

**Before the
Federal Communications Commission
Washington, DC 20556**

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

COMMENTS OF UNITED STATES CELLULAR CORPORATION

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United States Cellular Corporation ("USCC") hereby files its Comments in response to the FCC's Notice of Proposed Rulemaking in the above captioned proceeding.¹ USCC is a wireless carrier providing cellular and PCS service in numerous markets nationwide. It has registered over 3,200 towers with the Federal Communications Commission. Thus, USCC has a vital interest in any action the FCC may take regarding its communications tower licensing policies.

Introduction and Summary

USCC has consistently supported the positions taken by the wireless industry and its representatives in this proceeding in response to both the 2004 report of Avatar International ("Avatar Report") and the 2003 Notice of Inquiry.² USCC has argued that the evidence which has been placed before the FCC by those

¹ In the Matter of Effect of Communications Towers on Migratory Birds, Notice of Proposed Rulemaking, WT Docket No. 03-187, FCC 06-169, released November 6, 2006 ("NPRM").

² See, "Wireless Telecommunications Bureau seeks Comment on Avator Environmental, LLC Report Regarding Migratory Bird Collisions with Communications Towers," a Public Notice, WT Docket 03-187, released December 14, 2004. See also, Effects of Telecommunications Towers on Migratory Birds, Notice of Inquiry, WT Docket 03-182, 18 FCC Rcd 16938 (2003) ("Notice of Inquiry"). See, e.g., February 14, 2005 Comments on the Avatar Report of CTIA and the National Association of Broadcasters ("CTIA/NAB"); PCIA; Cingular Wireless LLC and SBC Communications, Inc. ("Cingular"); AT&T Wireless Services, Inc. ("AWS"); and Sprint Corporation ("Sprint").

seeking additional regulation of FCC licensees 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? We reiterate that position in response to the NPRM.

USCC files these comments to restate and emphasize what we believe to be the most important considerations which the FCC should consider in relation to migratory birds. Those considerations are: (1) the lack of any present evidentiary basis upon which the FCC could impose the new regulations proposed in the NPRM; (2) the extremity of the additional "remedies" sought by the Environmental Petitioners and referred to in the NPRM; (3) the FCC's lack of legal authority to proceed under the statutes cited in the NPRM; and (4) the need for the FCC to consider the migratory bird issue in light of the overriding national priority to improve wireless service. USCC also discusses its willingness, on a voluntary basis, to cooperate in reducing avian mortality.

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

A reading of the NPRM and the comments which preceded it make it clear that the FCC does not now have the solid scientific evidentiary foundation upon which any new regulations of this type must rest.

It has been previously demonstrated in painstaking detail in this proceeding by CTIA/NAB, Cingular, PCIA, and Woodlot Alternatives that any new FCC

³ See, e.g., February 14, 2005 Comments on the Avatar Report of American Bird Conservancy, Forest Conservation Council, Humane Society of the United States and Defenders of Wildlife ("Environmental Petitioners").

regulations concerning wireless towers and the alleged threat they pose to migratory birds are not supported in the scientific literature.⁴

As initial matter, we still do not know and cannot learn from either the NPRM, or the September 2004 Avatar Report or the USFWS comments filed in February 2007, 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 in the NPRM (§ 27), the Environmental Petitioners themselves make estimates of avian mortality which vary by factors of ten or more, in one instance from four million bird deaths a year to 50 million. Any action now to impose "migratory bird" restrictions on licensees at the behest of the Environmental Petitioners based on the data referred to in the NPRM 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.

The NPRM also refers, at §§ 30-31, to studies undertaken by Dr. Joelle Gehring of Michigan State University, a summary of which has been filed in the proceeding. Dr. Gehring's studies deal with the alleged effects on avian mortality of different types of lighting systems and the guy wires. However it is relevant that Professor Gehring's 2003 and 2004 studies, whatever their scientific merits,

⁴ See February 14, 2005 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 February 14, 2005 Comments on Avatar Report of Centerpointe Communications, LLC, pp. 1-7; Cingular Comments, pp. 1-12; See also Comments of USFWS, filed February 2, 2007, p. 10; NPRM §§ 27-29.

involved three guyed and three unguyed towers, all located in Michigan. In 2005, Professor Gehring studied avian mortality at 12 guyed and 9 unguyed Michigan towers. What constitutes "enough" scientific evidence to support a new federal mandate may be debatable. But certainly this is not enough.

Thus, at present the FCC should not, based on the Gehring studies or other widely varying estimates of avian mortality, 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, which the NPRM considers (§§ 48-58) or to require the substitution of white strobe for red beacon lighting, as the NPRM proposes (§ 38), 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, which are properly reflected in Section 1.1307 of its Rules. Similarly, FCC licensees, such as USCC, want to be good corporate citizens, obeying all relevant laws, including environmental laws. However, the FCC's primary responsibility, and that of its licensees, is set out in its governing statute, namely "to make available so far as possible, to all people of the United States ... a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities." 47 U.S. C. § 151. The FCC should always consider that essential responsibility in considering issues of this type.

