EA indicates, S-R chose a reconfigured antenna system at the Shorts School River Road site because it met S-R’s most important selection criteria and was perceived to “significantly reduce” the possibility of visual and environmental impacts in the subject site area.⁷³ It utilizes self-supported latticework towers, replacing the originally proposed guyed towers, and significantly reduced antenna heights. The EA indicates that if this site proceeds as proposed, it will allow for the “decommissioning” of the two 225-foot guyed towers currently used by KRKO(AM) at the Larimer Road site. The EA observes that the site has excellent conductivity, which allows full coverage of Everett and southern Snohomish county, and it states that the rural nature of the site is ideally suited for the construction of the towers because of the lower population density in the vicinity of the transmitter, the size of the property available, and the ease of property development.⁷⁴

⁶⁸ See EA at Section 2.4.1.

⁶⁹ *Id.* at Section 2.4.2.

⁷⁰ *Id.* at Section 2.4.3.

⁷¹ *Id.* at Section 2.4.4. The EA also indicates that the soil around the site, comprised of “glacial till and hardpan,” hampers signal propagation. *Id.*

⁷² *Id.* at Section 2.4.5. The EA indicates that “[t]he ground wave propagation from this site towards Everett would not be an improvement from the KRKO licensed site on Larimer Road.” *Id.*

⁷³ *Id.* at Section 2.3.

⁷⁴ *Id.* The EA indicates that the absence of high-tension power lines, the size of the land purchased, the fact that the land is bare and flat, available for sale, with access, and with provision for electric power “contribute significantly” to the viability” of the site. *Id.*

Comments/Objections to EA. Although we received no timely comments in response to the *Public Notice* announcing the acceptance for filing of the EA for KRKO(AM)'s modified facilities, we received comments challenging the EA from the group Snohomish Citizens, through counsel, on October 4, 2007.⁷⁵ Previously, on September 13, 2007, the President of Snohomish Citizens requested an extension of time to comment on the EA.⁷⁶ We think it inappropriate to extend formally the comment period for the EA given the fact that Snohomish Citizens had actual notice of the EA and the length of time which Snohomish Citizens has already had to comment on the EA even prior to release of the *Public Notice*. Nevertheless, we believe that consideration of these comments will be beneficial to obtaining a thorough review of the environmental effect of the proposed KRKO(AM) modification.⁷⁷

In their October 4 Comments, Snohomish Citizens argue that the EA is incomplete, outdated, and does not address significant environmental impacts that should be addressed in a full EIS. In these comments, Snohomish Citizens initially describes the area, the surrounding properties, and the uses made of the surrounding properties.⁷⁸ It then reprints selected comments from the Snohomish County Parks Department on the potential environmental effects of the KRKO(AM) towers, both from internal Parks Department memoranda and in comments filed upon S-R's draft EIS in the Washington state zoning approval process, expressing concerns about the "visual appeal" and the "scenic viewing opportunities" in the picturesque rural Snohomish River floodplain.⁷⁹ It observes that the upper Snohomish River Valley is part of a major migratory bird route in the spring, specifically mentioning trumpeter swans and ducks (including mallards and American Wigeons).⁸⁰ The Licensee filed a response to this submission on October 12, 2007.⁸¹

⁷⁵ See *Letter from Jennifer A. Dold, Esq.* (Rec'd Oct. 4, 2007) (Snohomish Citizens' "October 4 Comments").

⁷⁶ *Letter from Lee C. Bennett, Jr., President, Citizens to Preserve the Upper Snohomish River Valley* (rec'd Sep. 17, 2007) (stating that: (1) he did not know where to look for the *Public Notice* announcing the acceptance and availability of the EA; and (2) two members contacted the Commission's duplicating contractor, Best Copy and Printing, Inc., and were informed that the EA "was not in the file and, therefore, not available for review.") S-R opposed this request on September 24, 2007, noting that, whether or not the EA was in the Commission's Reference Information Center – and the staff has confirmed that the EA is now in the KRKO(AM) file – Snohomish Citizens was served with a copy of the original filing in August of 2001 and formally acknowledged receipt of that information. *Letter from Robert B. Jacobi, Esq.*, (rec'd Sep. 24, 2007).

