

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

In the Matter of )
SBA Towers III, LLC ) ASR App. A0909673
Petitions to Deny and Requests for )
Environmental Review Against )
Antenna Structure Registration (FCC Form 854) )
with Environmental Assessment, )
Copper Harbor, Michigan )

MEMORANDUM OPINION AND ORDER

Adopted: February 29, 2016

Released: February 29, 2016

By the Deputy Chief, Competition and Infrastructure Policy Division:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant an Application for Antenna Structure Registration (ASR) filed by SBA Towers, III, LLC (SBA), to register a 199-foot above ground level (AGL) communications tower in Copper Harbor, Michigan.1 The proposed tower would be self-supporting, not use guy wires, and not require lighting under Federal Aviation Administration (FAA) or Federal Communications Commission (Commission) regulations. The application was filed on July 17, 2014, and includes an Environmental Assessment (EA). Numerous parties filed objections2 to the

1 Application for Antenna Structure Registration (FCC Form 854), SBA Towers, III, LLC, filed July 17, 2014, ASR App. A0909673 (http://wireless2.fcc.gov/UlsApp/AsrSearch/asrApplication.jsp?applKey=4280243).

2 Some parties objecting to the application submitted Petitions to Deny, while others submitted Requests for Environmental Review. In addition, we received several comments from parties supporting SBA’s application. As (continued....)

proposed site based on environmental and historic preservation concerns, alleging that the proposed antenna structure may have an adverse effect on the environment, and therefore is inconsistent with the Commission's environmental rules<sup>3</sup> implementing the National Environmental Policy Act of 1969 (NEPA)<sup>4</sup> and Section 106 of the National Historic Preservation Act of 1966 (NHPA).<sup>5</sup> Some commenters further contend that SBA has not explored reasonable alternative sites to the proposed site on Brockway Mountain.

2. For the reasons set forth herein, the Competition and Infrastructure Policy Division (Division),<sup>6</sup> pursuant to delegated authority, denies the Petitions to Deny and Requests for Environmental Review, and rejects arguments against the construction of the proposed tower that were raised in letters, informal complaints or other filings. In addition, the Division makes a Finding of No Significant Impact on the Environment (FONSI), and grants SBA's Application.

## II. PROCEDURAL HISTORY

3. On July 17, 2014, SBA submitted its application, accompanied by an EA.<sup>7</sup> SBA selected July 21, 2014 as the National Notice Date, so that the deadline for interested parties to file pleadings was August 20, 2014. Nevertheless, because of procedural defects in many of the pleadings, the Division notified SBA that the normal deadline for filing pleadings would be suspended, and the Division ultimately accepted pleadings that were filed by September 20, 2014.<sup>8</sup> Numerous parties submitted Comments, Petitions to Deny and Requests for Environmental Review by the extended deadline.<sup>9</sup> However, Petitions to Deny are subject to numerous procedural requirements that do not apply to other types of pleadings, and many parties that filed Petitions to Deny failed to follow these requirements.<sup>10</sup> Accordingly, on October 29, 2014, the Division sent a letter to all parties providing instructions on how to correct pleading defects, and directing them to do so by November 10, 2014.<sup>11</sup> The Division indicated that if any party filing a Petition to Deny failed to correct its defects by this deadline, its pleading would be treated as an informal complaint.<sup>12</sup> Many parties submitted amended pleadings by the November 10, 2014 deadline. SBA filed its Opposition to Petitions to Deny and Requests for Environmental Review and Reply to Comments (Opposition) on November 21, 2014. Pleadings responding to the Opposition were due December 8, 2014.<sup>13</sup>

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we consider the substantive arguments raised by all responsive pleadings, we collectively refer to these filings as "comments" and the parties as "commenters."

<sup>3</sup> See 47 CFR §§ 1.1301–1.1319.

<sup>4</sup> 42 U.S.C. §§ 4321-4395.

<sup>5</sup> 54 U.S.C. § 306108.

<sup>6</sup> On May 12, 2015, the former Spectrum and Competition Policy Division was renamed the Competition and Infrastructure Policy Division.

<sup>7</sup> The EA was uploaded to the application in eight parts. Unless otherwise indicated, citations to the EA will designate the part number in the name, e.g., a cite to the seventh part of the EA would be denoted as "EA7."

<sup>8</sup> See Letter from Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, FCC Wireless Telecommunications Bureau, to Parties in Proceeding (Oct. 29, 2014) (Division Oct. 29, 2014 Letter).

<sup>9</sup> See Appendix.

<sup>10</sup> See Division Oct. 29, 2014 Letter (*citing* 47 CFR § 1.939).

<sup>11</sup> *Id.* at 1-3.

<sup>12</sup> *Id.* at 1-2. Because of the multiple similar pleadings that resulted from this additional round of pleadings, in addition to pleadings in response to a subsequent Division request, *infra*, citations to pleadings include the dates filed.

<sup>13</sup> *Id.* at 3.

4. On May 7, 2015, SBA filed a letter in which it offered to paint the proposed tower in a non-reflective color if deemed appropriate.<sup>14</sup> On May 14, 2015, the Division requested that SBA provide additional information in order to complete its review of the application.<sup>15</sup> SBA submitted its responsive material on August 20, 2015, three parties filed responses to SBA's submission by September 21, 2015, and SBA filed its reply on October 6, 2015. On October 16, 2015, the Division asked for a description of the methodology used for conducting the requested field survey, which SBA provided on October 20, 2015.

### III. DISCUSSION

5. NEPA requires all federal agencies to identify and consider environmental effects when authorizing or undertaking a major federal action, and to prepare an Environmental Impact Statement (EIS) for any proposed action that the agency has determined will have a significant effect on the environment.<sup>16</sup> Under Council on Environmental Quality (CEQ) Rules, if a proposed action falls within a class that the agency has determined may significantly affect the environment, but will not necessarily have a significant environmental impact, rather than initiate an EIS in the first instance, the agency may prepare, or delegate preparation of, an EA in order to determine whether an EIS is required.<sup>17</sup> Categories of actions that the agency has identified as individually and cumulatively unlikely to have a significant effect on the human environment are categorically excluded from review.<sup>18</sup>

6. Section 1.1307(a) and (b) of the Commission's rules identifies specific circumstances under which communications facilities may significantly affect the environment, and which, if present, require the applicant to prepare an EA for the Commission to evaluate as part of its decision-making process. Because the Michigan State Historic Preservation Office (Michigan SHPO)<sup>19</sup> found that the proposed tower would have an adverse effect on historic properties, and SBA subsequently completed a Memorandum of Agreement with the Michigan SHPO and the Commission to address these effects, SBA was required to complete an EA.<sup>20</sup>

7. In addition, under Section 1.1307(c) and (d), the agency shall require an EA if it determines, on its own motion or in response to an allegation by an interested person, that an otherwise categorically excluded action may have a significant environmental impact. SBA's EA addresses the effects that its proposed tower may have on state-identified endangered species and migratory birds, even though these effects are not listed in Section 1.1307(a) or (b).<sup>21</sup> Further, although SBA argues that it was not required to consider visual effects beyond its obligation under Section 106, it addresses these concerns in its

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<sup>14</sup> See Letter from Edward Roach, Vice President and Associate General Counsel, SBA, to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, FCC Wireless Telecommunications Bureau, FCC (May 7, 2015).

<sup>15</sup> See Letter from Aaron Goldschmidt, Assistant Chief, Competition and Infrastructure Policy Division, FCC Wireless Telecommunications Bureau, to Edward Roach, Esq., Vice President and Associate General Counsel, SBA (May 14, 2015) (Division May 14, 2015 Letter).

<sup>16</sup> See 42 U.S.C. § 4332(2). See also 40 CFR § 1508.11.

<sup>17</sup> See 40 CFR § 1508.9.

<sup>18</sup> See 40 CFR § 1508.4.

<sup>19</sup> The Michigan State Historic Preservation Office is the State historic preservation officer for Michigan under ACHP rules, 36 CFR § 800.2(c)(1).

<sup>20</sup> See 47 CFR § 1.1307(a)(4) (requiring an EA for "[f]acilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places").

<sup>21</sup> While the Wireless Telecommunications Bureau routinely requires EAs to address effects on migratory birds for towers over 450 feet in height, see 47 CFR § 1.1307(d) Note, this proposed tower does not exceed that threshold.

Opposition.<sup>22</sup> Below, we address each of these potential environmental effects, as well as the potential effects on federally endangered species.<sup>23</sup> The potential environmental effects under the remaining categories listed in Section 1.1307(a) and (b) are not in dispute.

**A. Section 106**

8. *Background.* On November 1, 2011, SBA submitted its FCC Form 620 (historic preservation review submission packet) for a 230-foot self-supporting lattice tower to the Michigan SHPO.<sup>24</sup> On the Form 620, SBA indicated that the proposed tower would have no direct effects and no adverse visual effects on historic properties within the Area of Potential Effect (APE) of the tower, which includes the Keweenaw Mountain Lodge and Golf Course Complex.<sup>25</sup> The Michigan SHPO responded that Brockway Mountain Drive also needed to be considered, as it is eligible for listing in the National Register of Historic Places (NRHP), and requested additional information from SBA.<sup>26</sup> SBA submitted the requested information in February 2012,<sup>27</sup> and the Michigan SHPO responded with a finding of adverse effect on both the Keweenaw Mountain Lodge and Golf Course Complex and Brockway Mountain Drive.<sup>28</sup> In September 2012, SBA submitted a revised FCC Form 620 reflecting a new, reduced tower height of 199 feet,<sup>29</sup> thereby eliminating the need to light and mark the proposed tower according to Commission rules.<sup>30</sup>

9. SBA invited the Advisory Council on Historic Preservation (ACHP) to consult on the proposed tower.<sup>31</sup> ACHP declined to consult, but recommended that SBA negotiate a Memorandum of Agreement (MOA) with the Michigan SHPO and the Federal Communications Commission.<sup>32</sup> SBA then began negotiations with the Michigan SHPO and further engaged members of the public, including at a public meeting on May 22, 2013.<sup>33</sup> After months of negotiations and changes to the proposed MOA, the MOA was fully executed on July 2, 2014, and indicated that the Commission and the Michigan SHPO had determined that the proposed tower would have an adverse effect on the Keweenaw Mountain Lodge

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<sup>22</sup> See Opposition at 36.

<sup>23</sup> See 47 CFR § 1.1307(a)(3) (requiring an EA for “[f]acilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973”).

<sup>24</sup> See EA1 at 16.

<sup>25</sup> *Id.*

<sup>26</sup> See EA2 at 83 (Letter from Michigan SHPO to RAMAKER Assoc., Inc. (RAMAKER), dated Jan. 13, 2012). RAMAKER is an environmental consultant to SBA. Applicants are required to identify only historic properties that are either listed in the National Register or are identified as determined eligible for listing in certain publicly available sources. 47 CFR Pt. 1, App. C, § V.D.1.a. On review, the SHPO may identify additional properties included in its inventory and located within the APE that it considers eligible for listing. *Id.*, § VI.D.c.1. Since SBA does not challenge the Michigan SHPO’s identification of Brockway Mountain Drive, we need not consider whether it meets the criteria in Section VI.D.c.1.

<sup>27</sup> See *id.* at 84 (Letter from RAMAKER to SHPO, dated Feb. 10, 2012).

<sup>28</sup> See *id.* at 86 (Letter from Michigan SHPO to Stephen DelSordo, Federal Communications Commission, dated Apr. 13, 2012).

<sup>29</sup> See *id.* at 12 (FCC Form 620, dated Sep. 21, 2012).

<sup>30</sup> See 47 CFR § 17.4.

<sup>31</sup> See EA1 at 16; 36 CFR § 800.2(b).

<sup>32</sup> See EA2 at 89 (Letter from the Advisory Council on Historic Preservation to Amos J. Loveday, President, Atchley Harden Lane, LLC, dated Oct. 15, 2012). Atchley Harden Lane, LLC, is a historic preservation consultant to SBA.

<sup>33</sup> See EA2 at 153.

and Golf Course Complex and Brockway Mountain Drive.<sup>34</sup> The final MOA includes several measures to which SBA agreed in order to mitigate the adverse effect, including (a) limiting the height of the tower to 199 feet in order to minimize its visual impact and the need for lighting or marking under FAA and Commission regulations; (b) landscaping the surrounding area; (c) assisting with the nomination of Brockway Mountain Drive to the National Register of Historic Places; (d) providing up to \$3,000 to develop and install one or more historic markers or signs for Brockway Mountain Drive; and (e) designing the tower to accommodate future collocation in order to reduce the likelihood that additional tower construction will be needed in the area.<sup>35</sup>

10. SBA also contacted interested Tribal Nations through the Commission's Tower Construction Notification System (TCNS), and none of these Tribal Nations identified any Indian religious or cultural sites that may be affected by the proposed tower.<sup>36</sup>

11. Commenters challenge the MOA's determination that the adverse effect has been adequately mitigated. Specifically, Alexander Protzel argues that the Michigan SHPO guidelines recommend that the area of potential effects should be set at a radius of 2.5 miles rather than the 0.5 mile APE used in the MOA.<sup>37</sup> Commenters also express concern over the addition of utility poles along Brockway Mountain Drive to provide electricity to the tower.<sup>38</sup>

12. While SBA acknowledges that the APE for which Mr. Protzel advocates is consistent with Michigan SHPO guidelines for communications towers, SBA asserts that the larger APE is inconsistent with the FCC's rules that establish a presumptive APE for visual effects of 0.5 mile for towers under 200 feet.<sup>39</sup> Because the Michigan SHPO signed the MOA establishing an APE of 0.5 mile, even though it was within its discretion to seek a larger APE, and Mr. Protzel offers no substantive basis to deviate from the APE used by the expert agencies, SBA contends that the Commission should maintain the APE used in the MOA.<sup>40</sup> In response to concerns about power lines, SBA indicates that no utility poles are contemplated, and that power will be provided underground using the existing utility right-of-way.<sup>41</sup>

13. *Analysis.* Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties.<sup>42</sup> Section 1.1307(a)(4) of the Commission's rules implements the NHPA by requiring applicants to consider the effects of proposed Federal undertakings on historic and cultural properties that are listed or eligible for listing in the National Register of Historic Places.<sup>43</sup> In order to complete Section 106 review under the NHPA, the applicant is required to follow the procedures set forth in the Nationwide Programmatic Agreement (NPA), which is incorporated into the Commission's rules.<sup>44</sup> The NPA streamlines and tailors the Section 106 review process specifically for proposed new towers.

