

Before The
Federal Communications Commission
Washington, D.C.

In the Matter of

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Effects of Communications Towers
on Migratory Birds

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WT Docket No. 03-187

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS
AND
CTIA - THE WIRELESS ASSOCIATION
ON THE AVATAR REPORT**

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EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) and CTIA – The Wireless Association (“CTIA”) (hereinafter “Joint Commenters”) submit this reply to certain comments filed in response to the FCC’s *Public Notice* seeking comment on the report of Avatar Environmental, LLC (“Avatar”), regarding migratory bird collisions with communication towers. In responding to the Avatar Report, the U.S. Fish and Wildlife Service (“USFWS”) has reaffirmed that additional research is necessary before it can assess the issue of significance. Specifically, USFWS states that: (1) “it is *still impossible* to directly correlate [tower] collisions to impacts on bird populations;” (2) “[w]e acknowledge the need to work with the applicable research entities and the industry to identify the most appropriate approach and mechanism(s) to develop guidance on standard methods and metrics for data collection and monitoring at communications towers;” and (3) “[t]he Service acknowledges that the major focus of avian-communication tower research is to determine specifically *why* major mortality events occur, and *what can be done to avoid them*.” Joint Commenters concur with the above statements.

Without systematic, peer-reviewed research, the Commission cannot determine whether communications towers are having a material effect on avian population and therefore, are significantly affecting “the quality of the human environment,” – the standard required by the National Environmental Policy Act (“NEPA”). Indeed, in its initial comments, USFWS explicitly stated that “*much is simply not known* about the impacts of communications towers on birds today – even with the databases of many previous studies” and that these previous studies alone “*would be insufficient* for the FCC

to change its rules and processes.” Thus, even USFWS, which has taken the lead in advocating regulations, concludes regulation is premature.

Contrary to the claims made by the American Bird Conservancy, Forest Conservation Council, Human Society of the United States, and the Defenders of Wildlife (“Avian Groups”), the Commission is not violating NEPA. The Report by Land Protection Partners (hereinafter “LPP Report”) concluding that there is a scientific basis for establishing regulations for communication towers, which the Avian Groups attached to their comments, is fundamentally flawed. The methodology for determining species-specific mortality rates at communications towers, for example, is based on scant and statistically incompatible scientific research. Once again, the Avian Groups have failed to produce evidence that the comparatively small numbers of birds killed in collisions with communications towers are having *any significant effect* in altering migratory bird populations.

Further, despite Avian Groups’ calls for mandatory adoption of the USFWS’ voluntary tower siting guidelines (“guidelines”), the Commission should refrain from doing so. First, USFWS’ has recognized that the guidelines have created confusion in the field as to their force-and-effect and that these guidelines were adopted without proper public notice-and-comment. USFWS states that it intends to remedy these defects in the near future. Thus, it would be premature for the Commission to utilize these guidelines.

Beyond this inherent flaw, the Commission should not rely on these guidelines, which call for the construction of short (under 200 feet), unlit and unguyed towers, where possible, because they are not based on *scientific evidence*. Moreover, adoption of the

guidelines would significantly impair the deployment and service coverage areas for both broadcast and wireless services. The Avian Groups repeatedly claim that:

Simply co-locating antennae, keeping towers under 200' to avoid lighting where possible, building monopole towers where possible, keeping lighting to the minimum required by the FAA and using white or red strobe lights at no more than 20 pulses a minute *cannot possibly inhibit the provision of efficient and reliable communication services.*

These statements underscore the Avian Groups' continued and steadfast refusal to recognize the basic laws of physics that govern radio frequency signals and service coverage. As NAB has previously demonstrated, even moderate reductions in tower height can lead to dramatic reduction in service coverage area, thus producing a significant harm to consumers without a reasonable basis for regulation.