⁷⁷ See, e.g., *Scana Communications, Inc.*, Order, 13 FCC Rcd 25390 (WTB 1998).

⁷⁸ See October 4 Comments at 3-5.

⁷⁹ *Id.* at 5-6, (citing Exhibit 3 (comments on a December 19, 2001, *Memorandum* from Pat Kenyon, Senior Park Planner to Marc Krandel, Parks Planning Section Supervisor, Snohomish County Parks and Recreation)).

⁸⁰ *Id.* at 6-7. Snohomish Citizens indicates that local biologists have concluded that (1) the placement of the proposed antennas will harm the use of the upper Snohomish River Valley as a foraging route and will create a flight hazard by increasing the opportunity and likelihood that airborne water fowl will hit and be killed by the antenna structure; and (2) the placement of the towers will likely drive swans and ducks away from the upper Snohomish River Valley. *Id.* at Exhibits 4 and 5.

⁸¹ *Letter from Robert B. Jacobi, Esq.* (rec'd Oct. 12, 2007).

Conclusions Regarding EA and Objections. Upon examination of the EA and supplemental materials, we find that the information supplied satisfies the requirements specified in Sections 1.1307 and 1.1311 of the Rules.⁸² Initially, we reject the contention of Snohomish Citizens that the EA is incomplete, outdated, and insufficient. Although the EA was originally prepared in 2001, there is no evidence in the record that the information submitted has become stale or outdated, and S-R has certified that the representations in the original EA apply with equal validity to the most recent amendment to the KRKO(AM) proposal. Furthermore, as discussed in detail above, the EA was supplemented recently with probative evidence regarding, among other things, the lack of significant effect of the proposed KRKO(AM) towers on migratory birds and the lack of concern about the towers expressed by Indian tribes with an interest in the tower site area. The information before us is more than adequate to make a reasoned determination of the effects of the KRKO(AM) towers on the quality of the human environment.

Endangered Species/Migratory Birds. With respect to the specific criteria referenced by the objectors, first involving the purported effects of the KRKO(AM) towers on avian species under Section 1.1307(a)(3) of the Rules, the EA and supplemental materials clearly explain the basis for the applicant's determination that there are no listed or proposed threatened or endangered species or designated or proposed critical habitats within the project's action area and that there would be no effect on listed or proposed threatened or endangered species or designated or proposed critical habitats within the project's action area. It has provided the materials (with citations) that formed the basis for this determination, including a letter from the USFWS databases so indicating.

Additionally, with respect to the effect of the KRKO(AM) towers on migratory birds, USFWS has commended the Applicant for redesigning its antenna system to take into account USFWS guidelines and required it to report any "takings" of migratory birds at the tower site. Nothing further is required of S-R on this matter at this time.

Floodplain. With respect to the location of the KRKO(AM) towers in a floodplain, S-R has provided a copy of the building permit from the local jurisdiction where the proposed antenna structure will be located that shows the proposed structure is above the flood plain. It also has provided a copy of an Elevation Certificate issued to it by the National Flood Insurance Program, Federal Emergency Management Agency, United States Department of Homeland Security.

RF Radiation Exposure. With respect to various objectors' concerns regarding the perceived unhealthy exposure of local residents to RF radiation from KRKO(AM)'s facilities and their concomitant concern that the Commission's RF exposure rules do not provide adequate protection, we observe first that S-R's engineering consultants have established that KRKO(AM)'s proposal complies with the RF radiation exposure limitations contained in Sections 1.1307(b) and 1.1310 of the Rules with the following provisos.⁸³ S-R will be required to erect a protective fence around the transmission facility and install

⁸² 47 C.F.R. § 1.1311.

