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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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WT Docket No. 03-187

*In the Matter of*

**EFFECTS OF COMMUNICATIONS  
TOWERS ON MIGRATORY BIRDS**

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**Reply Comments of Cingular Wireless  
On Report by Avatar Environmental LLC**

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**EFFECTS OF COMMUNICATIONS** ) File No. WT Docket No. 03-187  
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**REPLY COMMENTS OF CINGULAR WIRELESS  
ON REPORT BY AVATAR ENVIROPNMENTAL LLC**

Cingular Wireless LLC (“Cingular”), through undersigned counsel, hereby submits its reply comments on the report submitted to the Commission by Avatar Environmental LLC.<sup>1</sup>

**I. Introduction and Summary.**

With one exception, all of the commenting parties agree with Avatar that the state of the science is insufficient to make policy choices or changes to the Commission’s environmental rules. The record is clear that there is no justification for any change in the Commission’s environmental rules due to concern for migratory bird mortality at communications towers. The one dissenting party, ABC<sup>2</sup> repeats shopworn arguments that have been thoroughly discredited in this and other proceedings. ABC’s call for the Commission to shut down deployment of wireless infrastructure while it completes a fruitless nationwide environmental impact statement is totally irresponsible, and would violate this Commission’s statutory mandate to facilitate infrastructure deployment. In its zeal to have the Commission impose burdensome new requirements

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<sup>1</sup> *Notice of Inquiry Comment Review Avian /Communication Tower Collisions* submitted by Avatar Environmental, LLC, EDM International, Inc. and Pandion Systems, Inc. (September 30, 2004) (“Avatar Report”).

<sup>2</sup> Comments by American Bird Conservancy, Forest Conservation Council, The Humane Society of the United States, and Defenders of Wildlife (“ABC”).

on the industry in advance of the science, ABC simply ignores both the facts and the law. The Commission cannot, and should not, accede to ABC's demands.

## **II. The Commission's Existing Rules Comply with Federal Environmental Laws.**

In numerous proceedings ABC has asserted that the Commission's existing environmental rules violate the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA") and the Migratory Bird Treaty Act ("MBTA"). ABC is wrong. ABC made this same claim in the opening round of comments in this proceeding. Cingular/SBC categorically demonstrated the fallacy of ABC's claims.<sup>3</sup> In the current round of comments, ABC simply restates its arguments without acknowledging, much less refuting, Cingular/SBC's showing. ABC's baseless arguments gain no validity through endless repetition.

### **A. The Commission Has Considered and Rejected ABC's Claim that the Commission's Rules Violate Federal Environmental Laws.**

In *PEER*<sup>4</sup>, this Commission considered and rejected claims by environmentalists that the Commission's environmental rules violate NEPA and the implementing regulations of the Council for Environmental Quality ("CEQ"). The Commission analyzed in detail the requirements of NEPA and the CEQ regulations and found that its existing environmental rules comport with both the statute and the regulations.<sup>5</sup> ABC ignores the Commission's decision in *PEER* refuting ABC's claim that the Commission's existing rules violate NEPA.

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<sup>3</sup> Cingular/SBC Reply Comments at 5-11.

<sup>4</sup> In the Matter of Public Employees for Environmental Responsibility: Request for Amendment of the Commission's Environmental Rules Regarding NEPA and NHPA, 16 FCC Rcd 21,439, 2001 WL 1538988 (2001) ("*PEER*").

<sup>5</sup> *PEER* at ¶ 11.

ABC's claim that the Commission's environmental rules violate the Migratory Bird Treaty Act ("MBTA") and the Endangered Species Act ("ESA") is also without merit. In Reply Comments filed December 11, 2003 in this proceeding, Cingular/SBC demonstrated that the Commission's existing rules are consistent with the MBTA and the ESA.<sup>6</sup> Cingular will not repeat that analysis here but incorporates it by reference. ABC's Comments on the Avatar Report make no attempt to refute the Cingular/SBC showing.

