

WT 08-61



EARTHJUSTICE

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March 20, 2008

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Honorable Kevin J. Martin, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

MAR 24 2008
FCC Mail Room

Re: *American Bird Conservancy v. Federal Communications Commission*

Dear Chairman Martin:

On behalf of the American Bird Conservancy and the Forest Conservation Council (collectively "ABC"), we write to request that the Federal Communications Commission ("Commission" or "FCC") comply fully and immediately with the opinion and order entered on February 19, 2008 by the United States Court of Appeals for the District of Columbia in *American Bird Conservancy v. Federal Communications Commission*, 2008 WL 425529 (D.C. Cir. 2008). In light of that opinion and order, we also request that the Commission act promptly to reduce the level of avian mortality caused by its communications towers registration program.

In its February 19 decision, the Court of Appeals found that the FCC had violated both the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") when it entered an order in April of 2006 that denied ABC's petition for compliance with those laws in connection with the FCC's communication tower registration program. See *In Re Petition by Forest Conservancy Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance*, FCC 06-44, 21 F.C.C.R. 4462 (2006). The Court vacated that order and remanded the matter to the Commission with instructions that the Commission comply with NEPA in addressing ABC's request for a programmatic environmental analysis of the environmental consequences of its tower licensing program on migratory birds and their habitats. 2008 WL 425529 at 4-5. It also ordered the Commission to comply with the ESA in connection with ABC's request that the Commission formally consult with the FWS regarding the cumulative effects of towers on endangered and threatened species. *Id.* at 5-6. Finally, it ordered the Commission to provide advance public notice of all tower applications in a manner that ensures meaningful public participation in NEPA procedures. *Id.* at 6.

The Court made clear that the Commission should "proceed with dispatch" to resolve the ABC petition. *Id.* Notwithstanding this admonition, it has been one month since the Court issued its decision, and we have seen no evidence that the Commission has taken any action to comply with that decision. Accordingly, we request that the Commission undertake all measures necessary to comply with the Court's ruling without delay. In addition, pursuant to both NEPA and the ESA, we request that the Commission refrain from making any irretrievable commitments of resources until it has fully complied with that ruling. Decisions by the FCC to authorize construction of communications towers in a manner that ignores the Court's ruling could trigger requests for injunctive relief by ABC and others.

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Timely Public Notice. Compliance with the Court's opinion and order should start immediately with an update to the Commission's website that provides for advance public notice and opportunity to participate in pending individual tower applications. This action was noted by the Court in its opinion as a way to provide a "simple solution" to the notice problem; thus, it would correct the failure of timely notice that the Court held unlawful. *See id.* at 6.

NEPA compliance. Based on its review of the record on the issue of avian mortality and towers, the Court expressly found that "there is no real dispute that communications towers 'may' have significant environmental impact." *Id.* at 4. Pursuant to the Court's order, the Commission should immediately commence an environmental analysis to determine the degree to which communications towers result in significant impacts on migratory birds. Consistent with the Court's admonition to proceed with dispatch, *id.* at 6, the Commission should prepare and complete that environmental analysis by a date certain, not later than six months from today.

ESA compliance. In conformance with the Court's order to comply with the ESA, the Commission should promptly consult with the United States Fish and Wildlife Service (USFWS) regarding the cumulative effects of communications towers on endangered and threatened species. ABC has provided the Commission with specific information regarding the potential impacts on two endangered avian species, and the USFWS warned that these impacts may be significant. Prompt consultation with the USFWS is the necessary first step to bring the agency's tower registration program into compliance with the ESA.¹

Compliance with the Migratory Bird Treaty Act. The Court ruled that it was reasonable for the Commission to consider issues relating to the MBTA in the context of its nationwide proceeding (*In re Effects of Communications Towers on Migratory Birds*, Notice of Proposed Rulemaking, 21 F.C.C.R. 13,242). 2008 WL 425529 at 3. At the same time, there is no dispute that FCC-registered towers kill migratory birds protected under the MBTA from any "taking" by anyone, including federal agencies, without a permit. 16 U.S.C. § 703(a). We therefore urge the FCC to act comply promptly with the MBTA by adopting bird mortality avoidance measures as part of its tower registration process.

In particular, we urge the Commission to take immediate actions of the kind described in recent peer-reviewed studies; those studies conclusively show that avian mortality could be reduced significantly if these actions are taken. These actions include: (1) requiring new towers to be outfitted with pulsing white or red lights (rather than steady burning red lights); (2)

¹ We are concerned that the Commission is not complying with the ESA. For example, we understand that the U.S. Fish and Wildlife Service Pacific Islands Fish and Wildlife Office in Honolulu, Hawaii advised the FCC (Ms. Susan Kimmel) on March 5, 2007 that the FWS was not able to concur with the FCC Not Likely to Affect ESA-listed species determination for nine Hawaiian towers and directed the FCC to begin formal consultation under section 7 of the ESA. To our knowledge, the FCC has not initiated such consultation for these Hawaii towers; this failure disregards the request from the FWS in violation of the ESA.

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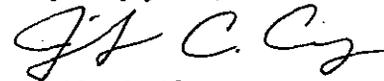
requiring red lights on existing towers to be retrofitted with pulsing lights; (3) restricting the use of guy wires; (4) co-locating towers; and (5) prohibiting towers from being located in sensitive areas (such as adjacent to refuges, parks and other areas of concentrated bird breeding or migration such as sanctuaries). See filings by ABC, the FWS, and Longcore, et al. in *FCC Notice of Proposed Rulemaking In the Matter of Effects of Communications Towers on Migratory Birds*, WT Docket No. 03-187.

The conclusions of the research conducted on twenty-four communications towers in Michigan are especially persuasive. See Gehring, Joelle and Kerlinger, Paul, *Avian collisions at communication towers: I. The role of tower height and guy wires*, Prepared for: State of Michigan (March 2007); Gehring, Joelle and Kerlinger, Paul, *Avian collisions at communication towers: II. The role of Federal Aviation Administration obstruction lighting systems*, Prepared for: State of Michigan (March 2007). The Michigan researchers filed their research conclusions with the FCC in March 2007 and stated, *inter alia*, that it is possible to dramatically reduce avian mortalities by removing steady burning lights and by constructing towers without guy wires.

The FCC has had this Michigan data in its possession for a year but has failed to act. Accordingly, we request that the Commission implement these proven bird avoidance measures as recommended and proven successful by the Michigan researchers and as supported in the NPRM filings by other scientists, including those at the FWS. These measures should be adopted promptly to comply with NEPA, the ESA, and the MBTA.

Please respond to this letter within ten business days and confirm all steps the Commission will take in order to comply with the ruling of the D.C. Circuit in *American Bird Conservancy v. FCC*. Thank you for your attention.

Very truly yours,



Jennifer C. Chavez

Stephen E. Roady

Attorneys for ABC et al.

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Edelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell