

to protect migratory birds is insufficient to justify the adoption of the draconian tower licensing requirements sought by 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 wireless carrier comments have identified with respect to the FCC and migratory birds. Those considerations are: (1) the lack of any present evidentiary basis upon which the FCC could proceed to impose the new regulations sought; (2) the extremity of the "remedies" sought by the Environmental Petitioners; (3) the FCC's lack of legal authority to proceed under certain of the statutes cited by the Environmental Petitioners; and (4) the need for the FCC to focus on the growing conflict between the national priority of improved wireless service and the proposals now before the FCC which will unnecessarily prevent the construction of wireless facilities.

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

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

It has been demonstrated in painstaking detail by CTIA/NAB, Cingular, PCIA, and PCIA's consultant Woodlot Alternatives that Avatar's "conclusions"

³ See, e.g., Comments on the Avatar Report of American Bird Conservancy, Forest Conservation Council, Humane Society of the United States and Defenders of Wildlife ("Environmental Petitioners").

supporting increased FCC regulation of wireless towers are not supported in the scientific literature which Avatar itself cites.⁴

We still do not know and cannot learn from either the Avatar Report or the comments filed by the Environmental Petitioners and the U.S. Fish and Wildlife Service ("USFWS"), how many migratory birds there are in the United States, or how many are killed each year by communications towers, or what percentage that number constitutes of overall avian mortality, or what might best be done to make towers safer for birds.⁵

As is noted by Avatar and other commenters,⁶ multiple studies are underway to assess the impact of communications towers on migratory birds, with results anticipated over the next 12-36 months. These studies may provide important information and could form part of the basis for rational FCC regulations. However, pending studies do not support immediate FCC action, as called for by the Environmental Petitioners. Any action now to impose "migratory bird" restrictions on licensees at the behest of the Environmental Petitioners based on the data summarized by Avatar would not be based on adequate scientific research under the principles set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and thus would not be sustainable on judicial review.⁷

⁴ See Comments on the Avatar Report of CTIA/NAB pp. 7-9, Exhibit A; Cingular pp. 20-21; PCIA, pp. 6-10, and Woodlot "Technical Comments."

⁵ See Comments on Avatar Report of Centerpointe Communications, LLC, pp. 1-7; Cingular Comments, pp. 1-12.

⁶ See PCIA Comments, pp. 10-11.

⁷ See Cingular Comments, pp. 7-12.

Thus, at present the FCC should not amend its rules, for example, to require that wireless or other FCC licensed towers be limited to 200 feet in height above ground or forbid that such towers be supported by guy wires, or ban red beacon lighting, even leaving aside the FAA's primary jurisdiction over antenna lighting issues.

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. Neither the Avatar Report or the comments filed by the Environmental Petitioners or the USFWS pay any attention to that essential responsibility, but the FCC should not forget it in evaluating this issue.⁸

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, if not most, 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 in their initial comments in this proceeding, filed November 2, 2003, concerning the inapplicability of the National Environmental

⁸ See also Cingular Comments on the Avatar Report at pp. 20-21.

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.⁹

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

In their November 2003 comments on this issue, the Environmental Petitioners asserted that the FCC must end its "stonewalling" and take various steps, necessary in their view, to comply with the National Environmental Policy Act ("NEPA"), the Migratory Bird Treaty Act ("MBTA"), and the Endangered Species Act ("ESA").¹⁰ The "steps" which the FCC was asked to take included: (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 any lighting of towers); (2) repeal of the currently applicable "categorical exclusions" of tower siting and construction from routine environmental review; (3) adoption of a rule requiring the FCC to prepare an environmental assessment for every tower which "may affect migratory birds;" (4) adoption of changes to FCC 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 adoption of measures to "prevent such adverse impacts;" (7) completion by the FCC of a "programmatic" Environmental Impact Statement

⁹ See Also PCIA Comments on the Avatar Report, p. 3 and CTIA/NAB/PCIA Joint Brief cited therein.

¹⁰ Environmental Petitioner Comments filed November 12, 2003, pp. 19-20.

(EIS) concerning avian mortality; and (8) and the "immediate" implementation of the prior items.

The Environmental Petitioners presumably still support those recommendations. However, in their recent comments on the Avatar Report, they have also sought to add the following additional requirements to applicants' "to do" lists: (1) conducting "surveys" of all possible "listed and proposed" species, including all mammals, birds, reptiles, amphibians, fish, invertebrates and flowering and non-flowering plant species that may potentially inhabit tower sites, or use the sites to meet their "life cycle needs," or may be adversely impacted by the proposed structure's radar frequency emissions; (2) conducting "literature reviews" to determine if the location of a proposed structure may affect any "suitable or potential habitat" for "listed or proposed" species; (3) reviewing "bird kill data" from "nearby structures" to determine if any listed or proposed bird species are likely to be adversely affected by a proposed tower; (4) determining if the structure conforms with September 14, 2000 USFWS Guidelines on the Siting, Construction, Operation and Recommissioning of Communications Towers; and (5) compiling "any other information" available from federal, state or local government, universities, or organizations which addresses any potential conflict between the proposed structures and "listed or proposed species for listing."¹¹

The Environmental Petitioners' previous and current proposals, if adopted in whole or in part, would essentially end the construction of wireless and other communications towers in this country. For example, how could the FCC prepare

¹¹ Environmental Petitioner Comments on Avatar Petition, p. 19.

an EA to assess the possible impact of all proposed towers on migratory birds when most scientific authorities agree that such impacts are now impossible to measure? How could licensees possibly measure the impacts on the "life cycle needs" of all potentially affected animal and plant species? Such "requirements" would be intended to, and would cause, infinite delays in tower construction.

