

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

In the Matter of)	
)	
Amendment of Part 1 of the Commission's Rules)	WT Docket No. 08-61
Regarding Environmental Compliance Procedures)	WT Docket No. 03-187
For Processing Antenna Structure Registration)	DA 09-904
Applications)	
Petition for Expedited Rulemaking and Other Relief))	
On behalf of American Bird Conservancy,)	
Defenders of Wildlife and National Audubon)	
Society)	

COMMENTS OF VERIZON WIRELESS

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SUMMARY

The Commission should deny the Petition for Expedited Rulemaking filed by the American Bird Conservancy, Defenders of Wildlife and National Audubon Society. Although the Commission already has before it a rulemaking that responds to Petitioners' concerns about the impact of towers on migratory birds, Petitioners ask the Commission to begin yet another rulemaking, which they assert is necessary to comply with the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the Migratory Bird Treaty Act ("MBTA"), (collectively "Environmental Laws") and to carry out the mandate of the U.S. Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy, Inc. v. FCC*.

As an initial matter, Verizon Wireless is concerned that the expansive regulations proposed by Petitioners would seriously impede wireless facilities siting, and make it far more difficult for carriers to deploy new broadband wireless services for the benefit of the public and meet their FCC-mandated build-out requirements. The proposed measures would introduce several new, cumbersome, and costly requirements that must be completed prior to most new construction and would add months, if not years, of delay to already long facilities siting processes. These sweeping rules and requirements would undermine a key objective of the American Recovery and Reinvestment Act of 2009 ("ARRA"), to promote construction of new wireless broadband infrastructure and job creation.

Verizon Wireless agrees that the Commission should take action to satisfy the Court's mandate in the Remand Order. The radical, expansive changes to Commission rules and practices that Petitioners request, however, go well beyond what is required in the Remand Order. Rather than beginning another rulemaking to consider the measures proposed by

Petitioners, the Commission should devote its limited resources to addressing the issues before the Commission as a result of the Remand Order. In particular, the Commission should:

- (1) Adopt a Public Notice requirement that applies only to new towers and existing registered structures that propose height increases and/or changes to the structure's marking and lighting;
- (2) Commence a programmatic EA to study the cumulative effects of towers in the Gulf Coast region on migratory birds;
- (3) Provide an explanation regarding the showing necessary to demonstrate sufficient environmental impacts on endangered species that would warrant a formal consultation with the FWS; and
- (4) Complete the open Migratory Bird NPRM proceeding considering whether any rule changes are necessary to protect migratory birds.

Petitioners' request for a new rulemaking should also be denied on the merits. Petitioners once again fail to offer the requisite scientific or other factual data that establishes a need for the rules they propose. Moreover, Petitioners' assertions that the Commission's existing environmental rules are not in compliance with various statutes are incorrect.

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COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby responds to the Federal Communications Commission's Public Notice,¹ seeking comments on the above-referenced Petition for Expedited Rulemaking ("Bird Group Petition") filed by American Bird Conservancy, Defenders of Wildlife and National Audubon Society ("Petitioners").

Although the Commission already has before it a rulemaking that responds to Petitioners' concerns about the impact of towers on migratory birds, Petitioners ask the Commission to begin yet another rulemaking, which they assert is necessary to comply with the National

¹ "Wireless Telecommunications Bureau Seeks Comment on Petition for Expedited Rulemaking and other Relief Filed on behalf of American Bird Conservancy, Defenders of Wildlife and National Audubon Society Regarding Commission Implementation of the National Environmental Policy Act, the Endangered Species Act, and the Migratory Bird Treaty Act," WT Docket Nos. 08-91 and 03-187, DA 09-904, Public Notice (released April 29, 2009).