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<sup>34</sup> See EA5 at 4 (MOA).

<sup>35</sup> See MOA at 2-3.

<sup>36</sup> See EA5 at 112-13.

<sup>37</sup> See Alexander Protzel Nov. 10, 2014 Petition to Deny at 3.

<sup>38</sup> See Copper Country Trail Committee Aug. 17, 2014 Petition to Deny (CCTC Aug. 17, 2014 Petition to Deny) at 2-3; James Hay Dec. 8, 2014 Letter; Michigan Nature Ass'n Nov. 10, 2014 Petition to Deny at 6.

<sup>39</sup> See Opposition at 34-35.

<sup>40</sup> See *id.* at 35-36.

<sup>41</sup> See *id.* at 39-40. See also EA1 at 8.

<sup>42</sup> 54 U.S.C. § 306108.

<sup>43</sup> See 47 CFR § 1.1307(a)(4).

<sup>44</sup> See 47 CFR § 1.1307(a)(4); 47 CFR Pt. 1, App. C.

14. We reject the contention that the APE for the tower should have been significantly enlarged. The NPA generally calls for an APE for visual effects of 0.5 mile for towers under 200 feet AGL.<sup>45</sup> While the APE can be extended where appropriate,<sup>46</sup> the Michigan SHPO in this case declined to extend the APE, and we have no reason to second-guess its decision to apply the presumptive APE rather than the otherwise applicable APE in its guidelines. With respect to concerns about utility poles along Brockway Mountain Drive, we accept SBA's assertion that the project will provide electricity to the tower underground using the existing right-of-way.<sup>47</sup>

15. As a signatory to the MOA, we previously found that the five measures articulated in the MOA adequately mitigate the adverse effects identified by the Michigan SHPO, and we find nothing in the record convincing us to alter our opinion. Further, neither the ACHP nor any interested Tribal Nations, who were afforded a reasonable opportunity to comment, objected to the siting. For these reasons, we conclude that, given the mitigation measures memorialized in the MOA,<sup>48</sup> SBA's tower will not have a significant environmental effect on the Keweenaw Mountain Lodge and Golf Course Complex, or Brockway Mountain Drive, due to visual intrusion on their historic qualities.

16. With regard to other visual effects on Brockway Mountain and the surrounding area, Section 106 is specifically focused on the consideration of effects to historic properties. Historic properties are those buildings, structures, sites, and objects that are either listed on or eligible for listing on the National Register of Historic Places.<sup>49</sup> In the absence of a defined building, site, structure, or object that meets the criteria set forth in the NHPA, natural landscapes and viewsheds generally are not eligible for listing on the National Register unless there is direct evidence of human design and occupation or the natural area or viewshed has associations with a Traditional Cultural Property identified by a Tribal Nation or by a distinct historically-organized group with long-term ties to the area under consideration.<sup>50</sup> There has been no suggestion here that any properties not covered by the MOA should be listed on the National Register, and thus we find no basis for considering visual effects on such properties within our Section 106 analysis.<sup>51</sup>

#### **B. Federally Listed Endangered Species**

17. *Background.* SBA's environmental consultant, RAMAKER & Associates Inc. (RAMAKER), completed an Informal Biological Assessment, which concluded that the proposed facility would not adversely affect any federally listed species in the project location.<sup>52</sup> RAMAKER sought concurrence from the United States Fish and Wildlife Service (USFWS) that the proposed tower is not likely to adversely affect listed threatened or endangered species or designated critical habitats.<sup>53</sup> In its concurrence letter, USFWS indicated that the effects to the threatened gray wolf (*Canis lupus*) would be "insignificant" and the effects to the threatened Canada lynx (*Lynx canadensis*) would be "discountable"

<sup>45</sup> See 47 CFR Pt. 1, App. C, § VI.C.4.a.

<sup>46</sup> See *id.* at § VI.C.

<sup>47</sup> See EA1 at 8.

<sup>48</sup> We also note SBA's willingness to paint the tower a non-reflective color, see para. 4, *supra*, as an additional measure that may further reduce any effect on historic properties.

<sup>49</sup> See 47 CFR Pt. 1, App. C, § II.A.9.

<sup>50</sup> See Linda Flint McClelland, J. Timothy Keller, Genevieve P. Keller, & Robert Z. Melnick, NPS National Register Bulletin: Guidelines for Evaluating Rural Historic Landscapes (2d ed. 1999); Patricia L. Parker and Thomas F. King, NPS National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties (3d ed. 1998).

<sup>51</sup> Below, we consider such visual effects under NEPA. See Section III.E, *infra*.

<sup>52</sup> See EA1 at 12-13, EA5 at 55-57.

<sup>53</sup> See EA5 at 55.



such that in each instance USFWS concurred that the proposed facility is “not likely to adversely affect” the species.<sup>54</sup>

18. Although not challenging the USFWS determination, the Michigan Nature Association expresses skepticism toward SBA’s ability to prevent the introduction of invasive species to the project site as the result of the tower’s construction, and regarding SBA’s willingness to monitor the site post-construction to ensure that it was successful with its prevention measures.<sup>55</sup>

19. In response to the Division May 14, 2015 Letter, SBA hired an environmental consultant to conduct a habitat assessment and acoustic survey for a newly listed endangered species, the northern long-eared bat (*Myotis septentrionalis*) (NLEB); the consultant concluded that the NLEB is not present.<sup>56</sup> Based on SBA’s analysis and USFWS’s review of its files indicating that no known NLEB roosts or hibernacula occur within a quarter mile of the project area, USFWS agreed with SBA’s conclusion that the proposed construction “is unlikely to adversely affect NLEB, and any potential impacts to the species [is expected] to be discountable.”<sup>57</sup>

20. Commenters challenge the quality and scope of SBA’s analysis of impacts on the NLEB, and argue that a longer survey conducted by an independent entity is necessary.<sup>58</sup>

21. *Analysis.* In its January 19, 2012 letter, USFWS concurred with SBA that the proposed project is “not likely to adversely affect” the endangered gray wolf or the threatened Canada lynx.<sup>59</sup> Subsequently, in light of SBA’s habitat assessment and acoustic survey and its own file review, USFWS concurred with SBA’s conclusion that the proposed construction is unlikely to adversely affect the NLEB. As USFWS is the expert agency on federally endangered species, commenters do not challenge its conclusions, and our review of the record indicates no reason to deviate from USFWS’s determinations, we conclude that the proposed tower is unlikely to have a significant environmental impact on the identified federally endangered or threatened species.

### C. Migratory Birds

22. *Background.* USFWS raised concerns about migratory birds, noting that the proposed tower site is within a known “migratory or daily movement flyway” and “a significant bird migration corridor.”<sup>60</sup> USFWS recommended that SBA follow USFWS’s guidelines by either relocating the tower or reducing the proposed tower height and minimizing lighting. In subsequently acknowledging that SBA had reduced the proposed tower height from 230 feet AGL to 199 feet AGL, thereby eliminating the need for lighting on the tower under FAA and Commission regulations, USFWS nevertheless indicated it remained concerned about the proposed tower due to “its location within a raptor concentration area or migratory corridor.”<sup>61</sup>

<sup>54</sup> See EA5 at 46-47.

