

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

In the Matter of)
)
Effects of Communications Towers on) WT Docket No. 03-187
Migratory Birds) DA 07-72

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS**

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

Daniel Mitchell
Karlen Reed

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

April 23, 2007

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I. Introduction and Summary

The Commission should exempt small rural carriers from the proposed new tower regulations which are economically burdensome under the Regulatory Flexibility Act (RFA). For carriers not covered by the RFA, the Commission should allow STATIC, the tower group and bird group, to continue their negotiations in an effort to reach consensus on tower lighting and siting guidelines. The Commission should also exempt existing unlit towers, conduct more avian/tower studies, not intrude on FAA jurisdiction, and allow a reasonable implementation period and waiver procedures for any new tower lighting and siting rules adopted.

II. History of the NPRM and Avian Mortality Studies

On November 7, 2006, the FCC released its NPRM seeking comment on whether new “white strobing light” regulations will reduce migratory bird collisions with communication towers. The NPRM asks: 1) Are there additional data that support this tentative conclusion? 2) Should the FCC set rules to mitigate migratory bird collisions with communication towers? 3) How should the FCC implement the new rules? 4) Should the FCC regulate the use of guy wires to support towers? 5) Should the FCC regulate the height of towers to mitigate bird deaths? 6) Should the FCC regulate the location of towers? 7) Should the FCC encourage collocation on towers to reduce the number of towers? 8) Do towers require Environmental Assessments?

A. NPRM Background.

This NPRM follows the Commission’s Notice of Inquiry (NOI) released in August 2003⁶ and a review of comments regarding a consultant’s September 2004 report furnished by the

⁶ *In the Matter of Effects of Communications Towers on Migratory Birds*, Notice of Inquiry, WT Docket No. 03-187, 18 FCC Rcd 16938 (2003).

Avatar Environmental LLC.⁷ Other factors appeared to have prompted the NPRM, including litigation filed by environmental groups in federal district court over the need for the FCC to conduct environmental assessments of cell towers, and the release of a 2002 report by the US Fish and Wildlife Service (USFWS) that millions of migratory birds collide with communications towers and broadcast towers each year.⁸ The FCC tentatively concluded in the NPRM that towers should be equipped with strobing white lights, rather than red strobing or pulsing lights, because using white strobing lights appears to reduce bird deaths.⁹

B. The Bird and Tower Studies.

Several bird reports and studies have been cited in the NPRM docket as supporting the call for tower regulation. One report, released in June 2000 by the American Bird Conservancy, is a compilation of 47 studies over a span of 50 years and was conducted in locations east of the Mississippi River (2000 Report).¹⁰ In the 2000 Report, the American Bird Conservancy states: “Bird kills caused by towers, their guy wires and related structures have been document for over 50 years but there has been insufficient investigation of the extent of tower kills and which species have been affected.” ABC concludes that further research is needed.¹¹

⁷ NPRM, ¶ 2. The FCC had hired Avatar to review the evidence and record contained in the NOI and make recommendations.

⁸ NPRM, ¶ 6.

⁹ NPRM, ¶ 3.

¹⁰ “Communication Towers: A Deadly Hazard To Birds, a Report Compiled By American Bird Conservancy Documenting The Killing Of 230 Bird Species,” released June 2000 by the American Bird Conservancy (2000 Report), available on the web at: <http://abcbirds.org/policy/towerkillweb.PDF>.

¹¹ 2000 Report, p. 19.

The NPRM notes another study, the September 2004 Avatar Study, which was undertaken in response to the Commission's 2003 Notice of Inquiry. The Avatar Study made several short-term and long-term recommendations for more research into migratory bird / tower collisions.¹² A third study, the 2005 Michigan Study performed by Dr. Joelle Gehring, is the most recent effort to ascertain the need for cell tower lighting and guy wire regulation.¹³ The Michigan Study indicates that guy wires are not a significant cause of bird deaths.¹⁴ The USFWS has been asking the Commission since 1999 to require environmental assessments as part of the tower siting process.¹⁵ The USFWS has also estimated between four and five million, perhaps as many as forty million, birds are killed at towers.¹⁶ These are some of the studies that form the basis for the Commission's NPRM.

