

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

In the Matter of)	
)	
Amendment of Part 1 of the)	
Commission's Rules Regarding)	WT Docket No. 08-61
Environmental Compliance)	WT Docket No. 03-187
Procedures for Processing Antenna)	
Structure Registration Applications)	
)	

Reply Comments of United States Cellular Corporation

United States Cellular Corporation ("USCC") hereby files its reply comments in the above-captioned dockets concerning the April 14, 2009 "Petition For Expedited Rulemaking and Other Relief" ("Environmental Petition") filed by the American Bird Conservancy, Defenders of Wildlife, and National Audubon Society ("Environmental Petitioners"). USCC is a mid-sized wireless carrier, with over 6.2 million customers. It owns over 3,800 registered antenna structures and thus has a large stake in the outcome of this proceeding. USCC strongly opposes the proposals of the Environmental Petitioners and supports the counter proposals made by the Infrastructure Coalition.¹ We comment separately to emphasize what we believe to be the FCC's most important present obligations.

I. The FCC Should Not Now Go Beyond The Mandate of The U.S. Court of Appeals

The questions of whether and to what extent certain types of FCC-licensed antenna towers harm migratory birds, and what the remedies for such harm might be, are unresolved and bitterly contested.² As various commenters have noted,³ the FCC has an open proceeding in

¹ See Comments of CTIA, the National Association of Broadcasters ("NAB"), the National Association of Tower Erectors ("NATE") and PCIA (collectively the "Infrastructure Coalition"), filed May 29, 2009.

² Compare, e.g., Environmental Petition, pp. 2-11 with the Comments of Verizon Wireless ("Verizon Wireless Comments"), filed May 29, 2009, pp. 10-17,.

which it is considering what, if any, changes in its rules are necessary to deal with the migratory bird/antenna tower issue.⁴ That is the proceeding in which the FCC should consider and resolve the broad environmental and legal questions involved in any action to regulate towers in relation to migratory birds. However, the FCC's most pressing short term obligation is to respond to the mandate of the United States Court of Appeals,⁵ which is the subject of both the Environmental Petition and a prior petition of the Infrastructure Coalition⁶ in this proceeding, which also responded to the Remand Order and which USCC supported in previously filed comments.⁷

The actions required of the FCC by the Remand Order have been once again succinctly set forth in the recent Comments of the Infrastructure Coalition and Verizon Wireless.⁸ The FCC must: (1) prepare an Environmental Assessment ("EA") to determine if there are any significant environmental impacts caused by Gulf Coast towers, which would in turn require the preparation of a more detailed Environmental Impact Statement ("EIS");⁹ (2) provide a description of the type of "showing" which would trigger 'programmatic consultation' by the FCC with the U.S. Fish and Wildlife Service ("USFWS") regarding the efforts of towers on endangered species;¹⁰ and (3) adopt a new procedure to provide adequate notice to the public of all pending tower registration applications.¹¹

The Environmental Petitioners, in contrast, argue the FCC must now take wide-ranging actions far beyond the scope of the Remand Order, including (1) amendment of the FCC's NEPA

³ See, e.g. Comments of National Telecommunications Cooperative Association ("NTCA Comments"), filed May 29, 2009, p. 5.

⁴ See, In the Matter of Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187 Notice of Proposed Rulemaking (released Nov. 7, 2006).

⁵ American Bird Conservancy, Inc. v. FCC, 516 F.3d 1027 (D.C. Cir. 2008) ("Remand Order").

⁶ See, Petition for Expedited Rulemaking of CTIA et. al For Amendments of Parts 1 and 17 of the FCC's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications, WT Docket No. 08-61, filed May 2, 2008.

⁷ See, USCC Comments in Docket 08-61, filed May 27, 2008.

⁸ See, Infrastructure Coalition Comments, pp. 7-11; Verizon Wireless Comments, pp. 8-10.

⁹ Remand Order, 516 F.3d, at 1033-1034, Verizon Wireless Comments, p. 9.

¹⁰ Remand Order, at 1034-1035; Verizon Wireless Comments, p. 9.