**B. ABC's Demand that the Commission Halt Wireless Infrastructure Deployment While it Prepares a Meaningless Environmental Impact Statement Is Irresponsible and Contrary to the Commission's Statutory Mandate.**

ABC demands that the Commission prepare a nationwide programmatic environmental statement, and until that statement is completed, "refrain from issuing new authorizations for towers that may adversely affect migratory birds."<sup>7</sup> ABC repeatedly cites a November 2, 1999 letter from the then Director of the USFWS to the then Chairman of the FCC calling for such an impact statement.<sup>8</sup> ABC ignores the fact that then Chairman Kennard responded to then Director Clark on March 21, 2000. In his letter, Chairman Kennard stated that:

[T]here is very little study and research, and thus no consensus within the scientific community, on the issue of what impact communications towers have on the migratory bird population and what, if any, mitigation measures could be effective.... Until the necessary research and study is undertaken and some consensus is reached by the expert government agencies and scientific entities to determine the circumstances in which communications towers pose a risk to migratory birds, we do not believe it appropriate for the FCC to undertake the expansive, generic EIS effort you describe.<sup>9</sup>

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<sup>6</sup> Cingular/SBC Reply Comments at 5-11.

<sup>7</sup> ABC Comments at 17.

<sup>8</sup> ABC's Comments contain 11 references to this letter.

<sup>9</sup> March 21, 2000 Letter from William Kennard to Jamie Rappaport Clark.

The state of the science today remains insufficient for the FCC to undertake a meaningful programmatic environmental impact analysis, as the Avatar report documents. ABC's frustration with the pace of scientific progress is understandable, but, as Centerpointe notes:

What the *Review* repeatedly points out is that additional study is required to provide even a modicum of facts upon which future policy might rest....And though one might sympathize with those organizations that feel compelled to *do something*, frustration without understanding is an inappropriate motivator for rational action.<sup>10</sup>

Regardless of the state of the science, the Commission cannot impose a moratorium on tower construction. A primary Commission responsibility under the Communications Act is to facilitate the deployment of wireless communication infrastructure so that the American people can enjoy the economic, public safety, homeland security and other benefits that accrue from the availability of wireless services.<sup>11</sup> The Commission's responsibilities under the environmental laws are secondary to its Communications Act responsibilities, and must give way in the event of a conflict.<sup>12</sup> The Commission cannot lawfully impose a tower siting moratorium over speculative concerns about avian mortality.

In opening comments on the Avatar Report, Cingular pointed out that the Commission staff has given bird advocates a virtual veto power over communication towers that require the preparation of an EA by placing opposed towers into a regulatory "black hole" in which the applications languish indefinitely.<sup>13</sup> The seriousness of this regulatory inertia was demonstrated by a Public Notice released

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<sup>10</sup> Comments of Centerpointe Communications, L.L.C. at 15 ("Centerpointe").

<sup>11</sup> 47 U.S.C.A. § 151; 47 U.S.C.A. § 303(g); *see also* Preamble to the Telecommunications act of 1996.

<sup>12</sup> *Flint Ridge Development Co. v. Senic Rivers Ass'n. of Oklahoma*, 426 U.S. 776, 788 (1976).

<sup>13</sup> Cingular Avatar Comments at 22-23.

March 4, 2005.<sup>14</sup> With regard to four applications by Centerpointe Communications the Public Notice states:

INFORMATIVE: These applications were WITHDRAWN by the applicant. The Friends of the Earth/Forest Conservation Council filed petitions to deny these applications. Withdrawal of the applications renders these petitions MOOT.

The date the Commission received each of these four applications was April 26, 2002.

Thus these four applications were not processed for almost three years by the Commission's staff before the tower company gave up and withdrew the applications.

The Commission cannot allow this to continue and be true to its statutory mandate.