Joint Commenters further submit that regulations governing the use of lighting to mitigate avian collisions with towers are entirely premature. The Joint Commenters concur with Centerpointe Communications that, prior to regulatory changes, additional studies of avian species' biological attraction and responses to lighting must first be conducted. The Commission should reject calls for regulating the use of guy wires, which are primarily employed to ensure *public safety*. Additionally, the Commission should refrain from promulgating regulations governing tower siting – terms such as migratory ridges and corridors are so vague that their use would preclude siting in a vast majority of America.

Finally, the Commission should reject Avian Groups' unsubstantiated demands for mandatory Environmental Assessments as a licensing or re-licensing requirement. As discussed in detail in our Initial Comments and Joint Avatar Comments, nothing in the Communications Act of 1934, as amended, NEPA, Endangered Species Act (“ESA”), or Migratory Bird Treaty Act (“MBTA”) provides the FCC with the authority to regulate the

design or siting of communications towers for the purposes of minimizing speculative and unsubstantiated effects on migratory birds. Thus, Joint Commenters respectfully request that the Commission issue a statement finding that no change to the Commission's environmental regulations for communication towers is warranted at this time.

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I. Introduction.

The National Association of Broadcasters (“NAB”) and CTIA – The Wireless Association (“CTIA”)¹ (hereinafter “Joint Commenters”) submit this reply to certain comments filed in response to the FCC’s *Public Notice* seeking comment on the report of Avatar Environmental, LLC (“Avatar”), regarding migratory bird collisions with communication towers.² Joint Commenters have been active participants in this proceeding.³ We continue to recognize that the preservation of the ecological balance of

¹ NAB is a non-profit, incorporated association of radio and television stations and serves and represents the American broadcasting industry. CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² See Wireless Telecommunications Bureau Seeks Comment on Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions with Communications Towers, *Public Notice*, WT Docket No. 03-187, rel. Dec. 22, 2004.

³ See *In Re Effects of Communications Towers On Migratory Birds*, Comments of CTIA and NAB, filed on Nov. 12, 2003 (“Initial Comments”), WT Docket No. 03-187, *Notice*

migratory birds is an important issue and we commend the Commission for its continued efforts to gather scientific evidence on avian mortality at communications towers, before it considers further actions. The Commission has made clear that, “[d]epending on the record developed in this proceeding, it will consider whether the current state of research of avian mortality at communications towers would support further action by the Commission in this area, including possible amendments of its environmental rules.”⁴ As discussed below, the evidence present in this record does not support further action at this time. Contrary to the assertions of the American Bird Conservancy, Forest Conservation Council, Human Society of the United States, and the Defenders of Wildlife (hereinafter “Avian Groups”), there is no reliable scientific evidence that comparatively small numbers of birds killed in collisions with communications towers are having *any significant effect* in altering migratory bird populations. Thus, the Commission has no reasonable basis for acting at this time.

II. In Light Of The USFWS’ Forthcoming Action On Its Guidelines, The Commission Should Refrain From Further Action.

As discussed in detail in our Joint Avatar Comments,⁵ although labeled voluntary, the U.S. Fish and Wildlife Service (“USFWS”) interim guidelines⁶ have

of Inquiry, 18 FCC Rcd 16938 (2003); Reply Comments of NAB filed on Dec. 11, 2003; Reply Comments of CTIA filed on Dec. 11, 2003; Comments of CTIA and NAB, filed on Feb. 14, 2005 (“Joint Avatar Comments”).

⁴ In re Effects of Communications Towers on Migratory Birds, *Notice of Inquiry*, WT Docket No. 03-187, 188 FCC Rcd 16938 (2003) (“*Notice*”) at ¶ 1 (emphasis added).

