WT Dockets 03-187 and 08-61

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Federal Communications Commission
Office of the Secretary

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Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Programmatic Environmental Assessment for Antenna Structure Registration Program; WT Docket No. 08-61 and WT Docket No. 03-187

Dear Commissioners:

These comments are submitted on behalf of American Bird Conservancy, Defenders of Wildlife and National Audubon Society (hereinafter "Conservation Groups") in response to Public Notice DA 10-2178 (Nov. 12, 2010), announcing the Commission's decision to conduct a Programmatic Environmental Assessment (PEA) of its Antenna Structure Registration (ASR) Program. The PEA is in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy v. FCC*, 516 F. 3d 1027 (2008), concluding that registered towers may have a significant environmental effect on migratory birds.

For many years, the Conservation Groups have been urging the Commission to revise its ASR program to comply with environmental laws, i.e. the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Migratory Bird Treat Act (MBTA) to reduce bird mortality from collisions with communications towers. Toward that end, we have filed numerous documents with the Commission in the two open dockets, all of which are hereby incorporated by reference, including our Petition for Expedited Rulemaking and Other Relief, filed April 14, 2009.[1]

American Bird Conservancy (ABC) is a non-profit organization dedicated to the conservation of wild native birds in the Americas. Founded in 1994, ABC has long been a leader in Partners in Flight and the North American Bird Conservation Initiative and is the

[1] WTB contact Aaron Goldschmidt has advised that the entire record in both open dockets will be considered part of the record for the PEA. As requested by Mr. Goldschmidt, we will draw the Commission's attention to those documents on which we principally rely.

only U.S.-based group dedicated solely to overcoming the greatest threats facing native birds in the Western Hemisphere. ABC has 7,000 members, offices in Virginia and the District of Columbia, and staff in California, Indiana, Missouri, Montana, New Hampshire, New York, and Oregon.

Defenders of Wildlife ("Defenders") is a national, non-profit membership organization dedicated to the protection of all native wild animals and plants in their natural communities, with its headquarters in Washington, D.C. Defenders' mission is to preserve wildlife and emphasize appreciation and protection for all species in their ecological role within the natural environment through education, advocacy, and other efforts. Defenders has more than one million members and supporters throughout the country and field offices in several states.

National Audubon Society, Inc., is a not-for-profit corporation organized under the laws of the State of New York. National Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. National Audubon has more than one million members and supporters and a presence in all 50 states, including more than 450 certified chapters, nature centers, sanctuaries, and education and science programs.

Introduction and Summary

Our comments are offered to assist the Commission in scoping and preparing the PEA in accordance with NEPA's mandate. When the full scope of the ASR program's direct, indirect, and cumulative (including reasonably foreseeable) impacts and reasonable alternatives are identified, there can be only one possible conclusion: a Programmatic Environmental Impact Statement (PEIS) is needed to analyze in depth the identified impacts and alternatives so that agency officials can make informed decisions and all unavoidable impacts are minimized in accordance with NEPA. To assure that the public has an opportunity for meaningful input throughout this process, we urge the Commission to make the draft PEA available for public comment for a period of no less than 30 days.

Millions of migratory and other bird species are killed at communications towers and related structures every year. While this phenomenon has been studied for years, as documented in the records of the open dockets, new studies, referenced in these comments and which have been submitted to the dockets, provide the latest data and analysis regarding the impacts of communications towers. These studies corroborate that there are population level impacts on many bird species and harm to endangered species caused by communications towers and related structures such as television and radio stations. Tower height, tower lighting, tower support structures (i.e. guy wires), location and lighting of related structures are all key factors in these bird kills. Each of these variables must be evaluated in terms of direct, indirect, and cumulative impacts. In light of the broadband build-out, entailing explosive growth in the number of towers, and other threats to birds such as global warming, the analysis must include consideration of reasonably foreseeable impacts.