The Spectrum and Competition Policy Division ("Division") of the Wireless Telecommunications Bureau, pursuant to delegated authority, recently considered the merits of a petition to deny filed by the Forest Conservation Council and the American Bird Conservancy ("Forest/ABC") against a proposed communication tower in Deersville, Ohio. The tower was proposed by the State of Ohio Department of Administrative Services ("State") as part of the State's 800 MHz band public safety system. The tower is a 350-foot tall self-supported structure with FAA approved red incandescent lighting. The State included with its application an EA, which the Division evaluated and found it to comply with Section 1.1307(a) and (b) of the Commission's rules.<sup>15</sup> Forest/ABC alleged that the proposed tower would kill migratory birds. The Division commissioned Avatar to evaluate the threat to migratory birds posed by the proposed tower.

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<sup>14</sup> Antenna Structure Registration Service Information, Report No. CWS-05-30, released March 4, 2005.

<sup>15</sup> State of Ohio Department of Administrative Service-Application for Antenna Structure Registration-Deersville, OH: Petition to Deny-Forest Conservation Council and the American Bird Conservancy, 19 FCC Rcd 18,149, 2004WL2071553, rel. Sept. 16, 2004 ("Deersville Order").

Avatar evaluated specific characteristics of the proposed tower and its location with regard to avian mortality. It concluded that the proposed tower would “incrementally increase the potential for both resident and migratory bird collisions” but “this increased risk would not likely be significant for area birds.”<sup>16</sup> The Division weighed this slight increase in the risk to birds against the public benefits that the proposed tower would bring to the citizens of Deersville and granted the State’s application. In the process, it rejected each of the boilerplate arguments against the tower advanced by Forest/ABC and concluded that the tower “will have no significant impact on the environment.”<sup>17</sup>

Because Forest/ABC use a “cookie-cutter” approach to their petitions to deny, the Division’s ruling on the merits in the Deersville Order should allow the staff to process expeditiously the backlogged applications. However, it has been six months since the Division released the Deersville Order and no further orders involving opposed applications have been released. The Division should process these backlogged applications without further delay.

**C. The Commission Must Reject ABC’s Demand that Migratory Birds Be Added to the List of Impacts for Which Environmental Assessments Are Required.**

ABC asserts that it has repeatedly advised the FCC to add migratory birds to the list of impacts for which Environmental Assessments are required under 47 C.F.R.

1.1307.<sup>18</sup> The Commission cannot and should not do so.

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<sup>16</sup> Federal Communications Commission Proposed Deersville Communications Antennae Support Structure: Avian Collision Assessment, prepared by Avatar Environmental LLC/EDM International, Inc. (July 30, 2004) at 6.

<sup>17</sup> Deersville Order at 5.

<sup>18</sup> ABC Comments at 20.

First, this would require the preparation and processing of an EA for every new tower. This would eliminate the categorical exclusion for the vast majority of communication towers that pose little or no threat to the environment. The Commission rejected environmentalists' request to eliminate the categorical exclusion for most communication towers in *PEER*. The Commission held that its categorical exclusions comport with NEPA requirements, "which require federal agencies to use categorical exclusions, where appropriate, to reduce excess paperwork and delay."<sup>19</sup> The Commission stated:

CEQ's implementing regulations specifically direct the Commission and other federal agencies to categorize activities to eliminate the need for environmental processing of actions that are not likely to have a significant environmental impact either individually or cumulatively.<sup>20</sup>

The Commission also found that:

*PEER*'s proposal to require applicants to file an EA or EIS, regardless of the likelihood of environmental harm, would impose unnecessary and substantial delays in preparation and processing of applications, as well as significant financial and administrative burdens on both applicants and the Commission.<sup>21</sup>

ABC itself admits that towers constructed in accordance with the USFWS interim guidelines "would eliminate most avian mortality at communication towers."<sup>22</sup> It is therefore clear that requiring EAs for every tower to address migratory bird concerns is over broad and unnecessary. It would cost wireless customers and taxpayers millions of dollars and would bring the deployment and expansion of wireless telecommunication infrastructure, particularly in rural areas, to a virtual halt. As the record in this

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<sup>19</sup> *PEER*, ¶ 17.

<sup>20</sup> *Id.*

<sup>21</sup> *PEER*, ¶ 12.