⁵ Joint Avatar Comments at 14, Appendix B; *see also* Comments of American Bird Conservancy, Forest Conservation Council, and Friends of the Earth, WT Docket No. 03-187, Nov. 11, 2003 at 16 (“Avian Groups Comments”) (stating that a “number of counties and municipalities have adopted the FWS Tower Guidelines”).

become *de facto* regulation in many local jurisdictions. The guidelines advocate a myriad of untested and unreasonable restrictions such as limiting communications towers height to under 200 feet, avoiding the use of lighting and guy wires⁷ without any consideration of their deleterious impact on RF propagation and service coverage. The USFWS now states that it “will likely hold public workshops on our communication tower guidance to help clarify its voluntary nature and hopefully avoid any confusion.”⁸ Joint Commenters are encouraged by USFWS’ recognition that the guidelines have created confusion as to their force-and-effect. We also applaud the USFWS for its declaration that it “will very likely open up a comment period on our communication guidance before it is officially released as an updated document.”⁹ In light of the proposed measures to be taken by USFWS, the Commission should refrain from promulgating regulations that incorporate the guidelines.

III. The Comments Of USFWS Clearly Demonstrate That There Is Insufficient Evidence To Support A “Significant Affect” Finding.

In addition to announcing their intention to correct the guidelines inherent defect, the USFWS’ comments demonstrate that there is insufficient scientific evidence to warrant regulatory change. Contrary to the repeated assertions of the Avian Groups, the

⁶ Letter from Jamie Rappaport Clark, Director, United States Department of Interior, Fish and Wildlife Service to Regional Directors: *Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers*, Sept. 14, 2000 (“guidelines”).

⁷ Guidelines at 3.

⁸ Comments of the United States Fish and Wildlife Service, WT Docket No. 03-18, Feb. 14, 2005 at 4 (“USFWS Avatar Comments”).

⁹ *Id.*

Commission is not violating the National Environmental Policy Act (“NEPA”).¹⁰ While Section 102(2)(C) of NEPA requires federal agencies to prepare an environmental impact statement for all “major” federal actions, as discussed in our initial comments, NEPA does not apply when the decision to site a communications tower is a private act, not a federal action.¹¹ Even if NEPA was applicable, in order to trigger it, tower sitings would have to meet the second required prong of NEPA – they must “significantly affect the quality of the human environment.” 47 U.S.C. §4332(C). USFWS has previously conceded that there is no evidence to support NEPA’s second requirement:

Because so few studies – at both short and tall towers – are ongoing, it is somewhat *meaningless to debate* the realistic impact and true mortality caused by communication towers on birds *until systematic research* is conducted.”¹²

In responding to the Avatar Report,¹³ the USFWS has reaffirmed that additional research is necessary before it can address the issue of significance:

¹⁰ Comments of American Bird Conservancy, Forest Conservation Council, Human Society of the United States and Defenders of Wildlife, WT Docket No. 03-187, Feb. 14, 2004 at 14 (“Avian Groups’ Avatar Comments”); Comments of American Bird Conservancy, Forest Conservation Council, and Friends of the Earth, WT Docket No. 03-187, Nov. 11, 2003 at 16.

¹¹ See Comments of NAB and the Cellular Telecommunications & Internet Association (“CTIA”), WT Docket No. 03-187, Nov. 11, 2003 at 4-8 (“Initial Comments”); see also Comments of PCIA, WT Docket No. 03-187, Feb. 14, 2004 at 3 (“PCIA Avatar Comments”); Brief of Intervenors CTIA, NAB and PCIA: The Wireless Infrastructure Association, *Forest Conservation Council, Inc.; In re Friends of the Earth v. FCC*, No. 03-1034 (D.C. Cir., filed April 30, 2003).

¹² Comments of the United States Fish and Wildlife Service, WT Docket No. 03-18, Nov. 18, 2003 at 4 (“USFWS Initial Comments”) (emphasis added).

¹³ Notice of Inquiry Comment Review Avian/Communication Tower Collisions, prepared for the FCC, by Avatar Environmental, LLC *et al.* (Sept. 30, 2004) (“Avatar Report”).

- Because of the limited avian monitoring and the lack of a current assessment of cumulative impacts from tall structures, *it is still impossible to directly correlate collisions to impacts on bird populations.*¹⁴
- We acknowledge *the need to work with the applicable research entities* and the industry to identify the most appropriate approach and mechanism(s) to develop guidance on standard methods and metrics for data collection and monitoring at communications towers Any such guidance must be consistent, standardized, but adaptable to specific sites, and needs to be scientifically rigorous, sound, and peer reviewed by professional ornithologists, technicians, and other specialists – including biologists with FWS.¹⁵
- The Service acknowledges that the major focus of avian-communication tower research is to determine specifically *why* major mortality events occur, and *what can be done* to avoid them.¹⁶

Joint Commenters concur with the above statements. Without systematic, peer-reviewed research, the Commission cannot determine whether communications towers are having a material effect on avian population and therefore, are significantly affecting “the quality of the human environment” the standard required by NEPA.

The Avian Groups’ assertions that based on “extensive documentation of the past and current killing of migratory birds at communications towers,”¹⁷ and that the “data clearly indicate[s] that mortality at communications towers is biologically significant”¹⁸ are simply not supported by the evidence in the record. Nor are they supported by the

¹⁴ USFWS Avatar Comments at 2 (emphasis added).

¹⁵ *Id.*

¹⁶ *Id.* at 3 (emphasis added).

¹⁷ Avian Groups’ Avatar Comments at 4.

¹⁸ *Id.* at 6.

USFWS, whom the Avian Groups have characterized as the “Federal agency with this expertise in birds...” Avian Groups’ Avatar Comments at 15. USFWS, however, has explicitly stated that “*much is simply not known* about the impacts of communications towers on birds today – even with the databases of many previous studies” and that these previous studies alone “*would be insufficient* for the FCC to change its rules and processes.”¹⁹ Thus, even USFWS, which previously has advocated for regulating communications towers, concludes that regulation is premature in the absence of a scientific basis.

The Avian Groups’ comments attach a report by Land Protection Partners (hereinafter “LPP Report”). The LPP Report concludes that there is a scientific basis for establishing regulations for communication towers. That study, however, is fundamentally flawed. LPP improperly attempts to extrapolate the number of birds per species killed at communications towers from the studies supplied by the American Bird Conservancy. Specifically, LPP states:

[w]e assume that the proportion of each species in this dataset equals the proportion of individuals killed each year by towers. We multiplied the percentage of each bird species in the dataset by a low (4 million) and a high (40 million) estimate of the total bird mortality at communications towers to obtain a range of the number of each species killed each year.

LPP Report at 4-5. And, LPP’s calculations are fraught with error. First, there is no means by which one can take 47 studies, each with dramatically varying methodology in number or towers, type, lighting configuration, location of tower siting, duration of data collection, number of species examined, etc., to yield any scientifically sustainable

¹⁹ USFWS Initial Comments at 6 (emphasis added).

account of avian mortality numbers. Second, the high and low figures are merely hypotheses, they are not supported by scientific evidence. Third, LPP's multiplication method assumes there is a *constant* mortality rate for each of the top ten bird species listed. That is an invalid assumption. Variations in topography, migration patterns, tower configurations, weather, etc., would statistically yield dramatically different results. Indeed, LPP itself states that "tower kills *could* contribute to population declines in neotropical" migrating songbirds and that their listed examples "are *not meant to be precise predictions* of mortality from communications towers." LPP Report at 8 and 10, respectively (emphasis added). Indeed, LPP has essentially conceded that these numbers are merely hypothetical, and further admits their estimates "will change as estimates of the total bird mortality at towers are refined." *Id.* at 10. Thus, contrary to the strident statements of the Avian Groups, the LPP Report does not establish via scientific evidence the number of avian collisions with communication towers for *any given species*. Avian Groups' Avatar Comments at 6.

Moreover, Joint Commenters disagree that the "estimates of total human-caused bird mortality are not relevant to determine whether kills at communications towers meet the NEPA standard for a significant impact." LPP Report at 4. As discussed in our Initial Comments,²⁰ the legal test under NEPA is whether the "human environment" is being "significantly" affected by losses of birds as an environmental resource in a way that is fairly traceable to communications towers.²¹ One cannot determine whether communications towers are significantly affecting avian species populations without

²⁰ Initial Comments at 11-15.

²¹ 40 C.F.R. § 1508.14.

evaluating avian tower strikes in proportion to total human-caused bird mortality, including mortality caused by manmade structures other than communications towers, permitted hunting and domesticated cats. Nothing in the Avian Groups' comments sets forth scientific evidence that communications towers are "significantly" affecting avian populations. Joint Commenters agree with Cingular Wireless that the record, including findings from Avatar and Woodlot, do not support a conclusion that communications towers' effect on migratory bird populations is "biologically significant."²² Thus, the Commission has no basis upon which to establish changes to its environmental processing regulations.

IV. The Commission Should Reject Avian Groups Demand For Mandatory Adoption Of The USFWS' Guidelines.

As discussed above, the *procedural* defects of the guidelines, coupled with USFWS' comments on the current state of avian mortality research, does not provide a foundation for regulatory change. In addition, the Commission should refrain from adopting or endorsing the guidelines because they are not, as Joint Commenters have previously demonstrated,²³ supported by *science*. Therefore the Commission should soundly reject the Avian Groups' demand that the Commission immediately adopt the guidelines. Avian Groups' Avatar Comments at 14. The Avian Groups have failed to demonstrate that avian mortality at communication towers can, in any measurable way, be mitigated by the guidelines. Despite the Avian Group's characterization that there is

²² Comments of Cingular Wireless, LLC, WT Docket No. 03-187, Feb. 14, 2004 at 14 ("Cingular Avatar Comments").

²³ See Reply Comments of CTIA, *Effects of Communications Towers On Migratory Birds*, WT Docket No. 03-187, Dec. 11, 2003; see also Joint Avatar Comments at 6-7.

“solid evidence of the efficacy of such measures,”²⁴ they are simply not supported by even the smallest scintilla of relevant scientific data. Indeed, even LPP Report recognizes that “[t]here is no single tower height threshold that will eliminate bird collisions entirely, except zero feet.” LPP Report at 15.

Moreover, USFWS has acknowledged that the individual factors, including height, lighting, topography, and guy wires, are very poorly understood. Specifically, in its initial comments the USFWS cautioned “it is premature to assume that [tower] height alone is the critical factor to avian mortality,” that “determining what specifically about light attracts birds will need more research,” the impact of towers sited on “ridges, mountains and other high ground are not well known,” the effect of guy wire deterrents “have not been scientifically tested,” and the safe distance of siting away from wetlands “remains a question.”²⁵ For each factor, the USFWS is on record as stating their effects are unknown and that the current body of research of these factors “is far from adequate.”²⁶ Yet, the Avian Groups characterize the guidelines as “reasonable alternatives for mitigating” harm to migratory birds. Avian Groups’ Avatar Comments at 17. Further, they state:

Simply co-locating antennae, keeping towers under 200’ to avoid lighting where possible, building monopole towers where possible, keeping lighting to the minimum required by the FAA and using white or red strobe lights at no more than 20 pulses a minute *cannot possibly inhibit the provision of efficient and reliable communication services.*

²⁴ Avian Groups’ Avatar Comments at 2.

²⁵ USFWS Initial Comments at 9, 8, 10, 9 and 10, respectively.

²⁶ *Id.* at 5.

Id. at 21 (emphasis added). These statements underscore the Avian Groups' continued and steadfast refusal to recognize fundamental differences in communications services and technologies and the basic principles of physics as it relates to radio frequency signal propagation and service coverage.