<sup>55</sup> See Michigan Nature Ass’n Dec. 8, 2014 Response to Applicant’s Opposition to Petitions to Deny and Requests for Environmental Review and Reply to Comments at 2-3 (Michigan Nature Ass’n Dec. 8, 2014 Response).

<sup>56</sup> See SBA Aug. 20, 2015 Reply at 3, Attach. D.

<sup>57</sup> See SBA Aug. 20, 2015 Reply at 3, Attach. C at 2.

<sup>58</sup> See Keweenaw Land Trust Sep. 21, 2015 Response to Recent SBA Towers III Posting / Petition to Deny and Request for FCC Mediation at 2 (KLT Sep. 21, 2015 Response); Copper Country Trail Committee Sep. 20, 2015 Request for the Federal Communications Comm’n to Deny ASR No. A0909673 and Mediate an Alternative at 3-4 (CCTC Sep. 20, 2015 Request); Keweenaw Community Forest Co. Sep. 21, 2015 Request for the FCC to Deny ASR #A0909673 and Facilitate Mediation.

<sup>59</sup> See EA5 at 46-47.

<sup>60</sup> EA1 at 13, USFWS guideline 4, USFWS letter.

<sup>61</sup> See EA5 at 44.

23. To further evaluate the effect the proposed facility may have on both migratory birds and other avian species, SBA hired Exponent, Inc. (Exponent) to conduct an informal biological assessment at the location of the proposed tower.<sup>62</sup> The assessment concluded that the proposed tower poses little to no risk to birds because Brockway Mountain hosts only a Spring migration, which typically involves substantially fewer individuals than does the Fall migration; and unguyed, unlit communications towers that are less than 200 feet AGL cause far fewer bird mortalities than do taller guyed towers.<sup>63</sup>

24. In addition to sharing USFWS's concerns with the location of the tower as one known to attract large numbers of birds, commenters provide numerous criticisms of the Exponent Study. Several parties contend that the informal three-day survey was inadequate due to its brevity, the particular three days selected, or the time of day the survey was conducted.<sup>64</sup> Some parties allege that the Exponent Study contained factual errors, including the foundational assertion that Brockway Mountain does not host a Fall migration, that call into question its reliability.<sup>65</sup> Some pleadings argue that the Exponent Study improperly relied on the physical characteristics of the proposed tower to discount the significance of its location.<sup>66</sup> Commenters also challenge Exponent's assertion that the proposed tower will kill fewer birds than a taller, guyed, lit tower as irrelevant because the proposed tower would still kill birds.<sup>67</sup> Some observe that there is a great deal of local expertise concerning birds in the area, but that the Exponent Study is at odds with the local assessment of both the birds that migrate through the area<sup>68</sup> and the potential effect that the proposed tower may have on these birds.<sup>69</sup> Finally, given the asserted defects of

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<sup>62</sup> See EA5 at 89-111 (Exponent Study).

<sup>63</sup> See Exponent Study at 13.

<sup>64</sup> See, e.g., Zach Gayk Nov. 8, 2014 Petition to Deny at 3 (three days is inadequate survey period to categorize raptor and other bird use); Copper Country Audubon Dec. 8, 2014 Rebuttal to: Opposition to Petitions to Deny and Requests for Environmental Review and Reply to Comments at 2 (three day period selected was three weeks past peak migration for raptors) (Copper Country Audubon Dec. 8, 2014 Rebuttal); Audrey Mayer Nov. 8, 2014 Petition to Deny at 3 (neotropical migratory season is across two to three months, meaning certain species were not counted in the survey; and SBA's method of surveying for birds 1-2 hours before dusk is inappropriate for neotropical migrants because they fly dusk to dawn).

<sup>65</sup> See, e.g., Copper Country Audubon Nov. 7, 2014 Petition to Deny at 2-3 (disputing several assertions, including the absence of a Fall migration and the number of birds migrating during the 2013 Spring season, and observing a mischaracterization of the local geography).

<sup>66</sup> See, e.g., Copper Country Audubon Dec. 8, 2014 Rebuttal at 2; Joseph Kaplan Dec. 8, 2014 Request for FCC to Deny A0909673 and evaluate additional information/data to Deny at 1-2 (Joseph Kaplan Dec. 8, 2104 Petition to Deny). See also Michigan Nature Ass'n Dec. 8, 2014 Response at 3 (challenging SBA's claim that the proposed tower will be located approximately 2.5 miles from the closest Important Bird Area in that doing so treats the designation as a single point instead of an area, even though migratory birds and raptors fly widely all over Brockway Mountain and the surrounding area).

<sup>67</sup> See Audrey Mayer Nov. 8, 2014 Petition to Deny at 2; Michigan Nature Ass'n Dec. 8, 2014 Response at 3-4; Joseph Kaplan Dec. 8, 2014 Petition to Deny at 2.

<sup>68</sup> See Debra Mues Nov. 11, 2014 Petition to Deny at 1 (the Brockway Mountain Hawk Watch observed over five times as many raptors during the same three-day period that Exponent's assessment was conducted); Copper Country Audubon Nov. 7, 2014 Petition to Deny at 2 (Copper Country Audubon is the leading authority on Brockway Mountain bird migration and has much better data on bird migration over Brockway Mountain than what Exponent collected, but was not consulted by SBA).

<sup>69</sup> See Copper Country Audubon Dec. 8, 2014 Rebuttal at 2-3 (at least four experts with better knowledge of Brockway Mountain than the Exponent Study author agree "that siting a tower in the proposed location is a major concern for bird migration and must be studied further before dismissing the site as posing no 'significant barrier to bird passage'").



the study, Houghton Keweenaw Conservation District (HKCD) requests that USFWS or another commissioned entity complete a more thorough study of bird migration on the peninsula.<sup>70</sup>

25. In its Opposition, SBA reiterates the conclusions of the Exponent Study, supported by a Supplement prepared by the study's author.<sup>71</sup> Further, SBA argues that the fact that the Exponent Study counted significantly fewer raptors at Brockway Mountain than a similar survey 2.5 miles away is evidence that the proposed tower site would minimize impacts to avian species.<sup>72</sup>

26. In the Division May 14, 2015 Letter, the Division asked SBA to contact USFWS to reexamine the proposal, taking into account changes to the tower since USFWS issued its concurrence letter in January 2012 as well as data from a recently completed USFWS/United States Geological Survey bird migration radar study of the Keweenaw Peninsula.<sup>73</sup> SBA did so, and USFWS responded in a letter dated August 12, 2015. In that letter, USFWS recommends that the tower be relocated if feasible,<sup>74</sup> but concludes that "the current proposed height and lack of guy wire supports [considerably reduces] risks to protected species if relocation is not possible."<sup>75</sup> With respect to the radar study, USFWS informed SBA that while the data have been collected, they have not been analyzed or made public.<sup>76</sup> In response to this additional information, commenters ask that the review of the application be delayed until the radar study is publicly available.<sup>77</sup>

27. *Analysis.* We conclude that SBA's tower will not have a significant effect on populations of migratory birds. We share many of the concerns expressed by commenters concerning the inadequacies of the Exponent Study, and consequently do not rely on it in our analysis. Instead, we give great weight to the analysis by USFWS as the expert agency on migratory birds. While USFWS recommends that the tower be relocated if feasible,<sup>78</sup> as stated below we concur with SBA's analysis on the infeasibility of alternative sites for the tower. USFWS further indicates that "the current proposed height and lack of guy wire supports [considerably reduces] risks to protected species if relocation is not possible."<sup>79</sup> We see nothing in the record to suggest that USFWS failed to consider relevant information in offering its recommendation, or any other reason to deviate from its conclusion. Although some commenters ask that we await the release of the USGS and USFWS radar study that was conducted in the area, we see no grounds for delaying our decision pending the radar study's release given the absence of any indication that it would provide evidence suggesting an effect greater than USFWS believes to exist based on currently available science.

