

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

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

REPLY COMMENTS

United States Cellular Corporation("USCC") hereby files its Reply Comments in the above-captioned proceeding. In its comments, USCC asked the FCC to consider the following: (1) the lack of any present evidentiary basis upon which the FCC could impose the "migratory bird" regulations proposed in the Notice of Proposed Rulemaking;' (2) the extremity of the remedies which had been sought previously by "environmental" commenters in the proceeding; (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 burdensome regulations proposed in light of recent mandates it has imposed and the national priority to improve wireless service. USCC also discussed its willingness, on a voluntary basis, to cooperate in reducing avian mortality.

USCC submits that the comments of other filers provide strong support for those positions. We file these reply comments to note our agreement with their convincing arguments and to enumerate and criticize the additional and even more onerous regulations now being proposed by other commenters.

I. There Is No Present Evidentiary Basis Upon Which The FCC Can Proceed.

The comments of wireless carriers, broadcasters and tower companies, who have the responsibility of erecting antenna structures, demonstrate that the present scientific evidence

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").

does not support FCC action with respect to towers and migratory birds.² Those comments demonstrate that that none of the studies which have been submitted to the FCC in this proceeding provide a sufficient scientific basis for the actions now contemplated by the FCC. Specifically, those comments point to the successive demonstrations by Woodlot Alternatives, Inc. that there is no "evidence in the literature to date indicating communications towers are having a statistically significant or biologically significant impact on migratory bird populations."³ The industry comments also acknowledge the preliminary work done by Professor Joelle Gehring, but make a persuasive case that it too is insufficient to support the draconian rules which have been proposed.⁴ Lastly, those comments note: (a) the marginal and insignificant percentage of avian mortality caused by towers in comparison with loss of habitat, domestic cats, and other causes⁵ and (b) the "significant decline" in bird fatalities caused by towers over the past twenty years.⁶

By contrast, the comments of the environmental organizations and of the United States Fish and Wildlife Service ("USFWS") simply assume that the scientific case for regulation has been proven and demand that the FCC act in accordance with their wishes.⁷ We, however, ask that the FCC weigh the showings made by the industry commenters on this fundamental issue against those of the environmental organizations and the USFWS, and reach the appropriate conclusion, namely that the scientific case for regulation has still not been made.

² See, e.g., Comments of CTIA, National Association of Broadcasters, National Association of Tower Erectors, PICA, The Wireless Communications Association International, Inc., Association for Maximum Service Television, Inc. (collectively "The Infrastructure Coalition") pp. 5-16; Comments of Verizon Wireless, pp. 2-7; Comments of AT&T Mobility, pp. 4-11.

³ Quoted in Verizon Wireless Comments, p. 5.

⁴ See, e.g., AT&T Mobility Comments, 7-11.

⁵ Ibid, p. 5.

⁶ Infrastructure Coalition Comments, p. 7.

⁷ See, e.g., Comments of American Bird Conservatory, Center for Sustainable Economy, National Audubon, The Humane Society of the United States, and Friends of the Earth ("Environmental Petitioners"); Old Bird, Inc. ("Old Bird"); and the U.S. Fish and Wildlife Service ("USFWS") (filed February 2, 2007).

11. The NEPA, MBTA and ESA Furnish No Basis For The FCC To Act.

The industry comments furnish powerful support for the position that National Environmental Policy Act ("NEPA"), the Migratory Bird Treaty Act ("MBTA") and Endangered Species Act ("ESA") also do not, individually or collectively, provide a legal basis for FCC action on towers and migratory birds.⁸ What is crucial under NEPA is that agencies are required to analyze possible environmental effects only if there is a "major federal action" and that action will "significantly affect" the quality of the human environment.⁹ As the cited comments show, the FCC does not choose the location of the towers constructed by its licensees, and so its action cannot be considered the "proximate cause" of any environmental harm created by the decision concerning tower location, thus triggering NEPA applicability. Moreover, even if the FCC were to include that NEPA was applicable to tower siting, there is insufficient probative scientific evidence of harm to birds before the FCC to justify a finding of significant effect.

There is even less reason to apply the MBTA in this proceeding. First, only the Department of Interior is authorized to enforce it.¹⁰ Second, the 1918 statute's clear purpose was to protect migratory birds from "intentional" activities such as poaching and hunting. Arguably, the MBTA does not even apply to the Federal Government.¹¹ The Environmental Petitioners, in their comments, cite court cases holding that the MBTA may be applied to federal agencies and to the unintentional "taking" of migratory birds, while failing to acknowledge the cases adopting the opposite position. However, even the cases that they cite do not require that the MBTA be applied to bird collisions with communications towers. For example, in Humane Society v. Glickman, 17 F.3d 882, 883 (D.C. Cir. 2000), the court ruled that MBTA was applicable to a

⁸ See Comments of Infrastructure Coalition, pp. 16-30; Verizon Wireless, pp. 7-10.