Environmental Policy Act (“NEPA”),² the Endangered Species Act (“ESA”),³ the Migratory Bird Treaty Act (“MBTA”),⁴ (collectively “Environmental Laws”) and to carry out the mandate of the U.S. Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy, Inc. v. FCC*.⁵

Verizon Wireless agrees that the Commission should take action to satisfy the Court’s mandate in the Remand Order. The radical, expansive changes to Commission rules and practices that Petitioners request, however, go well beyond what is required in the Remand Order, lack an evidentiary basis, and would result in sweeping regulation of the placement of wireless communications facilities in direct contravention of the goals of the Commission and the Administration. Verizon Wireless urges the Commission not to grant this petition and thus begin yet another rulemaking on migratory bird matters. Instead, it should complete the existing rulemaking and respond to the Remand Order. In taking these actions it should (1) balance the Commission’s obligations to protect migratory birds and its goal of removing (not creating) barriers that block new, expanded and improved wireless services, including broadband technologies; (2) adopt only those new requirements and procedures that are necessary to fulfill the Court’s mandate; and (3) ensure that any new rules intended to protect migratory birds are founded on the requisite scientific evidence and other information that demonstrates that such rules are

² 42 U.S.C. § 4321 *et seq.*

³ 16 U.S.C. §1531 *et seq.*

⁴ 16 U.S.C. § 701 *et seq.*

⁵ 516 F.3d 1027 (“Remand Order”).

necessary to and effective in achieving the Commission's statutory responsibilities in this area.

I. BACKGROUND

In 2006, the FCC released a Notice of Proposed Rulemaking tentatively concluding that medium intensity white strobe lights are to be considered the preferred lighting system for communications towers and seeking comment on whether to require such lights for all new and existing towers.⁶ The Migratory Bird NPRM also sought comment whether to adopt regulations regarding the placement and design of communications towers to protect migratory birds. In particular, the Commission sought comment on whether it should adopt regulations governing the use of guy wires and regarding the height and placement of communications towers.⁷ That NPRM remains pending.

On February 19, 2008, the United States Court of Appeals for the D.C. Circuit decided an appeal brought by the American Bird Conservancy and Forest Conservation Council (Petitioners) challenging an April 2006 *Memorandum Opinion and Order*.⁸ In that Order, the FCC denied a petition by Petitioners asking the FCC (1) to prepare an environmental impact statement (EIS) under NEPA analyzing the effects of all past, present, and reasonably foreseeable tower registrations on migratory birds in the Gulf Coast region; (2) to initiate a formal consultation with

⁶ Effects of Communications Towers on Migratory Birds, *Notice of Proposed Rulemaking*, WT Docket No. 03-187, 21 FCC Rcd 13241, 13260-13264 (2006) ("Migratory Bird NPRM").

⁷ Migratory Bird NPRM, 21 FCC Rcd at 13264-13266.

⁸ Petition for National Environmental Policy Act Compliance, *Memorandum Opinion and Order*, 21 FCC Rcd 4462 (2006) ("Gulf Coast Order").

the United States Fish and Wildlife Service (FWS) pursuant to the ESA regarding the Gulf Coast towers' impact on various bird species; (3) to take steps in accordance with the MBTA to reduce bird mortality at Gulf Coast tower sites; and (4) to provide notice of proposed Gulf Coast tower ASR applications and an opportunity to comment on such applications before they are granted. The FCC denied each request stating that there was insufficient evidence to justify the actions requested and that the effect of communications towers on migratory birds will be considered in the context of the FCC's Notice of Proposed Rulemaking considering such effects.⁹ The Court of Appeals granted the Petition for Review on issues (1), (2) and (4) above, and remanded these issues back to the FCC for action consistent with the Court's decision. The Court denied the Petition with respect to issue (3).

On May 2, 2008, in response to the Remand Order, CTIA and other members of the "Infrastructure Coalition" filed a Petition for Expedited Rulemaking to address the notice issue.¹⁰ Verizon Wireless submitted comments supporting the Infrastructure Coalition Petition and urging the Commission to adopt exclusions for communications towers where possible to minimize the tower siting delays and cost increases that will necessarily be caused by additional

⁹ See Migratory Bird NPRM.

¹⁰ Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications, *Petition for Expedited Rulemaking*, WT Docket No. 08-61 (filed by CTIA – The Wireless Association, National Association of Tower Erectors, National Association of Broadcasters, and PCIA – The Wireless Infrastructure Association on May 2, 2008) ("Infrastructure Coalition Petition"). A *Public Notice*, DA 08-1078, seeking comment on The Infrastructure Petition was released on May 6, 2008.

rules to protect migratory birds.¹¹ This petition remains pending. On April 14, 2009, Petitioners filed their own rulemaking petition, which is the subject of these comments.

II. DISCUSSION

A. **The Commission Must Carefully Balance the Need to Protect Migratory Birds with Administration Goals to Facilitate the Implementation of New Wireless Broadband Technologies, Particularly in Rural Areas.**

Wireless carriers already face a number of hurdles and barriers in their efforts to build additional sites to expand coverage for consumers and public safety, improve service and bring next generation broadband technologies to American consumers. These barriers include unreasonable and unnecessary delays in obtaining local zoning approval, local zoning ordinances that impose discriminatory and unreasonable requirements on wireless facilities siting,¹² and myriad environmental requirements that must be met prior to constructing a new tower, and in many cases prior to adding or modifying an antenna on an existing structure.¹³ While these processes have a useful role, policymakers are taking a fresh look at laws and regulations that affect wireless facilities siting and are considering whether removing unnecessary barriers and

¹¹ Comments of Verizon Wireless, WT Docket No. 08-61, DA 08-1078 (filed May 27, 2008).

¹² *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165 (2008).

¹³ *See* 47 C.F.R. § 1.1307(a).

streamline facilities siting processes would facilitate implementing wireless broadband capabilities, particularly in rural America.¹⁴

Against this backdrop, Petitioners ask the FCC to adopt sweeping changes to the FCC's environmental regulations. For example, Petitioners ask the FCC to eliminate the categorical exclusions set forth in Section 1.1306(a), to add several categories of environmental review (many of which have little or nothing to do with migratory birds) to Section 1.307(a), and to add additional elements to environmental assessments that must be filed whenever a facility is determined potentially to have a significant environmental effect. Petitioners also propose an entirely new rule requiring formal consultation with the FWS and the National Marine Fisheries Service requiring, among other things, "discussions with experts (including experts provided by the consulted agency), habitat identification, field surveys, biological analyses, and the formulation of mitigation efforts" every time the consulted agency determines that a listed species or designated critical habitat may occur in the action area. The proposed rule would also require biological assessments to be performed on every site unless the consulted agency indicates that the project is not likely to adversely affect a listed species or designated critical habitat.¹⁵ Petitioners ask that these rules be adopted *in addition to* the lighting system, tower

¹⁴ See A National Broadband Plan for Our Future, *Notice of Inquiry*, GN Docket No. 09-51 (released April 8, 2009) at 14-16 (¶¶ 42-46) (seeking comment on measures the Commission should take to facilitate wireless broadband deployment).

¹⁵ Bird Group Petition, Proposed Rule Changes Appendix.

height, tower location, and tower support system regulations already being considered by the FCC in the Migratory Bird NPRM.¹⁶

Aside from their other infirmities discussed below, the regulations proposed by Petitioners would seriously impede wireless facilities siting, and make it far more difficult for carriers to deploy new broadband wireless services for the benefit of the public and meet their FCC-mandated build-out requirements. The proposed measures would introduce several new, cumbersome, and costly requirements that must be completed prior to most new construction and would add months, if not years, of delay to already long facilities siting processes.

These sweeping rules and requirements would undermine a key objective of the American Recovery and Reinvestment Act of 2009 (“ARRA”),¹⁷ to promote construction of new wireless broadband infrastructure and job creation. In the conference report accompanying the ARRA, the conference committee emphasized that ARRA broadband grants should be distributed in a way to “ensure, to the extent practicable, that grant funds be used to assist *infrastructure investments*.”¹⁸ The conferees also emphasized that “the construction of broadband facilities capable of delivering next-generation broadband speeds is likely to result in greater job creation and job preservation”¹⁹

¹⁶ As Verizon Wireless previously commented, those measures would make tower siting considerably more difficult in many regards and make it more difficult and costly for wireless carriers to deploy broadband networks, particularly in rural areas where taller, guyed towers are used more frequently to improve coverage. *See* Verizon Wireless Comments, WT Docket No. 03-187 (filed April 23, 2007), at 10-16.

¹⁷ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

¹⁸ H.R. REP. No. 111-16, at 774 (emphasis added).

¹⁹ *Id.* at 775.

Rules that increase the costs and delays associated with wireless facilities siting directly contravene the President's and Congress's goals of stimulating infrastructure investments and broadband deployment, thus depriving local economies in those areas of much-needed jobs and capital. As discussed below, the rules Petitioners propose are neither warranted by any scientific or other evidence. Should the Commission deem that additional rules are necessary, where possible, the Commission should adopt and retain categorical exclusions for towers that do not present a significant threat to migratory birds. The Commission must also carefully balance the need to protect migratory birds with the desire to facilitate wireless broadband deployment.

B. The FCC Should Focus Its Rulemaking Activity on those Measures Required by the Court's Mandate.

Petitioners' requested actions are not limited to those actions required by the Court in the Remand Order. Rather, the Bird Group Petition requests sweeping changes that go well-beyond what is required under the Remand Order. Rather than revisiting and rewriting the Commission's environmental rules, the FCC should focus on the issues remanded in the Remand Order.

In the Remand Order, the Court found that it was reasonable for the FCC to defer adopting rules to protect migratory birds pursuant to the MBTA, NEPA and ESA to the open Migratory Bird NPRM proceeding. The Court, however, found that the Commission erred (1) in dismissing Petitioners' request for review of the impacts on Gulf Coast region towers on migratory birds without first preparing an environmental assessment ("EA") to determine if there are any significant environmental impacts caused by Gulf Coast towers that require the

preparation of a programmatic environmental impact statement (“EIS”);²⁰ (2) in failing adequately to state what kind of showing is necessary to demonstrate sufficient environmental impacts on endangered species that would warrant a formal consultation with the FWS;²¹ and (3) in failing to provide adequate notice and opportunity to file comments regarding the effects of Gulf Coast region tower applications on the environment.²²

By contrast, the Petition asks the FCC (1) to make sweeping changes to the FCC’s environmental rules to eliminate categorical exclusions and cure alleged deficiencies in the rules; (2) to skip over preparing an EA and proceed directly to the preparation of a programmatic EIS assessing the impacts of towers on migratory birds; and (3) to ignore the Court’s request for a showing of what is necessary to demonstrate the need for a formal FWS consultation for endangered species and adopt incredibly prescriptive rules requiring such consultation. Petitioners also ask the FCC to adopt a notice requirement that posts notice of tower applications on the FCC website and allows parties to object to all antenna structure registrations, either formally or informally, within 60 days of the filing of an ASR application.²³ Unlike the Remand Order, Petitioners’ requests are not confined to the Gulf Coast area that was the subject of the appeal.

Rather than beginning another rulemaking proceeding to consider the prescriptive measures proposed by Petitioners, the Commission should devote its limited resources to

²⁰ Remand Order, 516 F.3d at 1033-1034.

²¹ *Id.*, at 1034-1035.

²² *Id.*, at 1035.

²³ Comments of American Bird Conservancy, Defenders of Wildlife, and National Audubon Society, WT Docket No. 08-61 (filed May 27, 2008) at 17-19.

addressing the issues before the Commission as a result of the Remand Order. In particular, the Commission should:

- (1) Adopt a Public Notice requirement that applies only to new towers and existing registered structures that propose height increases and/or changes to the structure's marking and lighting;²⁴
- (2) Commence a programmatic EA to study the cumulative effects of towers in the Gulf Coast region on migratory birds;
- (3) Provide an explanation regarding the showing necessary to demonstrate sufficient environmental impacts on endangered species that would warrant a formal consultation with the FWS; and
- (4) Complete the open Migratory Bird NPRM proceeding considering whether any rule changes are necessary to protect migratory birds.

C. The New Rulemaking Petition Should Be Denied Because it Fails to Present Evidence Establishing a Linkage Between Communications Towers and Migratory Bird Deaths or any Legal Basis for Changing Existing Rules.

Petitioners' request for a new rulemaking should also be denied on the merits. It fails to offer the requisite scientific or other factual data that establishes a need for the rules they propose. Moreover, Petitioners' assertions that the Commission's existing environmental rules are not in compliance with various statutes are incorrect.

1. There Is No Peer-Reviewed Scientific Study Evidence Supporting a Conclusion that Communications Towers Impact Migratory Bird Populations.

Petitioners continue to argue that scientific literature and expert opinion supports a finding that antenna structures are a significant cause of mortality for migratory and other bird species.²⁵ However, the evidence and opinion relied upon by Petitioners is the same information that was previously presented, and refuted. Verizon Wireless previously commented that:

²⁴ In this regard, Verizon Wireless supports the local public notice proposal that the Infrastructure Coalition will be making in its comments to the Bird Group Petition.

²⁵ Bird Group Petition at 2-11.

The scientific evidence and literature with respect to migratory bird tower collisions to date does not provide any basis for FCC regulatory action with respect to migratory birds. As discussed above, both Avatar and Woodlot [consultants hired by the FCC and CTIA, respectively, to review the scientific literature] found no linkage whatsoever between migratory bird collisions with communications towers and any significant decline in migratory bird population. Indeed, Avatar found that “over the last five decades of monitoring bird population, the number of bird mortalities at towers is reported to be decreasing while the number of towers is increasing. All long-term studies show a similar decline in total bird mortality . . .”²⁶

Both of the environmental expert firms that reviewed the scientific evidence in the record of the Migratory Bird NPRM concluded that there is insufficient evidence that communications towers are responsible for any significant decline in migratory bird populations. The Commission thus has no evidentiary basis to adopt any rule changes to protect migratory birds, let alone the radical and expansive rewrite of the environmental rules that Petitioners now propose. Moreover, none of the anecdotal and non-peer reviewed evidence that has been placed in the record and relied upon by Petitioners is sufficient to establish any causal link between towers below 380 feet tall and any decline in migratory bird populations, much less any linkage between different tower support and lighting systems and tower locations and declines in migratory bird populations. Accordingly, before the Commission adopts any rules to protect migratory birds, it would need to gather scientific, peer-reviewed study evidence regarding the potential impact of communications towers of different heights, with different support and lighting systems, in a variety of locations on migratory birds.

²⁶ Verizon Wireless Comments, WT Docket No. 03-187, (filed April 23, 2007) at 6, *citing* Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission, by Avatar Environmental, LLC (submitted September 30, 2004) (hereinafter “Avatar Report”), at 3-15.

Moreover, as Verizon Wireless previously explained, the only study establishing any linkage between communications towers and an increase in migratory bird collisions with communications towers, the Dr. Gehring study, is flawed in several respects. First, the study was limited to towers over 380 feet tall. Second, the study is limited both in terms of sample size and tower locations. Third, the study has not been peer-reviewed. Fourth, all the towers in the study were very tall and lit, making it impossible to isolate any factor – height, support system, or lights – as the cause for the increase in bird collisions that were noted.²⁷

2. The Commission Needs Additional Information Before It Can Adopt Rules Requiring Particular Tower Lighting Systems.

Even assuming the Commission does gather reliable scientific information establishing a causal linkage between communications towers and migratory bird collisions, the Commission lacks the information necessary to adopt any changes to tower lighting systems. In the Bird NPRM, the Commission tentatively concluded that the use of medium intensity white strobe lights for nighttime conspicuity is to be considered the preferred lighting system over red obstruction lighting to the maximum extent possible.²⁸ As Verizon Wireless previously argued, however, Dr. Gehring's study results from the fall of 2005 do not support a rule favoring white strobe lights over red strobe lights.

²⁷ See Verizon Wireless Comments, WT Docket No. 03-187, (filed April 23, 2007) at 5-6, 10-12, *citing* Comments of Joelle Gehring, Ph.D and Paul Kerlinger, "Avian Collisions at Communications Towers II. The Role of Federal Aviation Administration Obstruction Lighting Systems," WT Docket No. 03-187 (filed April 12, 2007) (hereinafter "Gehring Lighting Study Results"), at 10-11.

²⁸ Migratory Bird NPRM, 21 FCC Rcd at 13,262 (¶ 42).

Importantly, Dr. Gehring did not draw a distinction between red and white strobe lighting systems, concluding that both types of lighting were preferable to red steady-burning lights for reducing bird collisions.²⁹ Indeed, Dr. Gehring observed more collisions at towers using white strobe lighting as compared with towers using red strobe lights.³⁰

In addition, before adopting any tower lighting regulation, the Commission needs to consider other factors such as (1) the effect of lighting systems on air safety; (2) the effect of lighting systems on state and local zoning board approvals; and (3) the cost of requiring carriers to retro-fit existing towers with the preferred lighting system. Appropriately, the Commission is awaiting the results of an FAA conspicuity study evaluating the difference in conspicuity to pilots of several variables, including (1) solid lights as compared to blinking lights; (2) red lights as compared to white lights; and (3) whether adequate conspicuity is maintained if side marker lights are extinguished or operated at a reduced flash rate while maintaining the lights on the top of the obstruction.

With respect to zoning, as noted in the Avatar Report, “white strobe lighting often is not favored by residents located within sight of a tower; therefore, this becomes an aesthetic issue as well.”³¹ Verizon Wireless’ experience supports Avatar’s statement. Because neighbors do not favor nighttime white strobe lighting, it is very difficult to get zoning approval for white strobe

²⁹ Verizon Wireless Comments, WT Docket No. 03-187, (filed April 23, 2007) at 10-13, *citing* Gehring Lighting Study Results, at 10-11.

³⁰ Gehring Lighting Study Results at 10-11.

³¹ Avatar Report at 3-43.

lighting systems, and white strobe lighting systems are deployed in only about 4 percent of the thousands of towers Verizon Wireless owns, operates, or manages that are lit.³²

Verizon Wireless previously commented that because so few existing towers have white strobe lighting systems, any requirement to retro-fit existing towers with white strobe lighting would be very costly and burdensome. Verizon Wireless estimates that replacing the lighting system on an existing tower with white strobe lighting would cost \$10,000 per tower for towers under 200 feet tall and \$15,000 for towers over 200 feet above ground level. Considering that Verizon Wireless has over 2000 lit towers that have lighting systems other than white strobe lights, requiring a change on these towers to white strobe lighting would cost Verizon Wireless well over \$20 million. In addition, before any lighting system could be changed, Verizon Wireless would have to file lighting study applications for each tower with the FAA, and, once approved, amend the tower registration with the FCC. In many cases, Verizon Wireless would be required to apply for and receive zoning permits and/or construction permits to change the existing lighting systems. These requirements would impose even more costs and administrative burdens on carriers.³³

The Commission must evaluate and address each of these concerns before adopting any rule requiring any particular lighting system for communications towers. In any event, the issues of new lighting rules have already been teed up in the pending Migratory Bird NPRM. Petitioners' new filing offers nothing new on this matter and should thus be denied on this ground as well.

³² Verizon Wireless Comments, WT Docket 03-187, at 12.

³³ *Id.*, at 12-13.