28. To minimize any effect on migratory birds in an area USFWS recognizes as a "significant bird migration corridor," and consistent with USFWS recommendations, we require that if any security lighting is required under the tower, SBA shall use motion-activated, down-shielded lighting and avoid

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<sup>70</sup> See Houghton Keweenaw Conservation District Dec. 8, 2014 Request to Deny ASR No. A0909673 and Mediate an Alternative at 5 (HKCD Dec. 8, 2014 Request).

<sup>71</sup> See Opposition at 40-47, Exh. 2 (Supplement).

<sup>72</sup> See *id.* at 43, Exh. 2 at 4-5.

<sup>73</sup> See Division May 14, 2015 Letter at 1.

<sup>74</sup> See SBA Aug. 20, 2015 Reply, Attach. C at 2-3.

<sup>75</sup> *Id.* at Attach. C at 3.

<sup>76</sup> See *id.* at 3-4.

<sup>77</sup> See CCTC Sep. 20, 2015 Request at 3; KLT Sep. 21, 2015 Response at 2. We note that HKCD and Joseph Kaplan had previously had asked that the radar surveys be considered in making a determination about the proposed tower site. See HKCD Dec. 8, 2014 Request at 4; Joseph Kaplan Dec. 8, 2014 Petition to Deny at 2-3.

<sup>78</sup> See SBA Aug. 20, 2015 Reply, Attach. C at 2-3.

<sup>79</sup> *Id.* at Attach. C at 3.

constant nighttime illumination at the site.<sup>80</sup> Although not required, we also encourage SBA to consider implementing post-construction monitoring to assess impacts to migratory birds, as recommended by USFWS,<sup>81</sup> and making the tower site available to researchers, as suggested by the USFWS voluntary guidelines.<sup>82</sup> Owing to its location, SBA's tower could provide valuable information on migratory bird behavior.

#### D. State Endangered Species

29. *Background.* RAMAKER, SBA's environmental consultant, contacted the Michigan Department of Natural Resources, which indicated that RAMAKER should contact the Michigan Natural Features Inventory (MNFI) to identify rare species that may be present.<sup>83</sup> MNFI provided a Rare Species Review that identified two state-listed threatened plants of interest near the proposed tower site, the wild lilac (*Ceanothus sanguineus*) and the heart-leaved arnica (*Arnica cordifolia*).<sup>84</sup> Because RAMAKER reviewed the project site and determined that no acceptable habitat existed for either of these plant species, it concluded that they would not be affected.<sup>85</sup>

30. Subsequently, the Division requested that SBA conduct a site survey for these species during the plants' growing season, between the first week in June and the first week in July, because these plants are not necessarily visible during other months of the year.<sup>86</sup> In response, SBA hired an environmental consulting firm to conduct a site survey during the growing season. The survey determined that the wild lilac is not present, and that the closest occurrence of heart-leaved arnica is approximately 40 feet to the northeast of the project area limits.<sup>87</sup> In a follow-up letter, SBA provided the survey methodology used.<sup>88</sup>

31. Commenters express concern over the proximity of heart-leaved arnica to the project site.<sup>89</sup> In addition, the Copper Country Trail Committee challenges the absence of details on how the plant survey was conducted, although its comments were submitted prior to SBA's October 20, 2015 Letter that provided this information.<sup>90</sup>

32. *Analysis.* We conclude that with the proper safeguards, the proposed tower will not have a significant effect on heart-leaved arnica and wild lilac. We find that SBA adequately surveyed the project area in determining that neither species is present. Nevertheless, because the detected population of heart-leaved arnica is nearby, *i.e.*, approximately 40 feet from the project area, we require SBA to place fencing or an elevated rope between the project area and the protected plants during construction to prevent unintentional direct impacts.

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<sup>80</sup> See EA5 at 48; FCC Fact Sheet: Migratory Birds ([http://wireless.fcc.gov/migratory-birds/Migratory\\_Birds\\_fact\\_sheet.pdf](http://wireless.fcc.gov/migratory-birds/Migratory_Birds_fact_sheet.pdf)).

<sup>81</sup> See SBA Aug. 20, 2015 Reply, Attach. C at 3.

<sup>82</sup> See *id.*, Attach. C at 2 (*citing* Guidelines for Communications Tower Siting, Construction, Operation, and Decommissioning).

<sup>83</sup> See EA1 at 13, EA5 at 65.

<sup>84</sup> See *id.*

<sup>85</sup> See EA1 at 13. See also EA5 at 67-68 (Letter from Charles J. Matz, Project Scientist, RAMAKER, to Lori Sargent, Endangered Species Specialist, Wildlife Division, Michigan Department of Natural Resources, dated Dec. 9, 2011).

<sup>86</sup> See Division May 14, 2015 Letter at 1.

<sup>87</sup> See SBA Aug. 20, 2015 Reply at 1-2, Attach. A.

<sup>88</sup> See SBA Oct. 20, 2015 Letter at 1, Attach.

<sup>89</sup> See CCTC Sep. 20, 2015 Request at 2; KLT Sep. 21, 2015 Response at 1-2.

<sup>90</sup> See CCTC Sep. 20, 2015 Request at 2.

### E. Aesthetics

33. *Background.* On December 20, 2011, the Keweenaw County Planning Commission approved a Special Use Permit for the tower.<sup>91</sup> Under “Basis of Determination,” the criteria considered included “The Special Land Use shall be designed, constructed, operated and maintained in a manner harmonious with the character of adjacent property and the surrounding area,” and “Special Land Use shall not change the essential character of the surrounding area.”<sup>92</sup> On December 21, 2011, the Keweenaw County Board of Commissioners adopted the recommendation of the Keweenaw County Planning Commission.<sup>93</sup>

34. On December 22, 2011, the Keweenaw County Zoning Board of Appeals approved a zoning variance request for the tower.<sup>94</sup> One of the criteria for approval is consideration of “the property values, use and enjoyment of the property in the neighborhood or district, and ... the public, health, safety and welfare.”<sup>95</sup>

35. Numerous commenters indicate that the area is a popular tourist destination for birdwatching, the scenery, and the general natural setting.<sup>96</sup> Commenters allege that the proposed tower would mar views from Brockway Mountain, along Brockway Mountain Drive, and of the mountain.<sup>97</sup>

36. In its Opposition, SBA asserts that scenic and aesthetic values are not actionable “under applicable statutes and precedents.”<sup>98</sup> Nevertheless, SBA also argues that the proposed tower would have “at most a negligible effect on scenic views.”<sup>99</sup> In support of this assertion, SBA submits a Declaration by Amos Loveday that considers the proposed tower’s effect on various scenic vistas.<sup>100</sup>

37. The Michigan Nature Association challenges SBA’s assessment as failing to account for hikers and other individuals who experience Brockway Mountain off of Brockway Mountain Drive.<sup>101</sup>

38. *Analysis.* CEQ regulations state that NEPA requires consideration of aesthetic effects.<sup>102</sup> While the Commission does not automatically require submission of an EA in cases that may raise aesthetic concerns, such concerns may be raised as extraordinary circumstances pursuant to Sections

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<sup>91</sup> See EA1 at 51-54.