Two trade groups representing tower interests, the CTIA and the National Association of Broadcasters (NAB), submitted a study (the Woodlot Study) as part of the August 2003 NOI that refuted several bird studies and concluded that the data were insufficient and were collected in a non-standard manner.¹⁷ The Woodlot Study concluded that there was a lack of sufficient scientific evidence to support any FCC action to protect migratory birds.¹⁸

¹² NPRM, ¶ 24.

¹³ USFWS Comment, p. 9 (filed Feb. 2, 2007).

¹⁴ Dr. Joelle Gehring ex parte (filed Sept. 19, 2006).

¹⁵ USFWS comment, p. 4 (filed Feb. 2, 2007).

¹⁶ NPRM, ¶ 16.

¹⁷ NPRM, ¶¶ 21, 28.

¹⁸ *Ibid.*

III. Negotiations Are Occurring On Cell Tower Lighting Best Practices.

Four tower trade groups -- CTIA, PCIA, NAB and National Association of Tower Erectors (NATE), have volunteered to work with four bird groups – American Bird Conservancy, Audubon, American Defense Fund and Defenders of Wildlife -- to attempt to negotiate a list of “best practices” for communications tower lighting, the use of guy wires, and collocation efforts. This negotiating team calls itself “STATIC” – Solving the Avian-Tower Interaction Committee – and recently met with FCC staff members to discuss the progress of their negotiations.¹⁹ On February 15, STATIC filed a request with the FAA for a “conspicuity study” to examine whether steady-burning red sidelights on towers can be eliminated without resulting in harm to air traffic.²⁰ STATIC continues its periodic meetings in an effort to reach a tower/bird consensus on best practices for tower lighting and siting.

IV. Four Factors To Consider Before Issuing Regulations.

Before the Commission creates or implements any rules that require modifications of existing communication towers, the Commission should consider several factors: 1) data validity; 2) costs of regulation; 3) human visual impacts; and 4) federal preemption of local tower siting rules. Each factor is critical to determining whether the public interest will best be served with FCC tower lighting regulations.

A. Data Validity.

First, the Commission should first determine whether the scientific studies being used to advance regulation were appropriately conducted, whether the statistical analyses are valid and

¹⁹ CTIA *ex parte* (filed Apr. 6, 2007).

²⁰ *Ibid.*

accurate, whether the extrapolations and underlying assumptions are reasonable and logical. Some of the results and methods of the studies are suspect given their methods and data interpretation. For example, a 2000 report advanced by the American Bird Conservancy to support FCC tower regulation is a compilation of 47 studies over a span of 50 years, conducted in states primarily east of the Mississippi River. The 2000 Report's results rely exclusively on the underlying studies' validity, so any errors or exaggerations that occurred in the underlying studies are perpetuated without scrutiny or explanation. This 2000 Report's conclusion that 230 bird species were affected by cell towers²¹ has been cited repeatedly by other bird studies. Those citations should be questioned unless the underlying data, assumptions and conclusions are valid.

B. Costs of Regulation.

Second, the Commission should consider the costs of regulating communications towers and its impact on small rural carriers. NTCA members who own cell towers report cost estimates of \$10,000 per tower to retrofit existing short (under 350 feet tall) towers from red lights to white lights, and \$16,000 for medium towers that are 350 - 500 feet in height.²² The effort to retrofit an existing tower requires far more than just changing the light bulbs. Everything on the tower needs to be replaced, including the power cable going up the towers. The white strobe lights require installation of five to seven conductors, depending on the tower height, and control panels and light housings would have to be changed. There is also a labor cost for removing the old lamp, housing and cable. These cost estimates do not include the expenses for computer monitoring or battery backup of the tower systems. Others have

²¹ 2000 Report, p. 1.

²² NTCA members report that the FAA designates towers that are 100 – 350 feet tall use a “D-1” lighting system, and towers that are 351-500 feet tall use a “D-2” lighting system.

estimated the costs of implementing white strobing light rules at more than \$100,000 per tower for taller towers.

While some may consider this amount a small price to pay to protect birds, the Commission must realize that the sum a rural carrier spends on bird protection affects that carrier's financial ability to expand and improve its network and deployment of advanced telecommunication services. One NTCA member in Kentucky reports that it would cost his company on average \$10,000 per tower to retrofit his existing towers, and this expense applied to his array of cell towers reflects 10% of his company's annual capital expenditure budget – funds that the rural provider could have used to upgrade his network for improved voice, video and data services.

