

Before the
Federal Communications Commission
Washington, DC 20556

In the Matter of)
)
Effects of Communication) WT Docket 03-187
Towers on Migratory Birds)

REPLY COMMENTS OF UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation ("USCC") hereby files its Reply Comments in the above-captioned proceeding.¹ USCC is a wireless carrier providing cellular and PCS service in numerous markets nationwide. It has registered over 2,500 towers with the Federal Communications Commission. Thus, USCC has a vital interest in any action the FCC may take regarding its communications tower licensing policies.

USCC wishes to associate itself with the comments filed by the wireless industry and its representatives in this proceeding.² USCC believes that the evidence placed before the FCC by those seeking additional regulation of FCC licensees to protect migratory birds is insufficient to justify the issuance of any notice of proposed rulemaking, let alone support the adoption of the draconian

¹ Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, 18 FCC Rcd 16938 (2003) ("Notice").

² See, e.g., Comments of Cellular Telecommunications and Internet Association and National Association of Broadcasters ("CTIA/NAB"); PCIA; Cingular Wireless LLC and SBC Communications, Inc. ("Cingular"); AT&T Wireless Services, Inc. ("AWS"); and Sprint Corporation ("Sprint").

tower licensing requirements sought by some of the environmental groups participating in this proceeding.³

USCC files these separate comments to emphasize what we believe to be the most important considerations that the comments have identified with respect to the FCC and migratory birds, namely the lack of any evidentiary basis upon which the FCC could proceed to impose the new regulations sought; the extremity of the "remedies" sought by the Environmental Petitioners; and the increasing conflict between the national priority of improved wireless service and regulatory proposals which will prevent the construction of wireless facilities.

I. The FCC Has No Basis Upon Which to Proceed.

A reading of the comments makes it clear that the FCC does not have the solid scientific foundation upon which any new regulations of this type must rest.

We do not know, and cannot learn from the comments filed, how many migratory birds there are in the United States, or how many are killed each year by communications towers, or what percentage of that number constitutes of overall avian mortality, or what might best be done to make towers safer for birds.

The data cited by Sprint⁴ indicate that communications towers are a relatively minor source of avian mortality, as opposed to buildings, or power transmission lines, or pesticides, or automobiles, or loss of habitat, and or even "domestic cats." Those data would suggest that communications towers are responsible for less than one percent of all bird fatalities.

³ See, e.g., Comments of American Bird Conservancy, Forest Conservation Council and Friends of the Earth ("Environmental Petitioners").

⁴ Sprint Comments, pp. 4-7.

Dr. Albert Mandeville of the U.S. Fish and Wildlife Service ("USFWS"), whose work on avian mortality is respectfully cited by parties on both sides of this dispute,⁵ states, on behalf of USFWS, that valid scientific work does demonstrate that communications towers have killed migratory birds. However, his comments acknowledge that the "etiology of bird-tower mortality is a major research need" and that there has been little research published concerning this subject since widespread construction of wireless towers began in the nineties.⁶ Dr. Mandeville notes that "additional research is imperative."⁷

Recognizing this basic need, the FCC is cooperating with the State of Michigan in performing a study to assess the impact of communication towers on migratory birds.⁸ That study will provide welcome data. However, a study of a limited number of towers in Michigan is just a beginning, given the enormity of what we do not know about this issue. It will not furnish a basis for rules changes along the lines contemplated by the Environmental Petitioners.

As is noted by CTIA/NAB in their comments (pp. 33-37), FCC regulations of scientific subjects such as radio frequency emissions have been based on well developed scientific knowledge. Any action now to impose "migratory bird" restrictions on licensees at the behest of the Environmental Petitioners would not

⁵ See, e.g., Comments of Sprint, p. 4; Comments of Environmental Petitioners, pp. 15-17.

⁶ USFWS (Mandeville) Comments, p. 3.

⁷ *Ibid.*, p. 6.

⁸ See FCC News Release, "Wireless Bureau Announces the State of Michigan to Initiate a Study Assessing the Impact of Communications Towers on Migratory Birds," released September 17, 2003 ("News Release").

be based on scientific research of comparable reliability, and would not be sustainable on judicial review.

The FCC is not an "environmental" agency, though it undoubtedly has environmental responsibilities. Similarly, FCC licensees, such as USCC, want to be good corporate citizens, obeying all relevant laws, including environmental laws. But the FCC's primary responsibility, and that of its licensees, is set out in its governing statute, namely "to make available so far as possible, to all people of the United States ... a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities." 47 U.S. C. § 151. The comments filed by the Environmental Petitioners pay no attention to that essential responsibility, but the FCC cannot forget it in evaluating these proposals.

As will be discussed in Section II below, the "remedies" put forward by the Environmental Petitioners would essentially paralyze the wireless tower siting process. They would greatly delay the construction of all towers and prevent many towers from ever being constructed. That result undoubtedly conflicts with the statutory mandate quoted above. Even if one leaves aside the persuasive arguments by CTIA/NAB concerning the inapplicability of the National Environmental Policy Act to wireless tower construction in the first instance, the FCC should never adopt rules so much at odds with its governing statute's central purpose as those proposed, without far more definitive scientific evidence than has been produced.