<sup>92</sup> *Id.* at 52.

<sup>93</sup> *Id.* at 61.

<sup>94</sup> See EA1 at 41-44, 66-67.

<sup>95</sup> *Id.* at 42.

<sup>96</sup> See, e.g., CCTC Aug. 17, 2014 Petition to Deny at 1-3; Sam Raymond Aug. 16, 2014 Letter at 1.

<sup>97</sup> See, e.g., Michigan Nature Ass’n Nov. 10, 2014 Petition to Deny at 4-5; Keweenaw Land Trust Nov. 9, 2014 Petition to Deny at 2 (KLT Nov. 9, 2014 Petition to Deny); Deborah Cunningham Aug. 18, 2014 Letter; Norma Veurink Nov. 9, 2014 Letter at 1; Margaret L. Laird Nov. 10, 2014 Petition to Deny at 2; Bryan McKamey Dec. 8, 2014 Reply to SBA’s Opposition to Petitions to Deny.

<sup>98</sup> Opposition at 36-37.

<sup>99</sup> *Id.* at 37.

<sup>100</sup> See *id.* at Exh. 6.

<sup>101</sup> See Michigan Nature Ass’n Dec. 8, 2014 Response at 4-5. See also Sam Raymond Aug. 16, 2014 Letter at 1 (identifying Brockway Mountain’s popular mountain bike and snowmobile trails).

<sup>102</sup> See 40 CFR § 1508.8(b). See also Section 101(b) of NEPA, 42 U.S.C. § 4331(b) (“it is the continuing responsibility of the Federal Government to use all practicable means... [to] assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings”). Courts also have recognized the obligation of federal agencies to consider aesthetic effects. See, e.g., *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973) (*MNCPPC*).

1.1307(c) and (d), and we decide on a case-by-case basis whether the action may have a significant environmental impact so as to require environmental processing.<sup>103</sup> In addressing such cases, we give considerable weight to any site approval obtained from a local, state, or regional land use authority or federal land management agency, if that approval has taken into account the environmental impact of the proposal.<sup>104</sup> Site-specific factors such as the presence of a designated scenic highway or trail are also considered.

39. Brockway Mountain has not been recognized as a specially protected scenic area, and the local government gave approval to the proposed tower after considering visual impacts. Under such circumstances, we ordinarily defer to the local government. Nonetheless, we consider the potential visual effects in this instance given the intensity of local interest, and given the evidence that the area is a popular tourist destination based in significant part on its scenic value.

40. A review of the documentation submitted by SBA to the FCC and to the SHPO, and of the documentation submitted by the interested public, reveals that Brockway Mountain Drive and the surrounding area are important to the residents and visitors of the Copper Harbor region. Almost as soon as Brockway Mountain Drive was constructed, companies manufactured and sold postcards of the drive and its views, and images were used for advertising to encourage visitors to come to Copper Harbor and to enjoy Brockway Mountain Drive.<sup>105</sup> With the rise in the use of social media, visitors and residents have been posting their favorite views of Brockway Mountain Drive and Brockway Mountain generally.<sup>106</sup> These images are not limited to those taken on Brockway Mountain Drive, but also include images taken from State Highway 26, which is to the north of the proposed communications tower, and from U.S. 41, which generally lies to the south of the proposed communications tower and is itself a designated National Scenic Byway. All three roads provide visitor and resident access to Copper Harbor and are considered scenic and pleasant drives through the countryside, providing views of Copper Harbor, Lake Superior, and Brockway Mountain.

41. While the documentation reveals that the proposed SBA communications tower would be visible from Brockway Mountain Drive and to a lesser extent from U.S. 41 and State Highway 26, a review of the submitted material and relevant maps indicates that the proposed tower would only be

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<sup>103</sup> See *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, GEN Docket No. 79-163, Report and Order, 60 Rad.Reg.2d (P&F) 13, para. 11 (1986) (*Amendment of Environmental Rules Order*); *AT&T Mobile Services, Inc. Construction of Tower Fort Ransom, North Dakota; Complaints of the Sheyenne River Valley National Scenic Byway, Don Busta, Judith L. Morris, and the North Country Trail Ass'n*, Memorandum Opinion and Order, 30 FCC Rcd 11023, 11032, para. 28 (WTB/CIPD 2015) (*Fort Ransom*).

<sup>104</sup> *Amendment of Environmental Rules Order*, 60 Rad.Reg.2d (P&F) at para. 12, *Fort Ransom*, 30 FCC Rcd at 11032, para. 28. This approach is consistent with the court's opinion in *MNCPPC*:

When local zoning regulations and procedures are followed in site location decisions by the Federal Government, there is an assurance that such "environmental" effects as flow from the special uses of land – the safety of the structures, cohesiveness of neighborhoods, population density, crime control, and esthetics – will be no greater than demanded by the residents acting through their elected representatives. There is room for the contention, and there may even be a presumption, that such incremental impact on the environment as is attributable to the particular land use proposed by the Federal agency is not "significant," that the basic environmental impact from the project derives from the land use pattern, approved by local authorities, that prevails generally for the same kind of land use by private persons.

*MNCPPC*, 487 F.2d at 1036-37.

<sup>105</sup> See, e.g., Alexander Protzel Nov. 10, 2014 Petition to Deny at 35.

<sup>106</sup> Google Earth contains an extensive array of photographs of the area.

visible in fleeting views while driving.<sup>107</sup> The record reflects that individuals use the area on the mountain off Brockway Mountain Drive for recreational purposes, such as biking, hiking, snowmobiling, and birdwatching. While these viewer groups may experience qualitatively different visual impacts from the tower than drivers in the area, our review of the record before us indicates that the visual effects from the proposed tower to those engaged in such activities do not have potentially significant impacts on the environment. For example, while the proposed tower may be visible from the Garden Brook Trail, which is part of the Copper Harbor Trail System for mountain biking, our review indicates that views of the tower from this trail would be infrequent, of limited duration, and at least partially obstructed.

42. We also note that the MOA considered visual impacts and adopted mitigation measures to address them. SBA has additionally agreed to paint the tower in a non-reflective color designed to reduce the tower's visibility. We condition our grant of SBA's application on painting the tower in that manner, which should further reduce any potential visual effects from the tower. Having considered the concerns as to visual effects of SBA's proposed tower and evidence that the Copper Harbor region is a popular tourist destination in large part due to its scenic value reflected in the record before us, we determine on our own motion, pursuant to Section 1.1307(d), that visual effects from the tower do not have a potentially significant environmental effect that must be evaluated in a further EA.