As will be discussed in Section II below, the "remedies" which have been put forward by the Environmental Petitioners previously and by the USFWS in

response to the NPRM 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. The FCC should never adopt rules so much at odds with its governing statute's central purpose as those it is considering, without far more definitive scientific evidence than has been produced.⁶

11. The "Remedies" Proposed By The Environmental Petitioners and USFWS Would Bring Tower Construction to a Halt.

USCC is cognizant of the tentative character of many of the recommendations in the NPRM. However, we consider it important to discuss the recommendations made previously by the Environmental Petitioners, which they are likely to propose again, as it is those recommendations which, if adopted, pose the greatest threat to a rational tower policy.

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").⁷

Those and other similar comments are reflected in the NPRM's request for comment regarding the FCC's scope of authority under each of those statutes? However, before asserting such jurisdiction the FCC should consider carefully the

⁶ See also PCIA Comments on the Avatar Report, p. 3 and CTIA/NAB/PCIA Joint Brief cited therein.

⁷ Environmental Petitioner Comments filed November 12, 2003, pp. 19-20.

⁸ NPRM, ¶¶ 34-36.

full meaning and implications of accepting those jurisdictional arguments, in light of what the Environmental Petitioners have requested be done under authority of those laws.⁹

The "steps" which the FCC was asked to take in 2003 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 remaining 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 post construction "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 (EIS) concerning avian mortality; and (8) and the "immediate" implementation of the prior items.

In their February 2005 comments on the Avatar Report, the Environmental Petitioners sought to add the following requirements to those previously proposed, some of which go far beyond birds: (1) conducting "surveys" of all possible "listed and proposed" species, including all mammals, birds, reptiles, amphibians, fish,

⁹ If the Environmental Petitioners have modified their positions on what they want the FCC to do under these statutes, it would be useful if they said so.

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 radio 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."¹⁰

The USFWS comments, filed this February, continue to support review of each proposed tower for migratory bird impacts under NEPA and application of the MBTA to FCC licensing decisions.¹¹

The Environmental Petitioners' previous proposals and those of USFWS, 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 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

¹⁰ Environmental Petitioner Comments on Avatar Petition, p. 19.

¹¹ USFWS 2007 Comments, pp. 4-6.

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 cause, and would cause, infinite delays in tower construction.

The Environmental Petitioners, the FCC, and USFWS would base the FCC's authority to take such action in the NEPA, the MBTA and the ESA. However, none of the statutes can serve as the legal basis for requirements so drastic.

While the courts have held that tower siting is a "federal undertaking" under the National Historic Preservation Act,¹² no court has held that tower siting is the type of "major" federal action making the NEPA applicable in this context, especially in light of the fact that most towers are still constructed permissively, without prior notice to the FCC.¹³ Moreover, it is highly questionable whether incidental bird deaths resulting from towers "sufficiently affect [] the quality of the human environment," so as to trigger the application of NEPA. The NPRM (§ 34) raises complex federal questions about what numerical and other tower impacts on migratory birds should result in the application of the NEPA. However, the FCC must first answer the fundamental jurisdictional question about whether the NEPA applies at all to those matters, and we believe that it does not.

Nor does the MBTA provide a reasonable basis for FCC action. As the NPRM notes (§ 35), the courts have issued rulings which differ as to the scope of the MBTA's applicability to federal agencies, and have never ruled on its relationship to

¹² CTIA v. FCC, 466 F.3d 105(D.C. Cir. 2006).

¹³ See Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1244-45(D.C. Cir. 1980).

the Communications Act and the FCC.¹⁴ We would note that the MBTA is a 1918 statute which refers to the intentional "taking" or "killing" of migratory birds by hunters, poachers and the like.¹⁵ It is not reasonable to apply the MBTA in this modern day context, in which the death of birds, while regrettable, is an incidental and unintended consequence of the erection of telecommunications towers vital to the nation's economic and the national security interests.

Nor does the ESA provide a satisfactory legal support for FCC action. Section 1.1307(a)(3) of the FCC's Rules already requires the FCC to evaluate proposed towers concerning their impacts on endangered species. The ESA furnishes no basis for the FCC to adopt additional regulations dealing with migratory birds in general, including those birds which are not members of any endangered species.

Finally, apart from the lack of statutory support for FCC action, the empirical basis for new FCC rules remains non-existent, insofar as USCC can determine from its own experience. USCC, in its November, 2003 comments on the Notice of Inquiry, noted the 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, and stated that its experience had been comparable. That is still the case. Our local managers and engineering personnel simply do not find bird carcasses near our towers. We submit that to shut down the wireless

¹⁴ See, e.g. Sierra Club v. Martin, 110F.3d 1551; 1555(11th Cir. 1997)(MBTA does not apply to the U.S. Forest Service).

¹⁵ See City of Sausalito v. O'Neill, 386 F.3d 1186, 1225(9th Cir. 2004).

industry's ability to construct towers based on such unproven allegations would be a mistake and an 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 been subject to ever increasing regulation at the federal and state levels. Wireless carriers now have to comply, *inter alia*, with federal requirements requiring "enhanced 911 location finding capability, with the Communications Assistance For Law Enforcement Act (which now includes a new "packet data" surveillance mandate effective on May 14, 2007), and with local number portability, hearing aid handset compatibility, and comprehensive signal "outage" reporting requirements.

The FCC in 2005 adopted new historic preservation tower siting requirements pursuant to the "Nationwide Programmatic Agreement" which require, *inter alia*, archeological surveys of new tower sites, and more detailed submissions to SHPOs than were previously required, as well as for extensive and time consuming notice and consultation rights for consulting parties.¹⁶ And on April 2, 2007, the FCC released an order which imposes on CMRS carriers' new password, "opt in" customer notification, record keeping and "strict liability for

¹⁶ See, In the Matter of Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process, Report and Order, 20 FCC Rcd 1073 (2004).

disclosure" requirements to ensure the protection of Customer Proprietary Network Information.¹⁷ Such requirements, whatever their individual legal and policy justifications, are cumulatively costly in terms of both human and monetary resources.

Moreover, in the states, lawsuits for alleged violations of state "consumer" statutes by wireless carriers through their advertising and coverage practices are a growth industry. And, lastly FCC has adopted new "truth in billing" requirements for wireless carriers, which, in concert with a 2006 court decision, may subject CMRS carriers to both FCC and individual state micromanagement of their bills' wording.¹⁸

However, those regulatory mandates, onerous though they may be, would still be of relatively minor significance in comparison to wireless carriers having to conduct a full scale environmental assessment of the impact of every proposed tower on multiple species of migratory birds, or carriers being limited to new towers of less than 200 feet in height, or carriers having to use only white strobe lights on towers, which will often preclude local zoning consent, or carriers having to "retrofit" thousands of towers to meet new "migratory bird" environmental requirements.

¹⁷ See In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information: IP Enabled Services, C.C. Docket 96-115, WC Docket 06-36, FCC 07-22, Report and Order and Further Notice of Proposed Rulemaking, released April 2, 2007.

¹⁸ 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, 20 FCC Red 6448 (2005); NASUCA v. FCC, 457 F.3d 1238 (11th Cir. ZOOS).

We submit that such outcomes would be contrary to the public interest. We also 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 costly regulations, which will ultimately make it much more difficult to carry out its responsibilities to the public.

IV. USCC Is Willing To Undertake Voluntary Measures To Assist Migratory Birds.

USCC understands that wireless towers may, under certain circumstances, kill migratory birds and wishes to alleviate that problem to the extent that it can, consistent with its responsibilities to the public. We fully support the negotiations which have taken place between the representatives of wireless and broadcast tower owners and the Environmental Petitioners and hope the differences between the two groups can be narrowed. USCC has itself participated in successful negotiations to resolve objections to a proposed tower by means of the use of strobe lighting and always strives to be environmentally responsible in its tower siting and lighting activities.

However, for USCC, what is crucial is that such efforts be voluntary and take into account the concerns of the FAA, local zoning authorities and the communities in which carriers must do business. For example, white strobe lights may "work" in certain circumstances, especially where a tower is not close to aviation flight paths or to heavily populated areas where neighbors may object to them. However, in other circumstances, some form of non-strobe lighting may be unavoidable. Often unlit and unguyed towers of less than 200 feet in height may fulfill carrier coverage

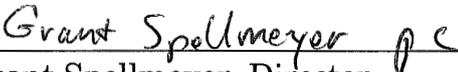
objectives. USCC has over 1500 towers in service which do not require lighting. In other cases, however, a base station's economic viability may be premised on building a tower to a height necessary to attain essential coverage objectives, which may involve at least some tower lighting. Any rule adopted by the FCC which denies carriers the flexibility they need to balance these conflicting obligations will not serve the public interest.

CONCLUSION

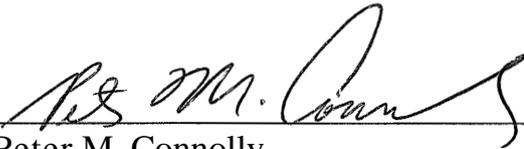
For the foregoing reasons, USCC asks that the FCC not seek to impose additional regulations on its licensees concerning migratory birds based on the evidence now before it.

Respectfully submitted,

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