These per-tower expenditures will strain small rural carriers' budgets and will hinder their deployment strategies for advanced telecommunications services, including mobile and fixed wireless voice, video and data. Early comments reflect this concern.²³ The Commission should recognize that not all tower owners are regional or national wireless service providers, and that regulations that may have a tolerable financial impact on large carriers can devastate small rural carriers.

C. Human Visual Impacts.

A third critical factor that the Commission should include in its analysis is the visual impact that white strobing lights will have on communities and the increased difficulty tower owners will have in siting new towers if those towers must have white strobing lights. Early

²³ ESR Radio Operator Comment, p. 1 (filed Jan. 11, 2007); Winstanley Broadcasting Comment, p. 1 (filed Jan. 10, 2007).

commenters have expressed this concern.²⁴ Municipalities have repeatedly insisted that rural carriers comply with local government siting rules, and those rules often include directives that require slow red pulsing lights for towers that must be lit, rather than fast white strobing lights. One NTCA rural carrier in Texas expressed serious concern over the community backlash that would result if his cell tower located by city hall in a small town of 300 people had to be changed to white strobes due to FCC regulation. Communities that prefer to satisfy human visual impacts over bird visual impacts will find it difficult to understand the need for white strobing lights.

D. Preemption Of Local Control Over Tower Siting.

Fourth, the Commission should consider whether it is appropriate in this circumstance to preempt local governments' traditional control over tower siting. Enforcement of such rules could overwhelm the Commission's resources, and local governments are ideally suited for tower siting decisions. As for guy wires, location and collocation requirements, rural carriers work with local communities and governments to design their cell tower arrays to comply with local government rules and local terrain. Local zoning boards and city councils traditionally play a large role in deciding where and when cell towers are erected and what impact mitigation techniques (visual, safety, historical) must be employed in siting the towers. If the FCC claims authority to determine whether guy wires are needed or where towers are located, this will usurp and preempt a significant, vital municipal function. An NTCA Oklahoma member indicated that requiring white strobing lights rather than red pulsing lights will increase community opposition to cell towers because the rapid strobing aspect is more visually disturbing and offensive than the slower red pulse effect. Many municipalities have established zoning ordinances for cell towers,

²⁴ Prince George County, Maryland, *et al.* Comment, p. 7 (filed Jan. 8, 2007).

and federal regulations that demand different requirements may preempt this traditional exercise of local police powers. Finally, wireless providers and cell tower owners already have market-based incentives to collocate several providers on a tower in order to maximize revenues and minimize site impacts.

These types of public and abutter impacts are traditionally handled by the local zoning authorities who are in a better position to examine the specific details of the tower siting applications. Municipalities may want to retain this exercise of control in their communities, so the Commission should reflect on local preemption impacts.

V. The Commission Should Exempt Small Rural Carriers From Tower Regulations Under the Regulatory Flexibility Act.

The Commission must examine the economic impacts that tower lighting and siting regulations would create for small entities as part of its responsibilities under the Regulatory Flexibility Act (RFA).²⁵ All of NTCA's members qualify as "small entities" under the RFA and are therefore subject to its protections from economically burdensome regulations.²⁶ The RFA mandates that the Commission exempt small rural carriers from tower regulations or, at a minimum, seek alternative avenues to reduce the economic burden on small businesses.

The Commission should use its authority to exempt small rural carriers from the coverage of the proposed new rules.²⁷ The record developed so far does not sufficiently demonstrate that

²⁵ 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). C.f. U.S. Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005) (Court of Appeals stayed enforcement of the FCC's Intermodal LNP Order for failure to consider impacts on two percent carriers and failure to initiate rulemaking proceeding).

²⁶ NTCA member organizations fit within the definitions set forth in the NPRM's Initial Regulatory Flexibility Analysis, Appendix A, ¶ C.

²⁷ 5 U.S.C § 603(c).

the tower regulations will not be economically burdensome on rural carriers. NTCA has provided examples that reveal that the tower regulations will significantly impact small rural carriers' growth and deployment strategies for advanced telecommunications services, including mobile and fixed wireless voice, video and data. The Commission, therefore, should exclude small rural carriers from the proposed regulations pursuant to the RFA.