#### F. Alternative Sites

43. *Background.* In its EA, SBA considers and rules out multiple alternative sites, including the Grant Township Well Field Property, the Grant Township site, the Grant Township Town Hall and Community Park, the Westcoat Property, and the Keweenaw Mountain Lodge, either as unavailable or for technical or regulatory reasons, and similarly considers and rejects the use of existing towers and non-tower structures.<sup>108</sup>

44. Numerous commenters contend that alternative locations exist in lieu of constructing on Brockway Mountain. Some parties assert generally that SBA should have made a greater effort to find a suitable alternative site.<sup>109</sup> When identifying specific alternative sites, commenters most commonly identify the Keweenaw Mountain Lodge property.<sup>110</sup> Houghton Keweenaw Conservation District (HKCD) submits an analysis conducted by PSC Alliance Inc. (PSC Alliance) of three alternative sites, all located on the Keweenaw Mountain Lodge property, that includes coverage maps for towers at these sites at a height of 199 feet.<sup>111</sup> PSC Alliance concludes that any of these sites would be viable alternatives.<sup>112</sup> Copper Country Trail Committee also suggests that putting the tower on East Bluff would be a reasonable alternative.<sup>113</sup>

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<sup>107</sup> We further note that views of the mountain from below are well outside the presumptive APE of 0.5 mile in the NPA, *see* 47 CFR Pt. 1, App. C, § VI.4.a., which was the APE applied by the Michigan SHPO and the Commission in the MOA. While the NPA does not govern NEPA review, the presumptions that it incorporates as to visual effects are instructive.

<sup>108</sup> *See* EA2 at 7-8 (Consulting Party Packet, Letter to Consulting Parties dated Aug. 9, 2013).

<sup>109</sup> *See, e.g.*, Keweenaw Community Forest Co. Dec. 8, 2014 Request for the FCC to Deny ASR #A0909673 and Facilitate Mediation at 1; Keweenaw Land Trust Dec. 8, 2014 Petition to Deny / Request for FCC Mediation at 1-2; Sue Haralson Dec. 7, 2014 Letter.

<sup>110</sup> *See, e.g.*, CCTC Aug. 17, 2014 Petition to Deny at 6; Keweenaw Adventure Co. Nov. 7, 2014 Petition to Deny at 2; Friends of Brockway Mountain Mar. 28, 2014 Letter to Mr. Edward Roach, SBA Corporation (submitted Aug. 17, 2014).

<sup>111</sup> *See* HKCD November 8, 2014 Petition to Deny at 11-19 (PSC Alliance Study).

<sup>112</sup> *See id.* at 11-12.

<sup>113</sup> *See* CCTC Aug. 17, 2014 Petition to Deny at 4-5.

45. In its Opposition, SBA submits a review of the PSC Alliance Study, concluding that the Keweenaw Mountain Lodge sites provide inadequate coverage.<sup>114</sup> SBA argues that the coverage prediction maps for the alternative Keweenaw Mountain Lodge sites provided by the PSC Alliance are too optimistic in that the predicted coverage accounts for little or no impact from the surrounding terrain.<sup>115</sup> SBA also quotes PSC Alliance as conceding that a 199-foot tower at these locations would be insufficient to provide necessary coverage.<sup>116</sup> SBA's analysis indicates that a large section of State Highway 26 would not be covered by a tower at either 199 feet or 280 feet AGL.<sup>117</sup> The SBA report states that coverage of State Highway 26 is important, both because it is one of two main arterial routes leading to and from Copper Harbor and because it is home to 430 residents.<sup>118</sup>

46. In addition, SBA contends that because Keweenaw Mountain Lodge is on the National Register, a tower near it would have an adverse effect, particularly if the tower were over 200 feet tall and therefore required lighting.<sup>119</sup> Although there already is a tower situated near Keweenaw Mountain Lodge, SBA argues that it cannot support collocations, is not tall enough to provide the desired coverage, and moreover, appears not to have undergone Section 106 review.<sup>120</sup>

47. SBA also opposes the East Bluff site as being too far from both State Highway 26 and much of U.S. 41 to serve those areas, and too far from SBA's existing tower in Lake Medora to allow communication between the two towers.<sup>121</sup> SBA further identifies zoning regulations and other restrictions that it states prevent consideration of locations that otherwise might be suitable, including restrictions affecting sites near properties listed in the National Register of Historic Places; on forest land; in park lands and nature preserves; and in beautification strips along U.S. 41, which is a designated National Scenic Byway.<sup>122</sup>

48. *Analysis.* Under the Commission's rules, an applicant's EA is required to discuss environmental and other considerations for rejecting alternatives to the proposal, with respect to both the location and the particular facility.<sup>123</sup> Determining reasonable alternatives thus involves a balancing test of environmental and other factors, including but not limited to cost, feasibility, technological requirements, the need for service, and the public interest. In this instance, commenters, including many parties opposing the siting of the tower on Brockway Mountain, generally agree that the Copper Harbor area of the Keweenaw Peninsula in upper Michigan is in need of public safety and commercial wireless service.<sup>124</sup> We therefore recognize the need for such service,<sup>125</sup> and so do not further consider the alternative of the facility not being constructed.

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<sup>114</sup> See Opposition at Exh. 3 (Declaration of Mustafa Siamoff).

<sup>115</sup> See *id.* at 1.

<sup>116</sup> See Opposition at 19 (*quoting* HKCD Sep. 22, 2014 Petition to Deny at 2014 Exh. at 61).

<sup>117</sup> See Declaration of Mustafa Siamoff at 1, Maps 3-8.

<sup>118</sup> See Opposition at 20-21.

<sup>119</sup> See *id.* at 22-23.

<sup>120</sup> See *id.* at 23-24.

<sup>121</sup> See Opposition at 26.

<sup>122</sup> See *id.* at 13-15.

<sup>123</sup> See 47 CFR § 1.1311(a)(4). See also 40 CFR § 1508.9(b) (CEQ regulation stating that an EA shall include a brief discussion of alternatives).

<sup>124</sup> See, e.g., CCTC Aug. 17, 2014 Petition to Deny at 2; KLT Nov. 9, 2014 Petition to Deny at 3; Ron Lahti, Sheriff, on behalf of Keweenaw County 9-1-1 Committee May 7, 2014 Letter to Edward Roach, VP and Assoc. General Counsel, SBA (submitted Aug. 4, 2014); Gregg Maze Nov. 10, 2014 Letter at 1 (dated Aug. 19, 2014). See also Opposition at 4-8 (citing and summarizing the various pleadings recognizing the need for wireless service).



49. As for alternative sites to Brockway Mountain, we agree with SBA that siting the tower on the Keweenaw Mountain Lodge property is not a reasonable alternative. We have reviewed the coverage data provided by PSC Alliance and SBA, and agree with SBA's analysis. We find that a tower situated at the Keweenaw Mountain Lodge would not provide adequate coverage to State Highway 26 even if the tower were 280 feet AGL. Moreover, because a tower that tall would require lighting, it would have an adverse effect on the Keweenaw Mountain Lodge, itself on the National Register, and likely would have at least as great an effect on migratory birds in the area. We also agree that the alternative of SBA collocating on the existing tower near Keweenaw Mountain Lodge is not workable, as that tower cannot support collocations and is not tall enough in any event.