A. Restricting Tower Heights To Under 200 Feet Will Significantly Impair Broadcast And Wireless Services.

To illustrate the problem of severely restricting tower height, in its reply comments, NAB contracted with Mark R. Fratrick, Ph.D., Vice President, BIA Financial Network to analyze six broadcast tower facilities as a representative sample of currently-sited mid-size towers, ranging from 223 to 604 feet height above average terrain, with varying topography. The net result of reducing the tower height to under 200 feet yielded an average decrease for population served for the three FM stations of *forty-five percent* (45%) within the city grade contour and over eighteen percent (18.3%) within the outer protected contour. The average decrease for population served for the three television stations would be over *sixty-one percent* (61%) within the city grade (Grade A) contour and over forty-three percent (43.8%) within the protected (Grade B) contour. The total population loss of over-the-air reception service for just the six cities listed was over 21,500,000. NAB Reply Comments at 9-17. Similarly, wireless services that cover large footprints, such as public safety radio systems, are likely to experience significant decreases in service coverage if towers are capped at 199 feet. The net result of such artificial limitations in tower height is a significantly impaired broadcast and wireless service, and inevitable disruption of critical and often life-saving services such as the broadcast Emergency Alert Services, E-911, Amber Alerts, Public Safety communications, etc. The Commission cannot adhere to the guidelines without causing

serious harm to the public at large by compromising communications service coverage, both for commercial and public safety services.

Additionally, the Commission should recognize that *all* communications structures will require eventual replacement, and that many new towers may be required to complete the digital television (“DTV”) transition and wireless network buildout. Shortages in service cannot be simply overcome by building more towers that are under 200 feet. Not only would the cost be prohibitive, the approval process for state and local jurisdictions onerous (if not impossible), but the tower configurations themselves, in many situations, would run afoul of the distance separation requirements contained in Parts 73.207 and 73.610 of the Commission’s Rules. Because there is no research that supports the theory that towers over 200 feet pose a significant risk to the “human environment,” as required by NEPA, the Commission cannot endorse these arbitrary guidelines.

B. The Commission Should Refrain From Endorsing The Use Of Strobe Lighting Until Additional Research Is Conducted.

While the Avian Groups demand mandatory adoption of the USFWS lighting guidelines, neither they nor the USFWS offer solid scientific evidence that such formidable measures would significantly mitigate avian mortality and equally important, maintain health and safety of human beings. For example, the Avian Groups advocate the use of red strobe lights (as an alternative to white strobe lights) even though they directly cite the acknowledgement in the guidelines that “[r]ed strobe lights have not been studied.” Avian Groups’ Avatar Comments at 10. Consequently, the guidelines recommend the use of a lighting configuration whose effect on migratory bird

populations is wholly unknown. LPP Report also states that “[c]onclusive evidence is not available that the color of light affects bird attraction.” LPP Report at 19. As Centerpointe Communications highlighted, Avatar stated that “there are 10,000 relevant species of birds and the photo and visual pigments for *only 11* of those species is known.” Centrepoint Comments at 14. Joint Commenters agree with Centrepoint that scientific research should focus “on the birds themselves, rather than the obstacles in which they collide.” *Id.* While the USFWS may “continue to *feel* that artificial lighting is the key attractant for birds to communications towers,”²⁷ until red strobe light and other lighting configurations are fully studied, regulation of tower lighting is wholly premature.

Further, as Centrepoint correctly notes, any regulation that mandates the use of white strobe lights is likely to meet with opposition from the hundreds of state and local jurisdictions and communities. Centrepoint Comments at 25. Indeed, in many jurisdictions, such as El Dorado, Kansas and Niagara, NY,²⁸ the use of white strobe lighting is strictly prohibited. While LPP asserts that “white strobe lighting does not attract, or negligibly attracts, migratory birds,”²⁹ it reaches such conclusions without providing any data that such hypotheses have been rigorously and extensively tested in

²⁷ USFWS Avatar Comments at 3 (emphasis added).