3. **Petitioners Fail to Establish that Rule Changes are Needed to Comply with Environmental Laws.**

Petitioners argue that the current FCC environmental rules fail to comply with NEPA and Council on Environmental Quality (“CEQ”) regulations implementing NEPA, with the ESA, and with the MBTA. In each instance, the alleged shortcoming in the FCC rules is predicated on Petitioners’ unfounded conclusion that communications towers significantly affect the environment, endangered species and migratory birds.³⁴

Petitioners’ arguments with respect to NEPA and the MBTA were previously raised in the context of the Migratory Bird NPRM.³⁵ There, Verizon Wireless argued, “NEPA requires federal agencies to analyze environmental effects only if there is a major federal action and if that action will significantly affect the quality of the human environment.”³⁶ Similarly, CEQ regulations provide that

The significance of an environmental impact is an agency decision that should be based on both the context and intensity of the impact. In the case of evaluating nationwide impacts of communications towers, the regulations require that the agency determine the effects of communications towers on migratory birds nationwide. The regulations also require the agency to evaluate the effects of the action on public safety, and to consider the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.³⁷

³⁴ Bird Group Petition at 11-44. For example, Petitioners arguments with respect to the ESA are predicated on the statement “there is no question that FCC-permitted communications tower have taken and continue to take birds listed under the ESA.” *Id.*, at 36. With respect to the MBTA, Petitioners state “there should be no dispute that FCC-registered towers kill migratory birds protected under the MBTA . . .” *Id.*, at 43.

³⁵ Migratory Bird NPRM, 21 FCC Rcd at 13257-13259 (¶¶ 33-35).

³⁶ Verizon Wireless Comments WT Docket 03-187, at 8, *citing* 42 U.S.C. § 4332(C).

³⁷ *Id.*, *citing* 40 C.F.R. § 1508.27 (a) and (b) [footnotes omitted].

Because the record in this proceeding fails to establish that communications towers have a significant impact on migratory birds, applying these factors leads to the inescapable conclusion that the effect of communications towers on migratory birds cannot be considered “significant” and no additional NEPA regulations are warranted.³⁸

Verizon Wireless argued that the MBTA also does not provide any basis for FCC action. The MBTA provides that “it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird . . .”³⁹ However, the only agency authorized under the MBTA to enact regulations regarding when and how migratory birds may be taken, killed or possessed is the Department of the Interior.⁴⁰ Moreover, the MBTA vests authority to enforce the terms of the MBTA solely with employees of the Department of the Interior.⁴¹ Accordingly, the FCC has no authority under the MBTA to adopt regulations to protect migratory birds and no authority to enforce provisions of the MBTA.⁴²

As noted previously, the Commission already has an open rulemaking proceeding considering what, if any, rules are necessary to protect migratory birds under the Environmental Laws. Thus, to the extent any rule changes are deemed necessary, they can be addressed in that

³⁸ *Id.*, at 8-9.

³⁹ 16 U.S.C. § 703.

⁴⁰ 16 U.S.C. § 704.

⁴¹ 16 U.S.C. § 706.

⁴² Verizon Wireless Comments WT Docket 03-187, at 9-10.

proceeding. Given the lack of reliable scientific evidence supporting the Petitioners' legal claims, however, those legal arguments fall short.

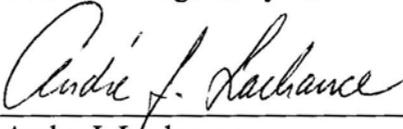
III. CONCLUSION

The actions requested by Petitioners go well beyond what is required in the Remand Order, lack the requisite factual and legal basis, or duplicate issues already being considered in the existing Migratory Bird NPRM. Their Petition should thus be denied.

Respectfully submitted,

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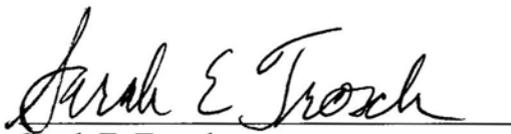
Certificate of Service

I hereby certify that on this 29th day of May copies of the foregoing “Comments of Verizon Wireless” in WT Docket 08-61 were sent by US Mail to the following parties:

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