Before The
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Effects of Communications Towers	)	WT Docket No. 03-187
on Migratory Birds	)	

REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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EXECUTIVE SUMMARY

The Cellular Telecommunications & Internet Association ("CTIA") files these reply comments to address certain misstatements or misunderstandings by other commenters concerning relevant principles of environmental or administrative law. These misunderstandings of relevant legal principles provide the common underpinnings for the comments filed by the American Bird Conservancy ("ABC") and the U.S. Fish and Wildlife Service ("F&WS") who seek immediate action by the Federal Communications Commission ("FCC" or the "Commission") in advance of the development of a sound scientific basis. These and other commenters who want to "regulate now and find out the facts later" do not dispute that the basic science is still nonexistent regarding what factors in tower construction and design may affect avian mortality, as was demonstrated in the joint CTIA-National Association of Broadcasters ("NAB") Comments and the accompanying technical report filed on November 12, 2003 ("CTIA Comments"). Indeed, the basic conclusion that the science is woefully absent is apparent from a fair reading of the F&WS Comments, which repeatedly acknowledges the absence of basic scientific understanding and the need for more research. Nonetheless, the "regulate now" Commenters argue that the FCC is somehow required (or at least, permitted) to take additional regulatory actions now, before the basic science is available.

Imposing regulations in advance of science to prevent the mere risk of a risk is sometimes called the of science to prevent the mere risk of a risk. In many highly publicized instances, such as the international controversies over "genetically modified organisms" and beef hormones, the U.S. government has vigorously and successfully attacked in international forums the notion that government should regulate first and develop the science later. More importantly, U.S. Courts squarely reject this so-called "precautionary approach," which is specifically invoked as the basis for the F&WS' Comments (p.12). Instead, it is a basic tenet of administrative law that government may not regulate arbitrarily without a sound factual basis to show that an actual problem exists and that regulatory action can improve the situation. The norm that government should act only if there is good reason to believe that benefits will exceed the costs is embodied in a long line of executive orders and statutes, and reflects the fundamental principle of U.S. law that government may not act arbitrarily, but must justify its decisions on the record subject to judicial review. Costly and restrictive government regulations should not be imposed to prevent a speculative risk of a risk, or when only personal opinions unsupported by science would support governmental action.

The fundamental principle of U.S. administrative law that government regulation must be based on substantial evidence (or its legal equivalent under the "capricious and arbitrary" standard in rulemaking) cannot be avoided by "adopting" a "guideline" that is supposedly based on the opinions of experts, such as the F&WS Voluntary Guidelines for tower construction. The legal requirements for government to develop a *voluntary guideline* are quite different from what is required to support a legally binding regulation. The F&WS Voluntary Guidelines for the siting of communications towers were developed without opportunities for public participation, scrutiny of its underlying factual basis or opportunities for judicial review. As the courts have repeatedly held, the government cannot do an end run around the basic requirements of the Administrative Procedure Act to develop a factual record, respond to comments and engage in reasoned decisionmaking by merely "adopting" a guideline developed for another purpose.

Both the ABC Comments and the F&WS Comments are predicated on the fundamentally erroneous legal premise that the FCC may somehow merely "adopt" the F&WS Voluntary Guidelines. In fact, however, the FCC would be required by law (as well as by principles of fairness and sound policy) to develop a factual and scientific record to support its actions and to show that they are not arbitrary — but in this case, as all concede, the basic science to do so is lacking. Neither the F&WS nor the Commission can avoid the fundamental norms of legality embodied in the American system of administrative law.

None of the environmental statutes cited by the "regulate now" commenters alters these basic principles of law requiring a record and factual support. Both the ABC Comments and the F&WS Comments assume and assert their fundamental conclusion that the FCC's current approach somehow violates the National Environmental Policy Act ("NEPA") or other environmental statutes. This unsupported assertion is simply incorrect. As CTIA demonstrates in detail in its initial comments, the FCC's current approach is fully consistent with NEPA, the Council on Environmental Quality ("CEQ") regulations and the caselaw. NEPA and the other environmental statutes do not apply because tower design and siting is a private rather than a governmental decision. Even if NEPA did apply, the FCC is entitled to make a generic finding that a particular activity is not having a significant effect of the human environment, rather that going through the wasteful and useless exercise of doing so on a tower-by-tower basis. The record in this proceeding certainly supports the FCC's continuing its current approach, because there has been no demonstration that communications towers are having a significant effect on migratory bird population. While the "regulate now" commenters rely on anecdotal accounts and erroneous interpretations of the relevant law to support their claims, the CTIA and NAB unequivocally demonstrate in their joint comments that the FCC's current approach is fully consistent with the Commission's legal obligations – and in fact, goes well-beyond what the statutes would require, even if they applied.

Therefore, CTIA respectfully submits that no further action or change in the FCC's regulation is appropriate at this time.

TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY i

I. THE FCC'S CURRENT APPROACH GOES BEYOND THE REQUIREMENTS OF NEPA AND OTHER ENVIRONMENTAL STATUTES 1

II. A SO-CALLED "PRECAUTIONARY APPROACH" DOES NOT JUSTIFY ADOPTING THE F&WS'S VOLUNTARY GUIDELINES.....3

III. CONCLUSION: NO FURTHER ACTION IS WARRANTED AT THIS TIME 8

I. THE FCC'S CURRENT APPROACH GOES BEYOND THE REQUIREMENTS OF NEPA AND OTHER ENVIRONMENTAL STATUTES

CTIA's Comments[1] demonstrated at length that NEPA does not apply to communications tower siting and design decisions, because: (1) these decisions are fundamentally private with only minimal federal involvement; and (2) in any event, there is no basis to conclude that these decisions (even if they were assumed *arguendo* to be "major federal actions") have a significant impact on the human environment, as required by the statute.[2]

Without any analysis of the statutory requirements, the ABC and F&WS comments blithely *assume* that an Environmental Impact Statement ("EIS") is required. These commenters then quote certain CEQ regulations out of context regarding what an EIS must contain. However, these requirements would apply *if but only if* an EIS were required, and none is required.[3] These arguments not only put the cart before the horse; they assume the existence of the cart. The *issue* is (1) does NEPA apply, and if so (2) what would NEPA require. Bald assertions that the FCC must "comply" with NEPA miss this threshold question.

The ABC Comments mistakenly conclude that "[u]ntil the FCC completes a programmatic environmental impact statement on its communications towers registration program, the agency must refrain from issuing new authorizations for towers that may adversely affect migratory birds."[4] While this conclusion is based on the *assumption* that the statute applies, and that a programmatic impact statement is required, in fact, all of the cases cited on

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[1] Comments of CTIA and NAB, filed on Nov. 12, 2003 ("CTIA Comments"), to *Effects of Communications Towers On Migratory Birds*, WT Docket No. 03-187, Notice of Inquiry ("Notice"), 18 FCC Rcd 16938 (2003).

[2] *See* 42 U.S.C. § 4332(C).

[3] *See* ABC Comments, filed on Nov. 11, 2003, at 1-2 ("CEQ regulations [40 C.F.R. § 1508.25(a)] require agencies to consider three types of actions *when preparing an EIS* ..." (emphasis supplied)).

[4] *See id.* at 3.

pp. 4-15 of CTIA's Comments demonstrate that no such EIS requirement applies at all where (1) the content of the decision at issue is fundamentally private with only minimal federal involvement, and (2) in any event, there is no significant effect on the human environment.