²⁸ El Dorado’s zoning regulation explicitly states: “[t]here shall be no nighttime lighting of or on wireless communication facilities except for aircraft warning lights or similar emergency warning lights required by applicable governmental agencies. *No strobe lights shall be used.*” See <http://www.eldoks.com/article6zr.html> (last visited March 14, 2005) (emphasis added). Niagra has similar restrictions: “Any lighting which may be required by the FAA *shall not consist of strobe lights*, unless specifically *mandated* by the FAA.” See <http://www.townofniagara.com/service2.htm> (last visited March 14, 2005) (emphasis added).

²⁹ LPP Report at 22.

the field. Moreover, in its initial comments, the USFWS “points out that studies previously cited have documented nighttime bird attraction to lights at or nearly at the ground level during inclement weather.”³⁰ Yet the guidelines do not address the use of ground lighting configurations, which are required in many local jurisdictions. Simply stated, the Commission has no scientific basis upon which to endorse or mandate the use of strobe lighting and may create substantial conflict with local regulations.

C. The Commission Should Refrain From Regulating The Use Of Guy Wires And Tower Siting Criteria.

In addition to tower height and lighting configurations, the Avian Groups urge the Commission to mandate two variations of USFWS guidelines. First, the Avian Groups “urge the FCC to adopt requirements for communications towers to avoid the use of guy wires unless applicants document that construction is not feasible without the use of guy wires.” Avian Groups’ Avatar Comments at 12. Guy wires, however, are employed based on topography, soil conditions, etc., to ensure, among other things, *human safety*. The propose requirement would needlessly delay the construction of telecommunications towers without commensurate benefit. It is the licensee’s responsibility to ensure the safety of its telecommunications facility. The Commission should not adopt regulations that second-guess tower construction safety and structural measures employed by licensees.

Second, the Avian Groups urge that tower siting selection avoid “migration corridors on ridgelines where migrating birds may fly at or below the height of towers.” Avian Groups’ Avatar Comments at 2. It is, however, entirely unclear what constitutes

³⁰ USFWS Initial Comments at 9.

(a) a migration corridor or (b) a ridgeline. These ambiguous characterizations could describe a vast majority of American territories, rendering licensees without any guidance in selecting appropriate siting areas or making it impossible to construct a tower at all in many areas.³¹ Indeed, as Woodlot and Avatar both noted, “additional information is needed to develop better correlations between seasonal migration patterns and specific factors causing tower collisions.”³² Thus, in order for the Commission to even contemplate regulating site selection based upon migration patterns or corridors, these areas must be well-defined by adequate scientific research.

V. The Commission Should Reject Avian Groups’ Call For Mandatory Environmental Assessments As A Licensing Or Re-Licensing Requirement.

Although all parties concur that additional research on avian mortality at communications towers is needed, the Commission does not have the authority to impose research requirements or funding obligations on its licensees. Agencies only have such authority as Congress delegates to them.³³ As discussed in detail in our Initial Comments

³¹ Moreover, this ambiguous characterization could potentially frustrate tower siting approval in nearly all state and local jurisdictions, as climate could be cited as a basis for denying any construction in large regions, thereby denying the public access to communications services.

³² See Technical Comment on *Notice of Inquiry* Comment Review, Avian/Communication Tower Collisions, Final (Avatar *et al.* 2004), by Woodlot Alternatives, Inc. (February 2005) at 2 (“Woodlot Report”); Avatar Report at 3-36.

³³ *Railway Labor Executives’ Association v. Nat’l Mediation Board*, 29 F.3d 655, 670 (D.C. Cir. 1994) (“it is beyond cavil that ‘an agency’s power is no greater than that delegated to it by Congress.’”), quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986); see also *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act ... unless and until Congress confers power upon it”); *American Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 965 (D.C. Cir. 1985) (“The extent of [an agency’s] powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background.”) (citation omitted), *cert denied* 475 U.S. 1011, (1986).