⁸³ 47 C.F.R. §§ 1.1307(b), 1.1310. *See also* OST/OET Bulletin No. 65, "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," and RF Worksheet # 2, appended to the Instructions to FCC Form 301.

appropriate warning signs. Additionally, the construction permit will contain a condition requiring S-R to take actual radiation measurements which will be submitted to the Commission to ensure compliance with the RF exposure limitations.⁸⁴

Moreover, we reject the objectors' contention that the Commission's RF exposure guidelines provide insufficient protection to members of the general public. The Commission's current environmental rules were first established in 1985, pursuant to a notice and comment rulemaking proceeding.⁸⁵ The current, more restrictive, guidelines were finalized in 1997, based on the recommendations and advice of federal agencies and groups with expertise in health-related areas and in standards setting.⁸⁶ More recently, the Commission updated its procedures for measuring RF exposure from mobile and portable devices.⁸⁷ These procedures are based on the work and recommendations of an expert group of the Institute of Electrical and Electronics Engineers (IEEE).⁸⁸ We are not persuaded by the submission of two studies – one of which is of dubious relevance⁸⁹ – that the Commission's RF exposure standards are incorrect or inadequate.

⁸⁴ The Commission has the authority to levy forfeitures and require broadcast stations to terminate operations until RF exposure hazards have been rectified. See *A-O Broadcasting Corporation*, Memorandum Opinion and Order, 23 FCC Rcd 603, 604 ¶ 3 & n.8 (2008) (citing *A-O Broadcasting*, Notice of Apparent Liability, 17 FCC Rcd 24184 (2002), *forfeiture issued*, 31 CR 411 (2003), *recon. denied*, 34 CR 858 (2005)).

⁸⁵ *Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation when Authorizing the Use of Radiofrequency Devices; Potential Effects of a Reduction in the Allowable Level of Radiofrequency Radiation on FCC-Authorized Communications Services and Equipment*, Report and Order, 100 FCC 2d 543 (1985); *on reconsideration*, FCC 85-467, 58 RR 2d 1128 (Aug. 22, 1985).

⁸⁶ *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, 11 FCC Rcd 15123 (1996); *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(V) of the Communications Act of 1934; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Second Memorandum Opinion and Order and Notice of Proposed Rule Making, 12 FCC Rcd 13494 (1997), *aff'd sub nom. Cellular Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000).

⁸⁷ *Office of Engineering and Technology Announces Release of Revised Supplement C to OET Bulletin 65*, Public Notice, 16 FCC Rcd 21553 (OET 2001); *Office of Engineering and Technology Announces a Transition Period for the Phantom Requirements of Supplement C to OET Bulletin 65*, Public Notice, 17 FCC Rcd 11287 (OET 2002).

⁸⁸ The IEEE Standards Coordinating Committee 34, Subcommittee 2 is convened specifically to develop procedures for evaluating the Specific Absorption Rate ("SAR") of RF emissions from wireless handsets.

⁸⁹ The 2002 research done near Rome, Italy involved studying Vatican Radio, a powerful station located in a northern suburb of Rome. Vatican Radio operates with three rotating and 28 fixed antennas in an area 2 km north-south by 1.5 km east-west. The antennas broadcast on different wavelengths at from 5 to 600 kW of power. There is no correlation between Vatican Radio and the proposed KRKO(AM) – or any other domestic AM – facility. Additionally, the abstract of the article itself acknowledges:

Although the study adds evidence of an excess of leukemia in a population living near high-power radio transmitters, *no causal implication can be drawn*. There is still insufficient scientific knowledge, and new epidemiologic studies are needed to clarify a possible leukemogenic effect of residential exposure to radiofrequency radiation.

Am J Epidemiol 2002 at 155:1096.

To the extent that the objectors believe that recent studies indicate that there are more significant effects of long-term low-level exposure to RF radiation from broadcast facilities, these suggestions are more appropriately raised in a petition for rulemaking with the Commission pursuant to Section 1.401 of the Rules⁹⁰ or with other expert agencies upon which the Commission relies rather than in a fact-specific adjudicatory proceeding such as this.⁹¹ The institution of a notice-and-comment rulemaking under the Administrative Procedure Act,⁹² if warranted, would allow for the development of a complete record on which the Commission could make an informed determination regarding the sufficiency of its RF radiation exposure rules.

Other Matters. Effects on local property values. Several commenters express concern over the perceived effect of the KRKO(AM) towers on property values in the area. While we understand their misgivings, concern over property values is not an environmental factor considered by the Commission in reviewing proposals for broadcast facilities. Moreover, the environmental statutes governing the Commission's obligations do not require federal agencies to consider socioeconomic factors, such as diminished property values, where the record establishes that the threshold requirement for environmental analysis – impact on the environment – has not been met.⁹³

Aesthetic concerns. Several commenters express their concern that the erection of the four KRKO(AM) towers in the Snohomish River valley will despoil the pristine, bucolic landscape that residents have long enjoyed. The Commission, in amending its environmental rules in 1986, observed that

[A]esthetic concerns may more appropriately be resolved by local, state, regional or local land use authorities. Those authorities can better handle such questions given their experience and familiarity with land use values. Accordingly, in considering any objections based upon aesthetic concerns, due recognition and considerable weight will be accorded to the fact that site approval has been obtained from a local, state, regional or federal land use board or agency, if that approval has taken into account the environmental impact of the proposal.⁹⁴

It is clear from the record in the local zoning approval process that the Snohomish County and Washington State authorities have carefully reviewed the environmental impact of S-R's proposal before issuing the requisite permits. We therefore defer to those authorities on the issue of the aesthetic impact of the KRKO(AM) towers.

⁹⁰ 47 C.F.R. § 1.401.

⁹¹ See, e.g., *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1984) (citation omitted) (“rulemaking is generally a ‘better, fairer and more effective’ method of implementing a new industry-wide policy than is the uneven application of conditions in isolated proceedings”).

⁹² 5 U.S.C. § 553.

⁹³ See, e.g., *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8155-56 (1999).

⁹⁴ *Artichoke Broadcasting Corporation*, Decision, 8 FCC Rcd 4531 (Rev. Bd. 1993). See also *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, Report and Order, 60 RR 2d 13, 17-18 (1986); and *Baltimore County, Maryland*, Memorandum Opinion and Order, 5 FCC Rcd 5615, 5617 (1990).

Proximity to Harvey Airfield. By letter dated April 3, 2001, the owner of the Harvey Airfield expressed concern about the proximity of the proposed KRKO(AM) towers to that private airport. Harvey Airfield officially withdrew its objection on April 18, 2002, because S-R had agreed to lower the height of the towers and there was no evidence that the towers would negatively impact aircraft radio or navigation equipment operations or instrument procedure guidance systems.⁹⁵ Even where a petition or objection is dismissed at the filing party's request, however, the Commission considers the merits of that submission.⁹⁶ The staff has coordinated with the Federal Aviation Administration (“FAA”) during the process of registering the KRKO(AM) towers, and the FAA has issued a “No Hazard” determination.⁹⁷ No further discussion is warranted on this matter.

Cumulative effects of KRKO(AM) and the CAAM. Several objectors argue that the Commission must consider the cumulative effects of the KRKO(AM) proposal and the subsequent CAAM Application.⁹⁸ The CAAM Application proposes the same site as the KRKO proposal, sharing two towers and proposing two additional towers.

S-R counters that the cumulative impact of all the towers involved in the KRKO(AM) and CAAM Applications is not relevant to the Commission’s determination of the matter before the staff here, *viz.*, whether the KRKO(AM) modification application should be granted. It acknowledges that cumulative impact is a relevant consideration and should be a factor in determining whether the CAAM application should be granted; it states that if the CAAM Application is not granted, for whatever reason, there will be no cumulative impact.⁹⁹ Objector Dold counters that NEPA has very clear requirements regarding the identification and evaluation of cumulative impacts caused by connected, cumulative, and/or similar proposals.¹⁰⁰ There is no credible argument, she states, that S-R and CAAM’s joint use of the same radio antennas at the same site could not be considered connected, cumulative, or similar actions, and that the failure to consider the cumulative impact of both proposals would violate NEPA.¹⁰¹

We find that we need not study the cumulative environmental effects of the KRKO(AM) and CAAM Applications at this time. As observed by S-R, if the CAAM application is not grantable, the additional towers will not be built, and there will be no “cumulative effect” added by those additional towers. Nevertheless, we will direct CAAM, when it ultimately files an EA for the CAAM Application, to include in the EA a specific discussion regarding the cumulative effect of all the towers at the site on with respect to each of the environmental factors set forth in Section 1.1307(a) of the Rules.

⁹⁵ See n.6, *supra*.

⁹⁶ *Stockholders of CBS, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3733, 3739 (1995); *Booth American Company*, Memorandum Opinion and Order, 58 FCC 2d 553, 554 (1976).

⁹⁷ See Antenna Registration No. 1228186 (referencing FAA Study 2002-ANM-2295-OE and imposing paining and lighting specifications in accordance with FAA requirements).

⁹⁸ See *Letter to Ms. Marlene H. Dortch from Jennifer A. Dold, Esq.* at 2 (rec’d Dec. 17, 2007).

⁹⁹ *Letter from Robert B. Jacobi, Esq.* (rec’d Jan. 16, 2008).

¹⁰⁰ *Letter from Jennifer A. Dold, Esq.* at 2 (rec’d Feb. 19, 2008) (citing 40 C.F.R. § 1508.25).

¹⁰¹ *Id.*

Premature Construction. A number of objectors have expressed concerns that, during the late summer and fall of 2007, S-R commenced construction of the KRKO(AM) facilities prior to grant of the Application. Several objectors enclosed pictures, purportedly taken at the proposed KRKO(AM) site, which show a crane and pile driver. In its September 5, 2007, response, S-R indicates that the construction underway at that time consisted of survey work, temporary roads, installation of 62 steel piles (to a depth of 40 to 50 feet and extending approximately six inches above the soil in foundation holes) for antenna tower and storage shelter foundations and the utilization of batter boards in preparation for the pouring of cement.¹⁰²

Section 319(a) of the Act¹⁰³ states, in pertinent part, that “[n]o license shall be issued under the Authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission.” Section 319 was enacted to ensure that applicants do not use incurred expenses as a means of exerting improper pressure upon the Commission to grant an application.¹⁰⁴ That section forecloses the Commission from issuing a license for the operation of any station that has been constructed prior to the grant of a construction permit.¹⁰⁵ However, the Commission has held that its prohibition on premature construction of a broadcast station is not absolute. For instance, the Commission has sanctioned certain types of pre-authorization construction, including site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment and other preliminary steps having no intrinsic broadcast use.¹⁰⁶ Pre-authorization construction of towers or installation of radio

¹⁰² *Letter from Robert B. Jacobi* at 1 and Appendix A (rec’d Sep. 5, 2007). The representation regarding “installation of steel piles” is consistent with the images provided by Ms. Day and Ms. Fenimore. S-R indicates that the piles shown sticking out of the ground in Ms. Day’s photograph represent excess steel from piles that could be driven no further, and it states that the steel has since been cut off six inches above the soil in the foundation holes and removed at all locations in preparation for the foundation pours. *Id.* at Appendix A.

