

**Before the
Federal Communications Commission
Washington, DC 20554**

Petition for Expedited Rulemaking of CTIA—)	
The Wireless Association, et al., for)	
Amendment of Parts 1 and 17 of the)	WT Docket No. 08-61
Commission’s Rules Regarding Public Notice)	
Procedures for Processing Antenna Structure)	
Registration Applications)	
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COMMENTS OF AT&T INC.

AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates (collectively “AT&T”), hereby submits comments in response to the proposed rules contained in the Petition for Expedited Rulemaking (“Petition”) filed by CTIA—The Wireless Association, The National Association of Broadcasters, the National Association of Tower Erectors, and PCIA—The Wireless Infrastructure Association (“Infrastructure Coalition”) in the above-referenced proceeding.¹ The Infrastructure Coalition filed the Petition in response to the remand of the Court of Appeals for the District of Columbia (“D.C. Circuit”) in *American Bird Conservancy, Inc. v. FCC*, which directed the Commission to increase public participation in the communications tower application process.² The Petition proposes that the Federal Communications Commission (“FCC” or “Commission”) commence a rulemaking that makes

¹ See Public Notice, “Wireless Telecommunications Bureau Seeks Comments on Petition for Expedited Rulemaking of CTIA—The Wireless Association, et al., for Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications,” WT Docket No. 08-61, DA 08-1078 (May 06, 2008) (“*Public Notice*”).

² *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008).

the following two tentative conclusions: (1) the Commission's Part 17 Antenna Structure Registration ("ASR") rules should be revised to incorporate a notice, comment, and approval process for ASR applications modeled on procedures now in use for transfer and assignment applications; and (2) the Commission's rules should be revised to clarify that any objection on environmental grounds filed against an ASR application must be filed as a Petition to Deny, subject to Section 309(d) of the Communications Act of 1934, as amended ("Act") and Section 1.939(d) of the Commission's rules.³ AT&T offers the instant comments in support of the Petition's request that the Commission confirm that any objection on environmental grounds filed against an ASR application must be filed as a Petition to Deny. Moreover, the Commission should confirm that, consistent with the FCC's longstanding and undisturbed categorical exclusion of communications tower registrations from NEPA review, environmental assessments ("EAs") are required only upon a substantial evidentiary showing.

I. THE COMMISSION SHOULD CONFIRM THAT SECTION 1.1313 OF THE COMMISSION'S RULES REQUIRES THAT ANY OBJECTION TO AN ASR APPLICATION ON ENVIRONMENTAL GROUNDS BE FILED AS A PETITION TO DENY.

AT&T strongly supports the Infrastructure Coalition's request that the Commission confirm that the directive in Section 1.1313 of the Commission's rules that environmental objections be filed as Petitions to Deny applies to tower applications. This reading of Section 1.1313 most effectively accounts for related provisions in the Communications Act. Moreover, requiring that objectors satisfy the evidentiary requirements for Petitions to Deny will enhance

³ See "Petition for Expedited Rulemaking of CTIA—The Wireless Association, et al., for Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications," WT Docket No. 08-61 (filed May 2, 2008) ("Petition").

the Commission’s ability to make reasoned and accurate decisions as to whether environmental concerns exist.

The Petition carefully explains how Section 1.1313 of the Commission’s rules – when read in conjunction with Sections 308, 309, and 153 of the Communications Act – requires that environmental objections to tower applications be filed as Petitions to Deny. Section 1.1313 provides that “[i]n the case of an application to which Section 309(b) of the Communications Act applies, objections based on environmental considerations shall be filed as Petitions to Deny.”⁴ As the Petition notes, Section 309(b) applies to applications covered by Section 308 which, in turn, covers applications for “station licenses.”⁵ “Station license” means an instrument of authorization “for the use or operation of apparatus for transmission of energy, or communications, or signals by radio” – a definition that surely encompasses communications tower registrations.⁶

In light of this, the Commission should clarify that Petitions to Deny tower applications based on environmental concerns must be filed in accordance with Section 309(d) and conform to the procedural and evidentiary requirements for Petitions to Deny in Section 1.939 of the Commission’s rules. In accordance with these requirements, a petitioner would need to present specific allegations of fact sufficient to make a *prima facie* case that grant of the application would not be in the public interest because of potential environmental problems.⁷ The petitioner also would be required to file an affidavit of a person with personal knowledge in support of

⁴ 47 C.F.R. § 1.313(a).

⁵ Petition at 11 (citing 47 U.S.C. § 308, 309(b)).

⁶ 47 U.S.C. § 153(42).

⁷ 47 U.S.C. § 309(d); 47 C.F.R. § 1.939(d).

these allegations.⁸ In the end, these evidentiary requirements will produce a well-informed record, which will facilitate reasoned decision-making by the Commission as to whether environmental concerns exist. Moreover, these requirements will protect the integrity of the notice and comment process from frivolous claims that waste Commission resources and delay infrastructure deployment.