¹¹ Remand Order, at 1035.

regulations to essentially eliminate "categorical exclusions" of towers from environmental review; (2) preparation of an EIS addressing the environmental consequences for migratory birds of the nationwide ASR process; (3) adoption of new rules to comply with the ESA; and (4) immediate "consultation" by the FCC with the USFWS regarding the effects of all towers and antenna structures on all threatened or endangered species.¹² And, despite the action of the U.S. Court of Appeals in upholding the FCC's deferral of action on Environmental Petitioners' claims under the Migratory Bird Treaty Act ("MBTA"), the Environmental Petitioners once again press their claim that the death of any migratory birds resulting from flying into FCC-licensed towers is a forbidden "taking" under the MBTA. This leads to the rash conclusion that the FCC is now required to take enforcement action pursuant to its alleged authority under the MBTA.¹³

In connection with the last point, we would note that it is typical of the Environmental Petitioners' overreaching assumptions concerning the legal obligations of the FCC. The courts have issued rulings which differ as to the scope of the MBTA's applicability to federal agencies, and have never ruled on its relationship to the Communications Act and the FCC.¹⁴ The MBTA is a 1918 statute which refers to the intentional "taking" or "killing" of migratory birds by hunters, poachers and the like.¹⁵ It is not in fact, reasonable to apply the MBTA in this modern day context, in which any deaths of birds, while regrettable, are an incidental and unintended consequence of the erection of telecommunications towers vital to the nation's telecommunications, economic, public safety and the national security interests.

¹² Environmental Petition, *passim*.

¹³ *Ibid*, pp. 43-44.

¹⁴ See, e.g. Sierra Club v. Martin, 110 F.3d 1551; 1555 (11th Cir. 1997) (MBTA does not apply to the U.S. Forest Service).

¹⁵ See City of Sausalito v. O'Neill, 386 F.3d 1186, 1225 (9th Cir. 2004).

In any case, none of the Petitioners' recommended actions is now required by the Remand Order and all of them reflect the Environmental Petitioners highly debatable beliefs regarding the requirements of the relevant laws. None should be taken by the FCC now.

In contrast, the Infrastructure Coalition's Comments focus on the appropriate means of complying with the Remand Order, rightly looking to the FCC's ongoing proceeding to deal with the issues raised by the Environmental Petitioners. We support the Infrastructure Coalition's persuasive case that that mandate of the Remand Order can be satisfied by FCC's adoption of rules which: (1) provide local public notice procedures to ensure that interested parties have an opportunity to participate in the ASR process;¹⁶ (2) require parties opposed to proposed towers to file Petitions to Deny within 30 days of such local public notice;¹⁷ (3) allow ASRs to be filed while FAA Determinations of No Hazard are pending;¹⁸ (4) require environmental objections to be filed as Petitions to Deny, with the "standing" and other requirements associated with such petitions;¹⁹ (5) provide that there be only one public notice period applicable to petitions regarding environmental issues;²⁰ and (6) require the FCC to adopt ASR processing rules and procedural deadlines to ensure fairness to both petitioners and tower applicants.²¹

USCC also supports the Infrastructure Coalition's reasoned arguments in support of issuance of a Gulf Coast Regional EA and referral of other migratory bird issues to the FCC's ongoing migratory bird proceeding.²²

USCC believes that the Infrastructure Coalition's proposals reflect an attempt to comply with the letter and spirit of Remand Order, while at the same time accommodating the need for

¹⁶ Infrastructure Coalition Comments, pp. 17-22.

¹⁷ Ibid, pp. 21-22.

¹⁸ Ibid, pp. 22-23.

¹⁹ Ibid, pp. 22-26.

²⁰ Ibid, pp. 26-27.

²¹ Ibid, pp. 27-28.

²² Ibid, pp. 28-30.

continuing wireless tower construction to meet urgent national needs for the development of wireless voice, broadband and public safety infrastructure. The proposals of the Environmental Petitioners do not reflect a comparable balance or awareness.

II. Other Commenters Suggest Additional Reasons for Not Adopting The Proposals of the Environmental Petitioners

The Infrastructure Coalition makes a solid case for the actions it proposes in light of the narrow requirements of the Remand Order and USCC agrees with it. However, other commenters in this proceeding put forward additional persuasive reasons why the FCC should not adopt the proposals of the Environmental Petitioners, either in response to the Remand Order, or as tentative conclusions in a Notice of Proposed Rulemaking in the ongoing migratory bird proceeding. USCC takes this opportunity to associate itself with their arguments.

USCC, for example, agrees with the Fixed Wireless Communications Coalition ("FWCC") that the FCC should not cut back sharply on the "categorical exclusions" from NEPA now available to tower applicants. An end to such exclusions would sweep many towers, which raise no actual environmental issues, into an endless and undesirable review process through an expanded EA mechanism. The FWCC stresses that the Environmental Petitioners' proposals would also turn EA preparation itself into a major obstacle to FCC tower approval, in that an EA, as the Petitioners' conceive it, would require applicants to include data on alternatives the applicant was not proposing and would include a "biological assessment" of a given tower, requiring expert consultants. The EA would thus take months to complete. The FWCC also notes that the proposals of the Environmental Petitioners would have little benefit for birds, since the overwhelming preponderance of bird deaths are from man made structures other than communications towers. Thus, any possible benefit for birds would be too small to justify the great harm to voice and wireless broadband network development inherent in adoption of these

proposals.²³ The FWCC comments rightly raise the need for balancing harms in the FCC's analysis of these issues.

USCC also notes the similar comments of the Association of Public Safety Communications Officials International, Inc. ("APCO"). APCO takes no position on the underlying scientific technical issues with respect to birds and towers. However, it expresses "deep concern" that the remedies proposed by the Environmental Petitioners are out of proportion to the alleged impact on birds from towers and argues that the procedures urged on the Commission by the Environmental Petitioners would delay or prevent the deployment of radio communications systems necessary for the protection of human life, health and property. APCO stresses the limits on funds available to local public safety officials and the considerable added costs which would inevitably result from the "remedies" suggested by the Environmental Petitioners.²⁴ The FCC should heed those concerns.

Verizon Wireless argues that the FCC must carefully balance the need to protect migratory birds with Obama Administration goal of facilitating the implementation of new wireless broadband technologies in rural areas. It echoes the argument of the Infrastructure Coalition that the FCC should focus its rulemaking activity on those measures required by the Remand Order. VZW also argues that the Environmental Petition should be denied because it fails to present sufficient probative evidence establishing a linkage between communications towers and migratory bird deaths or provide an adequate legal or factual basis for changing existing FCC rules. In support of that argument, Verizon Wireless argues that there is currently no adequate peer reviewed scientific study supporting a conclusion that towers may significantly impact migratory bird populations. Thus, the FCC needs additional information before it can

²³ Comments of Fixed Wireless Communications Coalition, filed May 29, 2009, passim.

²⁴ Comments of Association Public Safety Communications Officials, filed May 29, 2009, pp. 1-3.

adopt rules requiring particular lighting systems.²⁵ USCC entirely agrees that before the FCC can act to change its rules, it must resolve the serious evidentiary questions raised by Verizon Wireless.

Aviation Spectrum Resources, Inc. ("ASRI"), speaking for the commercial air transport industry, argues that communications towers individually and collectively do not have a significant impact on migratory birds, citing statistics from prior comments to the effect that towers may affect between .5 and .05 percent of migratory birds in any given year. ASRI urges the FCC to impose no additional substantial burdens on tower construction, citing the (as yet unrepaired) loss of antenna structures in the Gulf Coast region as a consequence of Hurricane Katrina and subsequent hurricanes. With respect to categorical exclusions, ASRI argues even if the FCC were to find that some proposed towers should not be categorically excluded from environmental review, the FCC should continue to exclude from routine environmental scrutiny new and modified antenna structures that are either temporary, do not require lighting, do not employ guy wires, are 200 feet or shorter, or are replacements for previously destroyed or damaged structures. USCC would certainly support such exceptions and perhaps others. Again, the issue of the exclusion of towers from routine environmental review must be given separate and adequate consideration.²⁶

As a possible alternative to the submission of Environmental Assessments for every new tower registration application, ASRI recommends that the FCC perform a single Environmental Assessment analyzing the effects that communications towers in the Gulf of Mexico region may have on migratory birds in the aggregate. In drafting with this EA, the FCC should consider which types of towers will and will not result in any significant environmental impact and apply

²⁵ Comments of Verizon Wireless, pp. 1-8.

²⁶ Ibid., p. 5.

those determinations to all future antenna structure applications in the region.²⁷ This would certainly be preferable to the ad hoc evacuation of every individual towers.

ASRI also rightly urges the FCC to reject the idea that petitioners against a given tower would only be required to demonstrate that a proposed tower might affect the environment. ASRI recommends that they be required to submit verifiable facts demonstrating a possible impact.²⁸ Finally, ASRI advises the FCC to reject petitioners' proposed rules requiring consultation by tower applicants with the USFWS and National Marine Fisheries Service. Such consultation, they argue, would fatally elongate the tower construction process.²⁹ Each of these concerns seems valid to USCC.

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²⁷ Ibid, pp. 6-7.

²⁸ Ibid, p. 7.

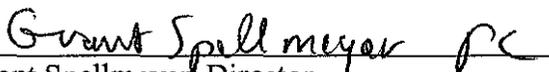
²⁹ Ibid, pp. 7-8.

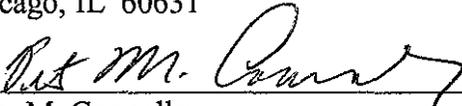
Conclusion

It is now urgently necessary that the FCC act in accordance with the holdings of the Court of Appeals in the Remand Order. It can do so by adopting the proposals of the Infrastructure Coalition. The FCC should consider other migratory bird related issues in the ongoing migratory bird proceeding.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION


Grant Spellmeyer, Director
Legislative and Regulatory Affairs
United States Cellular Corporation
8110 West Bryn Mawr
Chicago, IL 60631


Peter M. Connolly
Holland & Knight LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006

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