The comments of CTIA/NAB filed in response to the Notice of Inquiry and the comments of PCIA in response to the Avatar Report, have demonstrated that the NEPA, MBTA, and ESA do not, in fact, require that such impossible requirements be implemented.¹² The MBTA for example, is a 1918 statute which refers, inter alia, to the willful "taking" or "killing" of migratory birds, by poachers and the like. It is simply not applicable in this context. The FCC should heed those comments and also understand precisely how extreme and unreasonable the opposing arguments are. USCC would also, however, urge the FCC to face up to and decide these issues. It does no party to this proceeding or the public any good for the relevant federal agency not to decide basic jurisdictional issues so crucial to its licensees.

USCC, in our own November, 2003 comments on the Notice of Inquiry, also noted the empirical findings of the Washington State Association of Broadcasters and Sprint to the effect that they had not noticed any appreciable avian mortality at their towers. USCC's experience has been comparable. We submit that to shut

¹² See, CTIA/NAB November 12, 2003 Comments, pp. 1-30; PCIA Avatar Comments, p. 5; CTIA/NAB Avatar Comments, pp. 14-16..

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.

USCC also believes that it is appropriate and necessary that the FCC 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, *inter alia*, with new federal requirements pertaining to "enhanced 911," the Communications Assistance For Law Enforcement Act (soon to include complex new "packet data" surveillance mandates), local number portability, hearing aid compatibility, and comprehensive signal "outage" reporting. Such requirements, whatever their policy justification, are individually and cumulatively costly in terms of both human and monetary resources.

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.

The billing practices of the wireless industry have also been questioned and CMRS carriers may be made subject to FCC micromanagement of their bills' wording, which also will be both expensive and a likely generator of litigation.¹³

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, new FCC rules and policies bearing specifically on tower construction may also undermine the possibility of improved service.

For example, in the "Programmatic Agreement" proceeding, the FCC has adopted new rules which require archeological surveys of new tower sites, and more extensive submissions to SHPOs, as well as providing extensive notice and consultation rights, which may amount to a veto power, to Native American tribes and Native Hawaiian organizations, concerning towers to be built at locations in which such tribes and organizations do not now reside but to which they claim ancestral ties.¹⁴

¹³ See, In the Matter of Truth in Billing Format National Association of State Utility Consumer Advocates Petition For Declaratory Ruling Regarding Monthly Line Items and Surcharges Imposed by Telecommunications Carriers, CC Docket 04-208; Telecommunication Reports, February 18, 2005, "FCC To Consider Billing Restrictions on Wireless Carriers at Next Meeting."

¹⁴ See, In the Matter of Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process, Report and Order, WT Docket No. 03-128, FCC 04-222, released October 5, 2004.

Similarly, in its "radio frequency interference" proceeding,¹⁵ 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.¹⁶

The Programmatic Agreement probably will, and the RF proposal would, render tower construction more costly and subject to greater delay and obstruction than it now is, arguably conflicting with the national mandate for better service referred to above.

However, those regulatory changes, onerous though they may be, would nonetheless be of relatively minor significance to carriers in comparison to having to conduct a full scale environmental assessment of the impact of every proposed tower on multiple species of migratory birds, which both the Environmental Petitioners and the USFWS now endorse, or having to comply with the other recommendations of the Environmental Petitioners referred to above.¹⁷

We submit that such an outcome would be 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 increasing number of regulations of this type, which will make it impossible to carry out responsibilities to the public.

¹⁵ See Proposed Changes in the Commission's Rules Regarding Human Exposure to Radio Frequencies Electromagnetic Fields, Notice of Proposed Rulemaking, 18 FCC Rcd 13187 ("Notice").

¹⁶ Notice, at ¶8.

¹⁷ The USFWS recommends that all 836 species of birds protected under the MBTA be included as part of the FCC's checklist review", USFWS Avatar Comments, p. 21.

CONCLUSION

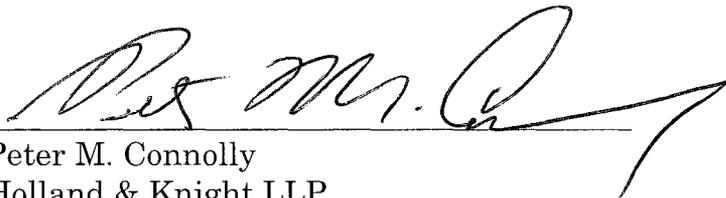
For the foregoing reasons, USCC asks that the FCC not seek to impose additional regulations on its licensees concerning migratory birds based on the Avatar Report or other evidence now before it.

Respectfully submitted,

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