The ABC Comments also misstate the proper legal test – the issue is not whether communications towers "adversely affect migratory birds" (as ABC asserts, *supra*). Rather, the statutory trigger for NEPA is whether a "major federal action" "significantly affect[s] the quality of the *human* environment." 42 U.S.C. § 4332(C) (emphasis supplied); *see* CTIA's Comments at 11, n.16, *citing Found. for North American Wild Sheep v. United States Dept. of Agriculture,* 681 F.2d 1172, 1178 (9th Cir. 1982) (test under NEPA is "whether … the proposed project may significantly degrade some human environmental factor.")*; see also* 40 C.F.R. § 1508.14. The "regulate now" commenters never argue nor demonstrate that the siting and design of communications towers is a major federal action, but *arguendo*, even if they are, NEPA requires some demonstration that communications towers are having such a significant effect on migratory bird populations that they are adversely affecting human beings ability to use or enjoy migratory birds. No one has even attempted to make such a demonstration.

The F&WS Comments are also misleading by implying that the Migratory Bird Treaty Act (MBTA) is violated by the "unauthorized taking of even one bird."[5] But the F&WS Comments omit to mention that the word "take" is a word of art that has been defined by a long line of court cases as applying only to hunting, poaching or other actions conducted for the purpose of killing or injuring protected birds. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991).[6] The one case cited by ABC, *U.S. v. Moon Lake Elect. Assn*, 45 F.Supp. 2d

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[5] F&WS Comments at 1.

[6] See also CTIA Comments, at 47.

1070 (D.C. Colo. 1999), is not persuasive authority to the contrary. In the first place, it is merely a single district court decision, but more fundamentally, the court merely denied a motion to dismiss on the facts before it. Thus, it certainly does not hold that the construction of a communications tower is regulated as a "taking" under the MBTA.

Despite the desire of certain commenters who ask the Commission to regulate first and ask questions afterwards, there are no requirements that either mandate – or indeed, would even *permit* – the FCC to go beyond its current regulatory approach on the state of the present record.

II. A SO-CALLED "PRECAUTIONARY APPROACH" DOES NOT JUSTIFY ADOPTING THE F&WS'S VOLUNTARY GUIDELINES

The ABC Comments specifically request the FCC to "adopt" the F&WS Voluntary Guidelines[7] (ABC Comments at 16). The F&WS Comments repeatedly cite the Voluntary Guidelines, and assert (without justifying the claim) that they embody "the best and most current science currently available."[8] However, F&WS stops just short of recommending that the FCC adopt the Voluntary Guidelines as a binding regulation, stating instead that "until more definitive lighting determinations are reached based on credible, statistically-significant, peer-reviewed science, the Service will not modify its voluntary lighting guidance nor will we make recommendations to the FCC and the Federal Aviation Administration (FAA) to modify their standards until new discoveries are made."[9] Nevertheless, F&WS goes on to request that the FCC should "encourag[e] use of the Service's voluntary communication tower guidance within

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[7] U.S. F&WS Guidance Document on the Siting, Construction, Operation and Decommissioning of Communications Towers issued on September 14, 2000.

[8] F&WS Comment, at 12.

[9] F&WS Comments, at 8.

an MOU [that] would make our guidance more meaningful and provide it with substantially more clout."[10]

Neither approach to giving the Voluntary Guidelines "more clout" is justified. The Voluntary Guidelines were developed to be just what the name suggests – *Voluntary* Guidelines. They were not developed with the rigor or intention that they would be mandatory and enforceable. There was no open public process with opportunities for comment and an opportunity to see and question the scientific basis leading up to the recommendations. Stated in the negative, the development of the Voluntary Guidelines violated virtually every known requirement of administrative due process as guaranteed by the Administrative Procedure Act, 5 U.S.C. § 501 *et seq*. and supporting caselaw.

For example, it is a fundamental requisite of administrative due process that interested parties are entitled to disclosure and an opportunity to comment on the key scientific evidence that supposedly supports the rule. *See U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (invalidating FDA rule for failure to make available for public comment the key scientific data underlying the rule); *see also General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (holding that EPA's reliance on a "guidance document" was improper without proper notice and comment since the document was binding and had the force of law). Similarly, it is a fundamental requisite of the American system of administrative law that the agency must lay out the evidence that supposedly supports a regulation, but it must also respond to the significant comments received and provide a written justification for its decisions that is subject to judicial review. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1972); *Motor Vehicle Mfr. Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983). None of these basic

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[10] F&WS Comments, at 12.

procedural safeguards has been provided in the case of the F&WS' Voluntary Guidelines. Therefore, the F&WS' self-serving claim that the Guidelines represent "the best and most current science currently available" should be regarded with skepticism. Notice and comment procedures are provided in order to give interested parties a chance to examine and test the adequacy of the information on which government proposes to rely. Not only is this a legal requirement, good science requires no less. Until a thorough ventilation of the underlying scientific issues is provided through notice and comment procedures, and if necessary, judicial review, no one can appropriately rely on the F&WS Voluntary Guidelines.