50. We agree with SBA's assertion that siting the tower at East Bluff is also an unsuitable alternative because it would be too far from State Highway 26 and much of U.S. 41 to serve those areas, and too far from SBA's existing tower in Lake Medora to allow for communication with it. We therefore agree with SBA that none of the proposed alternatives are suitable to satisfy the important needs for which this tower is proposed.

51. With respect to the general assertions that SBA should have made a greater effort to find a suitable alternative site, the record demonstrates that SBA considered numerous possible sites. We also note the restrictions and regulations SBA catalogues in its Opposition that severely limit the available alternatives.<sup>126</sup> We are satisfied that SBA made sufficient efforts to find a suitable alternative. As it notes in its Opposition, it was not obligated to conduct an exhaustive search,<sup>127</sup> particularly when it considered each site offered by commenters.

52. In addition, the record is clear that SBA did consider alternatives to its preferred facility and implemented those alternatives where feasible. Thus, SBA reduced the height of the proposed tower from 230 feet AGL to 199 feet AGL, thereby eliminating the need to light the tower for aviation safety and mitigating the consequent visual effects and effects on migrating birds.

53. For these reasons, we conclude that SBA adequately examined alternatives to its proposed communications tower under our rules and under NEPA.

#### IV. CONCLUSION

54. We have determined, consistent with NEPA and NHPA and upon an independent review of the EA, that the proposed construction will have no significant effect on the human environment<sup>128</sup> within the meaning of NEPA and Section 1.1307 of the Commission's rules.<sup>129</sup> We further conclude that allowing SBA to construct a tower on Brockway Mountain in Copper Harbor, Michigan, would serve the public interest, convenience, and necessity. Accordingly, we grant SBA's application.

(Continued from previous page)

<sup>125</sup> We further note that the Commission has an "ongoing commitment to promote wireless infrastructure deployment, with the goal of facilitating robust wireless coverage for consumers everywhere." See, e.g., *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations*, Report and Order, 29 FCC Rcd 12865, 12867, para. 4 (2014).

<sup>126</sup> See Opposition at 13-15.

<sup>127</sup> See *id.* at 10 (quoting AT&T Wireless PCS Inc., 14 FCC Rcd 9489, 9496 (WTB 1999), which cites *Druid Hills Civic Association v. FAA*, 772 F.2d. 700, 713 (11th Cir. 1985)).

<sup>128</sup> See 47 CFR § 1.1308(d).

<sup>129</sup> See 47 CFR § 1.1307.

**V. ORDERING CLAUSES**

55. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 1.939(b) and 1.1313(a) of the Commission's Rules, 47 CFR §§ 1.939(b) and 1.1313(a), the various Petitions to Deny against Antenna Structure Registration Application A0909673 ARE DENIED.

56. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 1.1313(b) and 17.4(c) of the Commission's Rules, 47 CFR §§ 1.1313(b) and 17.4(c), the Requests for Environmental Review and other informal objections against Antenna Structure Registration Application A0909673 ARE DENIED.

57. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 1.1308 and 17.4(c) of the Commission's Rules, 47 CFR §§ 1.1308 and 17.4(c), that applicant SBA Towers III, LLC shall use motion-activated, down-shielded lighting and avoid constant nighttime illumination at the site should any security lighting be required under the tower.

58. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 1.1308 and 17.4(c) of the Commission's Rules, 47 CFR §§ 1.1308 and 17.4(c), that applicant SBA Towers III, LLC place fencing or an elevated rope between the project area and the nearby identified plants of the species *Arnica cordifolia* during construction to prevent unintentional direct impacts.

59. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 1.1308 and 17.4(c) of the Commission's Rules, 47 CFR §§ 1.1308 and 17.4(c), that applicant SBA Towers III, LLC shall paint the tower in a non-reflective color in order to reduce the tower's visibility.

60. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), the regulations of the Council on Environmental Quality, 40 CFR §§ 1501.3, 1508.9 and 1508.13, Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and Sections 1.1308(d) and 17.4(c) of the Commission's Rules, 47 CFR §§ 1.1308(d) and 17.4(c), that the Division finds grant of the Application will have no significant impact on the environment.

61. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(a), and Section 1.929(a)(4) of the Commission's rules, 47 CFR § 1.929(a)(4), that Antenna Structure Registration Application A0909673, filed by SBA Towers III, LLC, is GRANTED.

62. IT IS FURTHER ORDERED, pursuant to Sections 1501.4(i) and 1506.6 of the regulations of the Council on Environmental Quality, 40 CFR §§ 1501.4(i) and 1506.6, and Section 1.1308 of the Commission's Rules, 47 CFR § 1.1308, that applicant SBA Towers III, LLC is to provide to the community to be served by this facility notice of the finding herein of no significant impact.

63. This action is taken pursuant to delegated authority under Sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131, 0.331.

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

**APPENDIX  
List of Parties**

Michael Abbott	Gregg Maze
Don Arkin	William Maze
Mathew Barkley	Kathryn McDonald
Aimme Bissonette	Bryan McKarney
Thomas Boost	Michigan Nature Association
Steve Brimm	Diane Miller
Patricia Butler	Debra Mues
Caleb Carlson	Jeff Nelson
Marie Celona	Richard Olson
Copper Country Audubon	Douglas Oppliger
Copper Country Trail Committee	Bob and Charlene Page
Deborah Cunningham	Dave and Jane Pallin
Myles Dexter	Jeff Parker
John Diebel	Victoria Parlin
Susan Earley	Richard Powers
Martin Faassen	Sharon Powers
David Flaspohler	Alexander Protzel
Friends of Brockway Mountain	David Purcell
Ann Gasperich	Delbert Rajala
Larry Gasperich	Sam Raymond
Mildred Gasperich	Amanda Rogers
Zach Gayk	Amber Roth
Crissy Gerhart	Cecilia Sanders
Gratiot Conservancy	SBA Communications
Mark Gulick	Richard Schaefer
Brett Hamlin	Leon Shaner
Sue Haralson	Doug Sherk
Timothy Hartshorne	James and Theresa Simak
Lori Hauswirth	Allison Slavick
James Hay	Laura Sonnleitner
Scott Hickman	James Tercha
Jill Hodges	The Nature Conservancy
Houghton Keweenaw Conservation District	David Toczydowski
Connie Julien	Kenneth Twardzik
Joseph Kaplan	Norma Veurink
Keweenaw 911 Committee	Gregory Waite
Greg Kester	Kathleen Waite
Keweenaw Adventure Company	Ann West
Keweenaw Community Forest Company	Bill Wicklund
Keweenaw County Road Commission	Elaine Wildman
Keweenaw Land Trust	Barbara Williams
Sue Ellen Kingsley	Travis Williams
Craig Kurtz	Bruce Wolck
Margaret Laird	Debra Wolf
Jim Loveland	Rheta Wolfe
John Lucas	
Robert Marlor	
William Marlor	
Audrey Mayer	