Alternatives for constructing and managing communication towers can save birds without compromising the Commission's wireless communications mission or aviation safety. Reasonable alternatives to be studied include: revising the categorical exclusion of towers

from NEPA review to exclude only towers with truly minimal impacts individually and cumulatively and revising the list of extraordinary circumstances requiring NEPA review of otherwise excluded projects; revising the ASR program to comply with the Commission's obligations under the ESA and MBTA; requiring changes in lighting schemes to less impactful alternatives (e.g. turning off steady burning lights or at a minimum synchronizing blinking lights) whenever permitted by the Federal Aviation Administration; promoting collocation of antennas and shorter towers without guy wires; requiring heightened scrutiny for proposed towers in environmentally sensitive areas; providing guidance on lighting of associated structures; putting FCC personnel in charge of identifying and evaluating environmental effects of proposed towers instead of allowing tower registration applicants to do it; and adopting an interim approach to registering towers while the Commission conducts its environmental analysis and proposes and finalizes revised rules for the ASR program.

The Full Scope of Impacts Must be Identified and Evaluated

1. **There must be a nationwide assessment of the intensity of bird impacts caused by communications towers.**

The records in the two open dockets include numerous references to and studies of bird kills, examining single night birds kills, seasonal bird kills, and annual bird kills. For example, as noted in our Petition for Expedited Rulemaking, at 3, one researcher recorded over 42,000 dead birds, representing 189 species, of which the vast majority were night-migrating neotropical migrants, over a 25-year period at a tower in Florida. Robert L. Crawford & R.Todd Engstrom, *Characteristics of avian mortality at a north Florida television tower: a 29-year study*, 72 J. Field Ornithology 380 (2001). Another researcher in Wisconsin collected nearly 121,560 birds representing 123 species over a 38-year period. Charles Kemper, *A Study of Bird Mortality at a West Central Wisconsin TV tower from 1957-1995*, 58 The Passenger Pigeon 219 (1996). This same researcher found 12,000-plus dead birds in one night at a tower in Wisconsin. Several other researchers have found over 1,000 birds killed in a single night at a lone tower. *See generally* Letter from Albert Manville, Sr. Wildlife Biologist, FWS, to G. Wm. Stafford, FCC (Nov. 7, 2003) (on file in WT Docket 03-187); Letter from Kenneth Stansell, Acting Deputy Dir., FWS, to Louis Paraertz, WTB, FCC (Feb. 2, 2007) (on file in WT Docket 03-187). *See also* Letter from George Fenwick, President, ABC to Marlene H. Dortch, Comm'n Sec'y, FCC, at 48-65 (April 23, 2007) (on file in WT Docket 03-187); Travis Longcore et al., Scientific Basis To Establish Policy Regulating Communications Towers To Protect Migratory Birds: Response to Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions With Communications Towers, WT Docket No. 03-187, Federal Communications Commission Notice of Inquiry (Feb. 14, 2005); Travis Longcore et al., Biological Significance of Avian Mortality at Communications Towers and Policy Options for Mitigation: Response to Federal Communications Commission Notice of Proposed Rulemaking Regarding Migratory Bird Collisions With Communications Towers, WT Docket 03-187 (April 23, 2007).

A literature review of 47 avian collision tower studies documented 230 bird species killed at communication towers. Gavin G. Shire et al., *Communication towers: A Deadly Hazard to Birds* 5 (American Bird Conservancy 2000), available at http://www.abcbirds.org/newsandreports/towerkillweb.pdf. ESA-listed birds, including

Red-cockaded Woodpeckers, Spectacled Eiders, Steller's Eiders, Newell's Shearwaters and Hawaiian (Dark-rumped) Petrel, are killed or harmed by towers. *See infra* at p. 36. Birds most frequently killed by towers are birds of the warbler, thrush, and vireo families. According to the United States Fish and Wildlife Service (FWS), species of conservation concern[2] comprise a high number of those birds killed at towers. *See* letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 9.