Moreover, even if the F&WS' Voluntary Guidelines were assumed to be all the F&WS claims them to be – namely, a distillation of current expert scientific opinion – that alone would still not be sufficient support for a binding regulation. This issue was squarely decided in *AFL v. OSHA*, 965 F.2d 962 (11th Cir. 1992). In that case, OSHA purported to codify "permissible exposure limits" for 227 substances in the workplace by adopting expert consensus standards that had been adopted with far more transparency and opportunities for public than were provided here. Nonetheless, the Eleventh Circuit set aside the OSHA rules holding that OSHA was required to discuss each substance separately and provide a disclosure of the key underlying scientific information and opportunity for comment. An agency simply cannot legally make an end run around the Administrative Procedure Act by "adopting" guidelines developed without the procedural guarantees required by law.

Those principles of basic administrative due process and procedural regularity apply here. The FCC is simply not permitted to accept uncritically the F&WS' Voluntary Guidelines as representing the "the best and most current science currently available." Rather, the FCC is

required to delve into the underlying scientific controversies and make available for public comment and challenge the evidence that supposedly supports these recommendations.

The F&WS concedes that "[t]he etiology of bird-tower mortality is a current major research need."[11] In plain English, this means that we just don't know what causes some birds to collide with some towers and other structures. Until that basic information becomes available, it surely is premature to rush to regulate. Absent more basic science, it will be impossible to create an administrative record supporting regulatory action that is not based on impermissible speculation and guesswork.

The F&WS attempts to avoid these basic administrative law requirements that government action must not be arbitrary but instead must be grounded on scientific facts by invoking a so-called "precautionary approach," "[b]ecause the Service takes the precautionary approach in its efforts to protect migratory birds, we must assume that all communications towers pose a risk to migratory birds, including those that are unguyed and unlit - until research can shed new light that would alter this hypothesis."[12] As discussed above, this premise violates the core norms of the American legal system by presuming guilt until innocence is proven.[13] While explicitly stated only in this one passage, in fact a key assumption underlying most of the arguments of the "regulate now" commenters is that the FCC should act now in advance of an adequate base of scientific knowledge. CTIA strongly disagrees. It is a fundamental principle of American law that government action must be rationalized and justified based on a factual

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[11] F&WS Comments, at 3.

[12] F&WS Comments, at 12.

[13] Gail Charnley and E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 32 ELR 10363 (Mar. 2002); s*ee also* Christopher D. Stone, *Is There a Precautionary Principle?*, 31 Envtl. L. Rep. 10790 (July 2001).

record. *See* Administrative Procedure Act, § 7, 5 U.S.C. § 706(2)(A) (1994); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971). As the D.C. Circuit reminded the FCC years ago in a different context, "[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[14]

No scientific or factual basis for the regulation of communications towers to reduce the risks of collisions by migratory birds yet exists, and therefore regulatory action would be premature and unjustified.

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[14] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *citing City of Chicago v. FPC*, 458 F.2d 731,742 (D.C. Cir. 1971).

III. CONCLUSION: NO FURTHER ACTION IS WARRANTED AT THIS TIME

For all of the foregoing reasons, CTIA respectfully requests that the Commission issue a statement finding that no change is warranted at this time to the Commission's regulations regarding analysis of the environmental effects of communications towers on migratory birds, either because the Commission lacks jurisdiction, or in the alternative, because the available scientific information is inadequate at the present time.

Respectfully submitted,

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