and Joint Avatar Comments, nothing in the Communications Act of 1934, as amended (“Communications Act”), NEPA, Endangered Species Act (“ESA”), or Migratory Bird Treaty Act (“MBTA”) provides the FCC with the authority to regulate the design or siting of communications towers for the purposes of minimizing speculative and unsubstantiated effects on migratory birds.³⁴ No provision of the Communications Act specifically delegates to the Commission authority to require telecommunications licensees to conduct avian mortality studies. Nor do the general provisions of the Communications Act referring to “necessary” regulations (*e.g.*, § 303(r); § 303(4)(i)) provide such authority. The Avian Groups have failed to point to any scientifically reliable evidence that would satisfy the test for significance under NEPA. Indeed, Woodlot affirmatively stated that none exists.³⁵ In other words, the supposed “problem” is entirely speculative, and no credible scientific data exists showing that communication towers are having any discernible effect at all on migratory bird populations. Clearly, no regulatory changes are appropriate when there is no scientific basis to conclude that a problem exists. NEPA is further limited by being a *procedural* statute, and does not provide any additional substantive regulatory authority to federal agencies.³⁶

Because there is no “credible scientific evidence”³⁷ to support a significance finding, the Commission may not use its NEPA authority to require industry to perform

³⁴ Joint Avatar Comments at 12-13; Initial Comments at 34-36.

³⁵ Woodlot Report at 1.

³⁶ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (NEPA is “essentially procedural.”).

³⁷ NEPA requires the use of “credible scientific evidence.” 51 Fed. Reg. 15618, 15623 (April 25, 1986).

avian mortality research. Congress included the significance requirement in NEPA to strike the balance it considered appropriate between the unavoidable costs and delay associated with developing reliable scientific studies and the need for information about environmental effects of projects. Congress legislated that speculative or hypothetical effects of projects do *not* need to be studied.³⁸ NEPA *only* authorizes an agency to conduct studies where there is existing evidence of a “significant effect” on the quality of the human environment.

Joint Commenters therefore strongly disagree with Avian Groups’ call for mandatory “Environmental Assessments as a licensing or re-licensing requirement for the construction of individual towers which may affect migratory birds.” Avian Groups’ Avatar Comments at 20. As discussed in detail in our Initial Comments,³⁹ the Commission’s current approach consists of a generic determination that communications towers are not having a significant effect on the human environment by virtue of their effect on migratory bird populations except where threatened or endangered species may be involved. This is a “categorical exclusion” which is specifically contemplated under 40 C.F.R. § 1508.4. This generic determination of non-significance is abundantly supported by the scientific literature reviewed by both Avatar and Woodlot. Moreover, in light of the fragmentary and dubious nature of scientific information currently available, it would serve little or no purpose to require site-specific assessments of

³⁸ *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 295 (D.C. Cir. 1988) (agencies are “not required to consider alternatives that are ‘remote and speculative,’ but may deal with circumstances ‘as they exist and are likely to exist’”), quoting *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972), citing *Carolina Env’tl. Study Group v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975).

³⁹ See Initial Comments at 15-19.

environmental impacts of each and every potential communications tower site, as suggested by the Avian Groups. Without more science, not enough is currently known to make consideration of design changes or other mitigating alternatives productive on a site-specific basis through Environmental Assessments. Opting for one of the site-specific approaches would simply bring wireless and broadcast network construction and upgrades to a halt. Such approaches merely provide those who oppose communications towers for other reasons a procedural mechanism to achieve long delays and subsequently increase costs and impede the prompt deployment of advanced wireless and broadcast services with no corresponding benefit. Further, nowhere in any of the Commission's rules describing environmental processing, or objections based thereon, are post-construction reviews contemplated or permitted. 47 C.F.R. § 1.1307(c) provides in part as follows:

If an interested person alleges a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision making process. (*See* § 1.1313).

Thus, Joint Commenters agree with PCIA that new or amended tower regulations cannot be applied retroactively. PCIA Avatar Comments at 3- 4.

VI. Conclusion.

For all the foregoing reasons, Joint Commenters respectfully request that the Commission issue a statement finding that no change to the Commission's environmental regulations for communication towers is warranted at this time.

Respectfully submitted,

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