In 2005, the FWS estimated that 4,000,000 - 5,000,000 birds are killed at communications towers each year. *See* Albert M. Manville, II, *Bird strikes and electrocutions at power lines, communication towers, and wind turbines: state of the art and state of the science – next steps toward mitigation,* Bird Conservation Implementation in the Americas: Proceedings 3rd International Partners in Flight Conference 1051, 1056 (C.J. Ralph and T. D. Rich eds., 2005) [Exhibit A to Petition for Expedited Rulemaking]. Since then, wildlife biologists have done further study to examine the intensity of the impacts. Recent studies conducted by leading biologists in the field concludes that that tower mortality has a major, significant biological impact, particularly on neotropical migrants. *See* Travis Longcore et al., *Biological Significance of Avian Mortality at Communications Towers in North America* (presented at American Ornithologist's Union in February 2010), Travis Longcore et al., *An estimate of avian mortality at communication towers in the United States and Canada,* Draft in preparation for publication, January 14, 2011, and Travis Longcore et al., *Species Composition of Birds Killed at Communication Towers in North America,* Draft in preparation for publication, January 14, 2011. While the studies notes that avian mortality is not even across species, and the relative importance to populations depends on the status of the species and their vulnerability, the finding of population level impacts to some species signifies a major level of intensity that demands further review. That review must evaluate, among other things, the degree to which endangered or threatened species and their critical habitat protected under the ESA and migratory birds protected under the MBTA are among the species killed at communications towers.

As part of that review, the Commission must address not only the impacts of current towers, but also the impact of the imminent explosive growth in the number of towers as part of the broadband buildout. A report presented to the FCC Chairman in May 2009 entitled Bringing Broadband to Rural America estimated that 16,000 new towers will have to be constructed, disproportionately in rural areas. *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A.pdf.

2. In addition to these direct impacts, indirect and cumulative impacts must be identified and evaluated.

Bird losses at these levels result in indirect impacts which should also be studied. For example, the impact on the bird watching public should be considered. Bird watching is one

[2] Birds of conservation concern are those migratory nongame birds that, without additional conservation measures, are likely to become threatened or endangered species. *See* U.S. Fish and Wildlife Service, *Birds of Conservation Concern 2002* at 1 (2002), available at http://www.fws.gov/migratorybirds/reports/BCC2002.pdf.

of the fastest growing hobbies in America. Wildlife watching generates $122 billion in economic output annually, and one in every four American adults is a bird watcher. Bird watchers travel significant distances to view birds, especially during the spring and fall migration seasons. Losses at population levels will surely impact that activity.

In addition, the Commission must consider the impact of additional threats to birds such as climate change, which is currently affecting bird migration. While some impacts of climate change may be uncertain, there can be no question that bird migration is being affected by climate change and that the losses associated with changing migration patterns of neotropical birds adds to the cumulative impact of bird losses at communications towers.

Finally, these current and reasonably foreseeable bird losses must be assessed in conjunction with other causes of adverse impacts to migratory and other birds that have a cumulative impact on bird populations. These include building windows (estimated 97,000,000 to 980,000,000 bird kills annually), vehicular strikes (estimated 60,000,000 to 80,000,000 bird kills annually), wind turbines (estimated 40,000 or more bird kills annually), power line electrocutions, and power line collisions (hundreds of thousands to hundreds of millions of birds). *See* Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 11-12.

3. The factors affecting bird mortality at communications towers must be identified and evaluated.

Lighting, height, support system, and location of communication towers are key factors in bird kills at towers. The impacts – especially for neotropical songbirds – increase with overcast conditions or inclement weather. Robert L. Crawford & R. Todd Engstrom, *Characteristics of avian mortality at a North Florida television tower: a 29-year study*, 72 J. of Field Ornithology 380 (2001). *See also* Joanne M. Lopez, *The Impact of Communication Towers on Neotropical Songbird Populations*, 18 Endangered Species UPDATE 50 (2001). Birds lose natural navigating cues and orient with the tower lights, circling the towers and eventually dying of exhaustion or collision with towers or support systems. *Id.* at 53. Birds may also die in collisions with other birds aggregated at the light source.