S-R also indicated that, over the next several weeks, it anticipated some additional site preparation work, including: (1) “form work” and “rebar” caging for cement at each tower foundation and at the storage shelter foundation; (2) installation of empty conduit in the ground; (3) installation of 20-foot steel foundation support piers at each tower location, necessary as part of the tower foundation due to the proposed construction in a flood plain; (4) installation of steel I-beam foundation columns adjacent to the foundation support piers to crate the 10’ x 12’ elevated platform for storage and to allow work on the support piers; (5) installation of a pre-fabricated storage shelter; (6) Steel I-beam installation and welding as part of the foundation to elevate the storage shelter 16 feet above ground level to escape base flood flows, as required by Snohomish County; (7) adding and removing temporary roads, and (8) preparing the soil and planting at the site for spring crops. *Id.* Only the first two of these additional construction efforts was in fact undertaken. S-R emphasizes that no temporary roads were added or removed since its September 5, 2007, response to Ms. Day’s allegations. *See Letter from Robert B. Jacobi, Esq.*, (rec’d Mar. 12, 2008).

¹⁰³ 47 U.S.C. § 319(a).

¹⁰⁴ *See, e.g., Patton Communications Corp.*, Memorandum Opinion and Order, 81 FCC Rcd 336 (1980); *WSAV, Inc.*, Memorandum Opinion and Order, 19 FCC 736 (1955), *aff’d sub nom. WJIV-TV, Inc. v. FCC*, 231 F.2d 725 (D.C. Cir 1956).

¹⁰⁵ *Christian Broadcasting of the Midlands, Inc.*, Order, 103 FCC 2d 375 (1986).

¹⁰⁶ *See, e.g. Manahawkin Communications Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 342 ¶ 22 (2001) (premature construction does not warrant denial of the application) ; *Wendell & Associates*, Memorandum

antennas has been strictly prohibited.¹⁰⁷ We find that S-R's installation of tower foundation supports, temporary roads, "batter boards," "rebar," and empty conduit constitute preliminary activities having no intrinsic radio communication use related to the proposed facility, and thus are not premature or unauthorized construction activities.¹⁰⁸

Conclusion/Actions. Upon examination of the EA, we find that the information supplied satisfies the requirements specified in Section 1.1311 of the Rules.¹⁰⁹

Additionally, pursuant to Section 1.1308 of the Rules,¹¹⁰ we find that the KRKO(AM) tower array will have no significant environmental impact on the quality of the human environment, and no further environmental processing is warranted. Moreover, we have examined the captioned application and find that it complies with all pertinent statutory and regulatory requirements.

Accordingly, in light of the findings made above, IT IS ORDERED, that the Informal Objections filed by the individuals and entities listed above ARE DENIED, and the application (File No. BP-20000308ABU) of S-R Broadcasting Co., Inc. for minor modification of the facilities of Station KRKO(AM), Everett, Washington, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Robert Jacobi, Esq. (Counsel for the Licensee)
Citizens to Preserve the Upper Snohomish River Valley
Jennifer A. Dold, Esq. (Counsel for Citizens to Preserve the Upper Snohomish River Valley)
CAAM Partnership, LLC
Individual Objectors (*see* Appendix)

Opinion and Order, 14 FCC Rcd 1671 § 24 (1998). *See also* *MCI Communications Corporation*, Order and Notice of Apparent Liability, 3 FCC Rcd 509 (1988), *modified*, Supplemental Order, 4 FCC Rcd 7299 (1988), *appeal dismissed by judgment sub nom.*, *TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990); *Christian Broadcasting of the Midlands, supra.*, *Patton Communications Corp., supra.*

¹⁰⁷ *Westinghouse Broadcasting Co., Inc.*, Memorandum Opinion and Order, 49 FCC Rcd 1171, 1173 (1974), *Merrimack Valley Communications, Inc.*, Memorandum Opinion and Order, 20 FCC 2d 161 (1969), *rehearing denied*, Memorandum Opinion and Order, 21 FCC 2d 440 (1970).

¹⁰⁸ *See Wendell & Associates, supra* (the preliminary steps that we do not consider premature or unauthorized, are those generally having no intrinsic radio communications use related to a proposed facility, such as site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors).

¹⁰⁹ 47 C.F.R. § 1.1311.

¹¹⁰ 47 C.F.R. § 1.1308.