⁹ 42 U.S.C. Section 4332(C).

¹⁰ Infrastructure Coalition Comments, pp. 24-25.

¹¹ Ibid., pp. 25-27.

U.S. Department of Agriculture decision to "take" Canada geese on a U.S. Air Force base. Other courts have disagreed on the jurisdictional issue, but more importantly here, there is a large distinction between the intentional activity of "taking" geese and the unintentional deaths of birds by collision with socially beneficial towers. The Environmental Petitioners (Comments pp. 40-42), also cite various cases which hold that the MBTA can be applied to activities not involving the intentional killing of migratory birds. However, their discussion ignores the crucial distinction, pointed to by the Infrastructure Coalition, that the relevant cases still require conduct which is "directed at" migratory birds, not conduct which "indirectly results in the death of migratory birds."¹²

As noted in U.S. v. FMC Corp., 572 F.2d 902 (2nd Cir. 1978), a case actually cited by the Environmental Petitioners, a

"construction [of the MBTA] that would bring every killing within [it], such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows into which birds fly, would offend reason and common sense."¹³

The FMC case provides the appropriate guidance to construing the MBTA in this context, namely common sense. Interpreting the MBTA as the Environmental Petitioners request is not required under the statute and would offend common sense in precisely the way discussed by the Second Circuit in the FMC case. There is no more reason to find an MBTA violation when a bird strikes a tower than when a bird flies into an office building window. All structures of consequence in our society require governmental approvals and birds sometimes fly into them. That unfortunate fact does not render the MBTA a law of universal applicability. The FCC should not adopt this construction of the MBTA.

¹² Infrastructure Coalition Comments, p. 26.

¹³ 572 F.2d, at 905.

Finally, the FCC is not obliged to adopt new regulations under the ESA to protect all migratory birds, including those not belonging to endangered species. Indeed, for it to do so would be beyond its powers.¹⁴ Section 1.1307(a)(3) of the FCC's Rules already obligates FCC licensees to file an Environmental Assessment (EA) for proposed facilities which may affect threatened or endangered species or designated critical habitats, including birds. This is a rule previously considered and approved by the Council on Environmental Quality and Department of the Interior.¹⁵ Any changes to the practices by which licensees comply with this rule can be made without a legally forbidden expansion of the FCC's jurisdiction.

111. The Changes In Tower Licensing Policy Proposed By The Environmental Petitioners and USFWS Are Untenable.

In our Comments, these Reply Comments and the industry comments we cite, it has been demonstrated that the FCC has no legitimate evidentiary or legal basis for additional rules regarding migratory birds. This shaky foundation renders the great number of new requirements sought by the Environmental Petitioners and USFWS in their comments all the more extraordinary and undesirable.

In our Comments (pp. 5-7), we sought to demonstrate that the requirements which the Environmental Petitioners had previously sought to impose on wireless and broadcast licensees at earlier stages of this proceeding would bring tower construction to a halt, an outcome completely at odds with the FCC's other wireless and broadcast policy objectives.

The comments filed by the Environmental Petitioners, and the USFWS this year neither endorse nor repudiate those earlier recommendations. They do not refer to them. So it is difficult to know whether they remain active. In any case, many of the recommendations are reaffirmed in the current filings and many new ones are added. The effect of what is now

¹⁴ See, Infrastructure Coalition Comments, pp. 27-30.

¹⁵ Ibid, p. 28.

proposed would be exactly the same as the previous recommendations, namely vastly increased expense and delay in tower approvals, amounting to a de facto moratorium of indefinite duration on new tower construction. The recommendations of the Environmental Petitioners and USFWS are similar but, in some cases, slightly different. Here are the highlights of both sets of proposals, which need little explanation to demonstrate the burdens they would create.

The Environmental Petitioners (Comments pp. 8-12) would require of applicants for new towers: (1) a written declaration regarding why the tower could not be kept under 200 feet in height and why the antenna could not be co-located on neighboring towers; (2) design of all towers for co-location; (3) the use of medium intensity white strobe lights for towers over 200 feet in height; (4) the use of red strobe lights where white strobe lights could not be used; (5) avoidance of red obstruction lights; (6) not using steady burning exterior lighting "shining up into the night sky" and the "down shielding" of "on ground security" lighting; (7) a written declaration demonstrating why any proposed tower height in excess of 400 feet AGL is necessary; (8) not using guy wires on any antenna structure under 200 feet in height and, for proposed guyed towers of 200-500 feet in height, a certification by a "qualified engineer" demonstrating why a lattice or monopole design could not be used; (9) the use of "daytime visual markers" on guy wires in "raptor or waterbird concentration areas;" (10) the siting of towers in existing antenna farms and avoidance of tower siting in areas with "a high incidence of fog, mist, and low ceilings;" (11) relocation of a proposed tower if its location were deemed to be used by "breeding, feeding or roosting" birds; (12) submission of "documentation" if criteria 9-11 applied; (13) "minimization" of "habitat loss;" (14) amendment of Section 1.1307(a) of the FCC's Rules to require the submission of EAs to the USFWS if the tower were likely to affect migratory birds, as well as submitting a new Tower Site Evaluation Form ("TSEF") to the

USFWS, which form remains to be developed; (15) submission of documentation that no EA is required, if that it is the case, to the USFWS and then to the FCC to determine whether any "threatened" or endangered species or "Birds of Conservation Concern" are in the area; (16) required "retrofitting" of existing towers within five years of the enactment of the rules, replacing red steady burning lights with white strobe lighting; (17) assessment of avian mortality at existing towers in excess of 300 feet in height using red steady burning lights and filing publicly available reports with the FCC regarding such towers; and (18) public notice procedures for all tower registration filings including those "categorically excluded" under NEPA, which notices would have to conform to CEQ rules for "public participation."

The Environmental Petitioners (Comments 17-18) also demand that the FCC must complete a "Programmatic Environmental Impact Statement" ("EIS") for its entire tower siting process, a proceeding which could easily take several years. The Environmental Petitioners further state that a cessation of all FCC tower registrations would be necessary until the EIS was completed (Comments, p. 30).

The USFWS (February 2, 2007 Letter, pp. 24-25) makes the following recommendations regarding FCC rules and policies: (1) no tower may exceed 200 feet in height, and must be lattice or monopole in design, and must contain no guy wires or lights; (2) development by the FCC of the TSEF, referred to above, to be submitted to the USFWS during the tower evaluation process; (3) amendment of Section 1.1307(a) of its Rules to refer to the TSEF process and empowering the USFWS to require the submission of an EA to the FCC if it is unsatisfied with an applicant's efforts with respect to migratory birds; (4) application by the FCC of this evaluation process to all new and "modified" towers;" (5) review of local "on the ground" (i.e. plant and animal) and "airspace" (i.e. bird and bat) "resources" in the environmental studies to be submitted by

applicants; (6) the use of "remote sensing data" (i.e. bird flight as measured by radar) in such studies; (7) for "on the ground resources," the use of studies "commensurate with the setting and site conditions," as determined by the USFWS; (8) strong discouragement by the FCC of applicants from installing steady burning ground based lighting; (9) a "post construction" monitoring process which will "assess and evaluate mortality and/or habitat fragmentation and disturbance at a statistically significant sample of communication towers of different height classes;" and (10) incorporation of the USFWS 2000 voluntary tower guidelines into rules, thus freeing the USFWS from having to evaluate every tower independently in light of these guidelines.

The costs to industry, in person hours, money and inevitable delays, of applying these recommendations to every existing and future tower registered with the FCC, would be huge. However, nowhere in the comments of either the **Environmental** Petitioners or USFWS are those costs acknowledged, through the Environmental Petitioners state, preposterously, that the measures they propose:

"will not in any way adversely affect the provision and buildout of telecommunications services in this country and will have no adverse effects on the deployment of wireless services, on homeland security, and on public safety."¹⁶

On its face, this is absurd. How could the imposition of draconian substantive requirements concerning tower height and lighting, the adoption of a new form, the inclusion of an additional agency in the tower approval process, of applying public notice requirements for all tower registrations and modifications, and the creation of multiple new documentation, monitoring, and retrofitting requirements for new and existing towers, let alone the multiyear moratorium which would be imposed by the EIS process, not have an "adverse effect" on

¹⁶ Environmental Petitioners Comments, p. 68.

wireless "provision and buildout?" We submit that the FCC is not required to go down this path and should not do so.

IV. The FCC Should Consider This Proceeding In the Context of Its Other Actions.

In our Comments we asked that the FCC consider this proceeding in light of the multiple new mandates adopted by the FCC in recent years. We noted that those mandates, onerous though they are, would be trivial in comparison to what is proposed here. We reiterate that point in light of the prior section of these Reply Comments.

We would also note one additional point. This proceeding will have a significant impact on the FCC's advanced wireless service proceeding. If the new regulations proposed by the environmental groups and USFWS are adopted, they will be a substantial barrier to buildout of the 700 MHz spectrum which is so important to this county's future telecommunications policy, particularly with respect to wireless broadband. The basic point is simple. If you cannot build towers it will not matter what 700 MHz band plan is adopted or which approach to public safety licensing is adopted in the AWS proceeding. The FCC should interpret the relevant laws and regulations in this proceeding with the 700 MHz proceeding also in mind, and in light of its main responsibility under the Communications Act, which is "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 communications service with adequate facilities."¹⁷

¹⁷ 47 U.S.C. §151.

Conclusion

For the foregoing reasons, the FCC should not adopt the regulations proposed in the NPRM and by the environmental commenters in this proceeding.

Respectfully submitted,

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