VI. Alternative Recommendations.

For carriers not covered by the RFA, the Commission should at least: 1) Allow STATIC to complete its negotiations; 2) Exempt existing non-lit towers; 3) Ask STATIC members to review/conduct more bird and tower studies specific to the proposed recommendations; 4) Avoid intruding on FAA jurisdiction; and 5) Allow a reasonable implementation period and create a waiver procedure for all rules adopted.

A. Allow STATIC To Continue Negotiating Guidelines.

The STATIC negotiating team is still working towards an industry and bird group consensus on best practices guidelines. The NPRM record will provide additional input and data for the STATIC negotiating team to discuss. The Commission should avoid issuing any regulations unless the industry's efforts at creating and implementing a series of best practices guidelines do not achieve the requisite level of bird protection. The Commission should allow STATIC time to complete its negotiations and, if possible, present a list of best practice recommendations to the Commission before considering any rules.

B. Exempt Existing Unlit Towers.

Additionally, the Commission should exempt existing towers that are not now required by the FAA to be lit. In general, the FAA does not consider towers under 200' to be a threat to

aviation and, consequently, the FAA does not require cell towers under 200' to be lit. The FAA may also be exempting existing towers over 200' from lighting requirements given the specific terrain and distance of the towers from known aircraft flight paths. The Commission should be able to rely on the FAA's lighting standards for aviation safety as a guide for avian protection. The FCC should exempt the existing unlit towers.

C. Conduct More Studies On Avian/Tower Impact.

One of the questions asked in the NPRM is whether there are additional data that support the tentative need for white strobing lights. More studies are necessary before issuing final rules. The studies submitted in the docket seem very limited especially as they relate to towers under 200' in height, and to base nationwide tower lighting rules on insufficient data seems inappropriate. While some of the brief comments so far support bird protection (e.g., "birds should not die"), other comments touch on other causes for avian mortality and challenge the USFWS's statement that 40 million birds die annually because of communication towers. Still others suggest more study is needed.²⁸ The Commission should also examine whether certain regions of the United States are more likely than others to experience migratory bird collisions. Some towers in a migratory flyway, for example, may pose a greater risk than others. Clearly, more studies are necessary to determine the causes of avian deaths.

D. Do Not Intrude On FAA Jurisdiction.

The Commission should be cautious in setting such rules. The Federal Aviation Administration (FAA) traditionally regulates tower lighting to prevent aircraft from colliding

²⁸ Michigan Department of Natural Resources Comment, pp. 1-2 (filed Jan. 19, 2007); James P. Wagner Comment, p. 3 (filed Jan. 22, 2007).

into the structures. This is a critically public safety purpose that the FCC should recognize and grant substantial deference. The Commission should not issue any new rules until the FAA determines whether it will conduct the conspicuity study requested by STATIC and, if so, until the FCC reviews the FAA's study results and conclusions.

E. Allow Implementation Period and Waiver Procedure.

Finally, the Commission should allow a reasonable implementation period for any new rules or best practices guidelines. Rural carriers will have to adjust their business plans and pricing structures to reflect the additional expense of compliance. The Commission should also provide for a waiver procedure so that rural carriers can seek either additional time for compliance or exemption from the rules under specified circumstances.

VII. Conclusion.

For these reasons, the Commission should exempt small rural carriers from the proposed new tower regulations which are economically burdensome under the Regulatory Flexibility Act. For those carriers not covered by the RFA, the Commission should allow STATIC, the tower group and bird group, to continue their negotiations in an effort to reach consensus on tower lighting and siting guidelines. The Commission should also exempt existing unlit towers,

conduct more avian/tower studies, not intrude on FAA jurisdiction, and allow a reasonable implementation period and waiver procedures for any new tower lighting and siting rules adopted.

Respectfully submitted,

**NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION**

By: /s/ Daniel Mitchell
Daniel Mitchell
Karlen Reed

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

April 23, 2007

CERTIFICATE OF SERVICE

I, Adrienne Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in WT Docket No. 03-187, DA 07-72, was served on this 23rd day of April 2007 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554
Kevin.Martin@fcc.gov

Best Copy and Printing, Inc.
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Commissioner Deborah Taylor Tate
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554
Deborah.Tate@fcc.gov

/s/ Adrienne L. Rolls
Adrienne L. Rolls

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554
Michael.Copps@fcc.gov

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Jonathan.Adelstein@fcc.gov

Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554
Robert.McDowell@fcc.gov