II. CONSISTENT WITH THE CATEGORICAL EXCLUSION REGIME, THE COMMISSION MAY REQUIRE AN ENVIRONMENTAL ASSESSMENT ONLY UPON A SUBSTANTIAL EVIDENTIARY SHOWING.

The standard for imposing an environmental assessment must be construed in light of the categorical exclusion regime – settled law undisturbed by the D.C. Circuit’s decision in the *American Bird Conservancy* case. While the D.C. Circuit clarified that “scientific consensus” is not required before imposing an EA, the Council on Environmental Quality’s (“CEQ”) categorical exclusion regime, as implemented by the FCC, was not challenged and remains in force. Consistent with this regime, the bare allegation of the potential for environmental harm is an insufficient basis on which to order an EA. Instead, the proponent of an EA must overcome via a substantial evidentiary showing the categorical exclusion for communications towers. A contrary interpretation would render the categorical exclusion – adopted after notice-and-comment rulemaking and reflected in the Commission’s rules – a nullity.

That the categorical exclusion of communications towers from NEPA review remains in effect is beyond dispute. The Commission adopted its Order implementing CEQ’s categorical exclusion regime after notice-and-comment rulemaking on a well developed record. Indeed, the Commission’s rulemaking investigating these issues took place over six years. Ultimately, in 1985, the Commission determined that, among other things, the registration of communications

⁸ 47 U.S.C. § 309(d); 47 C.F.R. § 1.939(d).

towers should be categorically excluded from environmental processing. In reaching its decision, the Commission noted that it had “been guided by nearly a decade of Commission experience with environmental processing.”⁹ The Commission also explained that “instances in which an Environmental Impact Statement has proved necessary, or where the facts have shown a significant impact on the environment, have been rare.”¹⁰ No party to the *American Bird Conservancy* case or the Gulf proceeding before the FCC challenged these findings, which are settled law.

The standard for imposing an EA must be construed in light of the categorical exclusion. Under the categorical exclusion regime, the proponent of environmental review of an otherwise excluded tower does not start with a blank slate. Instead, the categorical exclusion – and a decade of Commission experience indicating that environmental concerns arising from the Commission’s activities “have been rare” – must be overcome. Pursuant to CEQ rules, agencies conduct environmental review of categorically excluded actions only under “extraordinary circumstances.”¹¹ And FCC rules require not simply the bare allegation of *any* potential environmental harm but a written petition setting forth the alleged harm “in detail” including a showing that the harm would be “significant.”¹² The plain language of these regulations, construed in light of the categorical exclusion, compels a substantial evidentiary showing before an EA may be required.

⁹ See *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, Report and Order, FCC 85-626, ¶10 (1986) (“*FCC NEPA Order*”).

¹⁰ See *id.*

¹¹ See 40 C.F.R. §§ 1508.4.

¹² 47 C.F.R. § 1.1307(c). Notably, this section of the Commission’s rules cross-references Section 1.1313 (“Objections”).

Requiring an EA only upon a substantial evidentiary showing is also consistent with the efficiency underpinnings of CEQ's categorical exclusion regime. A principal reason CEQ and FCC regulations employ categorical exclusions is to reduce administrative delay and increase efficiency.¹³ Categorical exclusions enable agencies to concentrate scarce resources on federal undertakings likely to have a significant environmental impact, and not to analyze routine actions that an agency's experience dictates are unlikely to have such an impact.¹⁴ Here, the FCC determined after notice-and-comment rulemaking on a well-developed record that, in most cases, registration of communications towers is not likely to have a significant environmental impact. Accordingly, consistent with the efficiency objective of CEQ's categorical exemption regime, processing of communications tower registrations should not, in the ordinary course, be delayed. Such delay imperils multiple Commission policy objectives, including the promotion of ubiquitous wireless and broadband coverage and availability of E911 emergency calling service. Requiring a substantial evidentiary showing before off-lining a tower registration for further environmental review ensures that EAs will be required only in those rare cases where a registration may have a significant environmental impact.

III. CONCLUSION

For the foregoing reasons, AT&T urges the Commission to confirm that Section 1.1313 of the Commission's rules requires that environmental objections be filed as Petitions to Deny,

¹³ See 40 C.F.R. 1500.5(k) (requiring agencies to use categorical exclusions to reduce delay); 40 C.F.R. 1500.4(p) (requiring agencies to use categorical exclusions to reduce excessive paperwork).

¹⁴ See *Utah Env'tl. Cong. v. Bosworth*, 443 F.3d 732, 742 (10th Cir. 2006) (explaining that by "relying on categorical exclusions, the Forest Service promotes efficiency in its NEPA review process while avoiding unnecessary analysis").

and that, consistent with CEQ's categorical exclusion regime, EAs are required only upon a substantial evidentiary showing.

Respectfully submitted,

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May 27, 2008

CERTIFICATE OF SERVICE

I, Steven Merlis, do hereby certify that on this 27th day of May 2008, I caused copies of the foregoing "Comments of AT&T Inc." to be delivered to the following via First Class U.S. mail and/or email.

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