<sup>22</sup> ABC Comments at 21.

proceeding shows, it would do little or nothing to reduce avian mortality at communications towers.

Second, as a procedural matter, the Commission cannot change its environmental rules in this proceeding. The Commission would have to conduct a rulemaking proceeding that complies with the requirements of the Administrative Procedures Act to amend 47 C.F.R. § 1.1307(a). The Commission cannot and should not add migratory birds to the list of environmental impacts that require the preparation of an EA.

### **III. The Commission Cannot Impose the USFWS Interim, Voluntary Guidelines in this Proceeding.**

The Avatar Report acknowledges that the USFWS interim tower siting guidelines contain internal inconsistencies that must be resolved before they could be considered for formal adoption.<sup>23</sup> Nevertheless ABC and its consultant, Land Protection Partners (“LPP”), urge the Commission to adopt the present USFWS guidelines as Commission rules.<sup>24</sup> For the reasons discussed below, the Commission cannot, and should not, do so.

#### **A. The USFWS Itself Acknowledges that the Interim Guidelines Cannot Be Made Mandatory and Must Be Amended in Light of Emerging Science.**

Dr. Albert Manville, II of the USFWS filed comments on the Avatar report that reiterate the evolving nature of the science and the need to incorporate the results of ongoing studies into the interim guidelines before they are reissued:

Because avian-tower research is currently ongoing...new findings will almost certainly result in the need to update our guidance....[T]he service will very likely open up a comment period on our

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<sup>23</sup> Avatar Report. Table 5-1, page 5-13.

<sup>24</sup> ABC Comments at 14; Land Protection Partners Paper at 30.

communication tower guidance before it is officially released as an updated document.<sup>25</sup>

It would be premature to adopt the USFWS interim guidelines as Commission rules at a time when the USFWS itself is reevaluating the guidelines in light of emerging science.

**B. The Land Protection Partners Paper Is Insufficient to Justify Adopting the USFWS Interim Guidelines.**

LPP marshals the scientific evidence in support of each of the USFWS interim guidelines individually. In doing so, it ignores the fact that evidence supporting one guideline may contradict another guideline. For example, LPP cites the preliminary results of the Michigan public safety study as “powerful new evidence of the role of [tower] height in bird mortality.”<sup>26</sup> The data presented in Figure 3 show that unguyed, 380-480 foot towers killed virtually no birds over two migration seasons. These towers had FAA-approved solid red and flashing red lights. The fact that FAA-lighted towers approaching 500 feet in height killed no birds suggests that there is no scientific reason to restrict tower height to less than 200 feet in order to avoid FAA lighting. LPP ignores this obvious conclusion.<sup>27</sup>

LPP also supports the 199 foot guideline with a regression analysis that it claims provides “A statistically significant description of the effect of tower height on bird mortality....”<sup>28</sup> The data set that LPP uses to draw this conclusion contains only one tower less than 600 feet in height. That tower, a 197 foot tower in Tennessee, was found to result in an average of only 8 bird deaths a year over a three-year study

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<sup>25</sup> USFWS Avatar Comments at 4.

<sup>26</sup> LPP Paper at 14.

<sup>27</sup> LPP chides Avatar and Woodlot for an alleged lack of objectivity, which it defines as “if alternative explanations for patterns in data exist, they should be included in any discussion of results.” LPP Paper at 29. LPP lacks objectivity in advocating in favor of the 199-foot tower height guideline without discussing the unambiguous data from the Michigan study that FAA-lighted towers up to 500-foot in height kill few, if any, birds.

<sup>28</sup> LPP Paper at 13.

period.<sup>29</sup> LPP stretches statistics to the breaking point by claiming support for a 199 foot guideline from a data set of towers ranging from 600 feet to 2,000 feet in height.<sup>30</sup> The Commission cannot rely on the LPP Paper to support the USFWS interim guidelines.

#### **IV. The Emerging Science Demonstrates that Short Communication Towers Present Little or No Danger to Migratory Birds.**

Throughout this proceeding, Cingular has repeatedly noted the lack of any scientific information that short (less than 500 foot) communications towers of the type deployed by CMRS providers are involved in anything more than a few bird deaths.<sup>31</sup> The scientists commenting on the Avatar Report confirm that finding.

Dr. Joelle Gehring, the Principal Investigator for the ongoing Michigan State Police Tower Study, presented results from the first three migration seasons studied. Each tower in the study was searched daily during the 20 day study period. The study period was selected to coincide with the migration peak of long-distance songbirds. The results were adjusted for observer and scavenger bias. All towers were 380-480 foot tall. All had FAA lighting.<sup>32</sup> The mortality results, adjusted for observer and scavenger bias, were 4.25 birds per tower over a 20 day study period. No large scale kills were observed. Most of the kills were at guyed towers. Unguyed towers resulted

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<sup>29</sup> LPP Paper at 32, Table 4.

<sup>30</sup> The Tennessee tower was the only tower in the data set not obtained from the Woodlot Report or a report from the National Wind Coordinating Committee. The data were obtained during a personal communication between Gerald Winegrad of ABC and C.P. Nicholson of the Tennessee Valley Authority. The addition of this tower appears to be intentional in order to include within the data set a tower that complies with the USFWS guideline that towers should be less than 200 feet in height.

<sup>31</sup> Cingular Avatar Comments at 6-9; Cingular/SBC Comments at 9-10; Cingular/SBC Reply Comments at 13-14.

<sup>32</sup> E-2 lighting: red strobes at the top and half-way down; red, solid-on, incandescent lights 1/3 and 3/4 the height of the tower.

in only 14 bird deaths at 21 towers over 20 days.<sup>33</sup> This study clearly confirms that towers of the type employed by CMRS carriers present little or no risk to birds.

Dr. Manville noted that Avatar should add a “bullet” to its conclusions stating that “the towers of greatest risk appear to be multiple-guyed, multi-lit (especially with incandescent lighting), very tall towers.”<sup>34</sup> Even LPP agrees with the results of the Michigan Study that 380-480 foot towers pose significantly less risk of avian mortality than taller (1,000) foot towers, and that the results reported by Dr. Gehring “are powerful new evidence of the role of height in bird mortality.”<sup>35</sup> This conclusion is also consistent with the finding of Dr. Paul Kerlinger that “towers less than 500 feet have generally experienced very few kills...”<sup>36</sup>

## **V. Conclusion.**

The Avatar Report confirms that the existing state of the science does not warrant amending the Commission’s environmental rules to include avian mortality at communication towers as a checklist item. Indeed, the emerging science indicates that the type of communication towers employed by CMRS providers pose little if any risk to migratory birds. There is no justification for adopting the USFWS interim tower siting guidelines as Commission requirements. To the contrary, the USFWS guidelines need to be amended to remove inconsistencies and to conform to the emerging science, as the USFWS itself admits. The Commission has now ruled on the merits against the extreme positions advocated in this proceeding by ABC. The Commission should

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<sup>33</sup> Letter from Joelle Gehring, PhD. to Louis Peraetz, FCC, describing the results to date of the Michigan State Police Tower Study.

<sup>34</sup> USFWS Avatar Comments at 1.

<sup>35</sup> LPP Paper at 13-14.

<sup>36</sup> Cingular Avatar Comments at 7, citing *Kerlinger 2000* at 22.

proceed expeditiously to process the backlogged tower applications that have been challenged by bird advocates.

Respectfully submitted,

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March 14, 2005

**CERTIFICATE OF SERVICE**

I, Lydia Byrd, an employee in the Legal Department of Cingular Wireless LLC, hereby certify that on this 14th day of March, 2005, courtesy copies of the foregoing Reply Comments of Cingular Wireless were sent via first class mail, postage prepaid to the following:

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In addition, the document was filed electronically in the Commission's Electronic Comment Filing System on the FCC website.

s/ Lydia Byrd  
Lydia Byrd