II. The "Remedies" Proposed By The Environmental Petitioners Would Bring Tower Construction to a Halt.

As discussed in their comments, the Environmental Petitioners assert that the FCC must end its "stonewalling" and take various steps to comply with the National Environmental Policy Act ("NEPA"), the Migratory Bird Treaty Act ("MBTA"), and the Endangered Species Act ("ESA").⁹ The "steps" which the FCC is asked to take include: (1) adoption of the USFWS "guidelines" for siting of communications towers (the guidelines would essentially forbid the construction of towers of over 200 feet in height and the lighting of towers); (2) repeal of the current "categorical exclusion" of tower siting and construction from routine environmental review; (3) requiring the FCC to prepare an environmental assessment for every tower which "may affect migratory birds;" (4) adopting changes to tower construction requirements to accommodate migratory birds; (5) requiring regular "monitoring" of towers to record "avian mortality;" (6) requiring the FCC to "consult" with USFWS on the "adverse impact" of tower registration decisions and adopt measures to "prevent such adverse impacts;" (7) completion by the FCC of a "programmatic" Environmental Impact Statement (EIS) concerning avian mortality; and (8) the "immediate" implementation of the prior items.

The above requirements, taken together, would essentially end the construction of wireless and other communications towers or would drastically curtail such tower construction. To take one example, how could the FCC prepare an EA to assess the possible impact of all proposed towers on migratory birds when

⁹ Environmental Petitioner's Comments, pp. 19-20.

most scientific authorities agree that such impacts are now impossible to measure? Such requirements would be intended to, and would cause, infinite delays in tower construction.

The comments of CTIA/NAB and others have demonstrated that the NEPA, MBTA, and ESA do not, in fact, require such extreme results.¹⁰ The FCC should heed those comments and also understand precisely how extreme and unreasonable such arguments are.

USCC would also note the empirical findings of the Washington State Association of Broadcasters and Sprint to the effect that they have not noticed any appreciable avian mortality at their towers. USCC's experience has been comparable. We submit that to shut down the wireless industry's ability to construct towers based on such unproven allegations would be a grave injustice, which would ill serve the public interest.

III. The FCC Should Not Increase The Burdens of the Wireless Industry in This Proceeding.

In USCC's view, the FCC should also consider this proceeding in a larger context, the relevant characteristics of which are as follows:

In recent years, the wireless industry has come under severe and conflicting pressures. On the one hand, it has been subject to ever increasing regulation at the federal and state levels. Wireless carriers now have to comply with, inter alia, federal "enhanced 911" requirements, the Communications Assistance For Law Enforcement Act, and local number portability requirements. They have had to

¹⁰ See, CTIA/NAB Comments, pp. 1-30.

provide improved service to the hearing impaired and engage in number "pooling" even when they eventually use all the numbers they obtain. In the states, lawsuits for alleged violations of state "consumer" statutes by wireless carriers through their billing, advertising, and coverage practices, are a growth industry. Prominent members of Congress now regularly denounce the wireless industry for its "dead spots" and other alleged system failures.

Underlying many of these new and costly mandates, and much of the criticism and litigation directed at the wireless industry, is one central demand, namely that wireless carriers must provide greatly improved and enhanced coverage at lower prices for consumers. Whether or not that demand is justified by past industry practices or is otherwise fair or reasonable, it is clear that it cannot be met unless wireless carriers retain at least their existing legal ability to build new base stations, as better coverage is impossible without them.

However, many currently contemplated rules, which either the FCC itself has proposed or has been asked to adopt by others, will greatly complicate (or make impossible in many instances) the construction of such new facilities.

For example, in its "Programmatic Agreement" proceeding,¹¹ the FCC is considering whether to provide extensive consultation rights and arguably a veto power to Indian tribes and Native Hawaiian organizations over wireless "undertakings" on lands in which the tribes and organizations do not now reside but

¹¹ See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Process, Notice of Proposed Rulemaking, WT Docket 03-125 (rel. June 9, 2003).

to which they claim ancestral ties, and also to allow states to "opt out" of all the "exclusions" granted to carriers by the Programmatic Agreement itself.

Similarly, in its "radio frequency interference" proceeding,¹² the FCC has proposed to subject many communications towers which exceed 10 meters in height to "routine" environmental evaluation, which are not now subject to such evaluation.¹³

These and other proposed changes in the rules would certainly render tower construction more costly and subject to greater delay and obstruction than it now is. Thus, the adoption of such rules would undoubtedly mean fewer towers would be constructed, which would conflict with the national mandate for better service referred to above.

However, those regulatory changes, onerous though they would be, would nonetheless be of minor significance in comparison to having to conduct a full scale environmental assessment of the impact of every proposed tower on specific migratory birds. Such a requirement would simply be impossible to meet and would essentially bring the process of constructing communications towers to a halt.

We submit that such an outcome would be, to put it mildly, contrary to the public interest. We ask that the Commission consider this proposal in the larger context of whether it believes it useful to subject the wireless industry to an ever

¹² See Proposed Changes in the Commission's Rules Regarding Human Exposure to Radio Frequencies Electromagnetic Fields, Notice of Proposed Rulemaking, ET Docket No. 03-137, FCC 03-132 (rel. June 26, 2003) ("Notice").

¹³ Notice, at ¶8.

increasing number of regulations of this type, which will make it impossible to carry its responsibilities to the public.

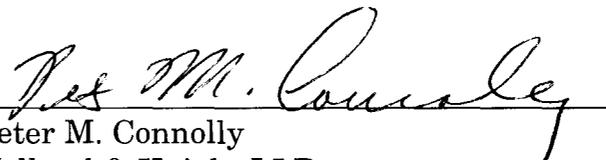
CONCLUSION

For the foregoing reasons, USCC asks that the FCC not seek to impose additional regulations on its licensees concerning migratory birds based on the evidence now before it.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION


James R. Jenkins, Vice President
Legal and External Affairs
United States Cellular Corporation
8110 West Bryn Mawr
Chicago, IL 60631


Peter M. Connolly
Holland & Knight LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006