As a FWS official noted: "Light appears to be a key attractant for night-migrating songbirds, especially when nighttime visibility is poor, cloud ceilings are low, fog is heavy, or various other forms of precipitation are associated with either passing or stationary cold fronts." Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 13. One study concluded that birds exhibit a greater attraction and sensitivity to red flashing plus red solid lights than to white strobes. *See* Sidney A. Gathreaux Jr. & Carroll G. Belser, *Effects of Artificial Night Lighting on Migratory Birds, in* Ecological Consequences of Artificial Night Lighting 67, 85-86 (Catherine Rich & Travis Longcore eds. 2006) [Exhibit B to Petition for Expedited Rulemaking]. *See also* William R. Evans et al., *Response of night-migrating songbirds in cloud to colored and flashing light*, 60 North Am. Birds 476, 487 (2007) (suggesting that flashing lights cause less aggregation than steady-burning lights, keyed by the on-time and length of darkness between flashes); Joelle Gehring et al., *Communication towers, lights, and birds: successful methods of reducing the frequency of avian collisions,* 19 Ecological Applications 505, 512 (2009) (finding fatality rates of 3.7 birds at towers with flashing lights versus 13 birds with steady-burning lights per 20-day period).

Therefore, the role of aviation safety lighting is a critical factor to be studied. Aviation safety lighting for towers over 200 feet is controlled by the Federal Aviation Administration (FAA) through its advisory circulars, which describe lighting styles and specify permissible styles based principally on tower height, and FAA policy guidance. *See* FAA, U.S. Department of Transportation, *Advisory Circular: Obstruction Marking and Lighting*, AC 70/7460-1K (Feb. 1, 2007) and app. 1. Towers with solid red lights (L-810s) combined with flashing red lights (incandescent L-864s) cause most avian mortality, including nearly all mass mortality events. Such tower lighting systems are common, particularly on towers over 400' AGL. Under the ASR rules, tower lighting must comply with the FAA advisory circulars. As the Commission is aware, the FAA is currently completing a study that may lead to changes in its advisory circular and policy guidance. The Commission's environmental review, therefore, must evaluate impacts under various scenarios depending on the possibility that there may or may not be a change in lighting styles, the towers affected by the possible change, and whether or not the change will be prescriptive. The FCC will need to consult with the FAA as part of its study.

Avian mortality also increases at taller towers, especially those with guy wires. *See* Travis Longcore et al., *Height, Guy Wires, and Steady-Burning Lights Increase Hazard Of Communication Towers to Nocturnal Migrants: A Review and Meta-Analysis*, 125 The Auk 485, 486 (2008); Joelle Gehring & Paul Kerlinger, *Avian collisions at communication towers: I. The role of tower height and guy wires* 1 (Prepared for the State of Michigan, 2007) (finding that "[n]early 16 times more fatalities were found at guyed towers 116-146 m in height as opposed to unguyed towers of the same height" and that "[t]all guyed towers [>305 m AGL] were responsible for about 70 times as many birds fatalities as the 116-146 m unguyed towers and nearly five times as many as guyed towers 116-146 m."). The Commission should consult with Dr. Gehring and Dr. Longcore and other wildlife biologists regarding additional data correlating bird deaths and tower height.

Tower location in the landscape should also be evaluated to determine its relationship with bird mortality. The Fish and Wildlife Service can provide data on migratory bird flyways and landscape features that are correlated with increased bird mortality and can assist in determining areas where tower construction should be avoided and where it can be accommodated.

<u>Alternatives that accomplish the FCC's mission with less adverse impact on birds must be evaluated.</u>

1. **An alternative, revised categorical exclusion that excludes from NEPA review only towers with minimal impacts and defines extraordinary circumstances requiring NEPA review is critical for NEPA compliance and reducing bird mortality at communications towers and should be part of the alternatives analysis.**

On December 6, 2010, the Council on Environmental Quality (CEQ) published its Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, 75 Fed. Reg. 75628. The guidance recommends that agencies review their categorical exclusions (and extraordinary circumstances) at least every seven years and that the review should focus on

categorical exclusions that no longer reflect current environmental circumstances or an agency's policies, procedures, programs, or mission. Id. at 75630. "*Where an agency's categorical exclusions have not been regularly reviewed, they should be reviewed by the agency as soon as possible.*" Id. at 75636-37 (emphasis added). As the guidance states:

> Agencies should exercise sound judgment about the appropriateness of categorically excluding activities in light of evolving or changing conditions that might present new or different environmental impacts or risks. The assumptions underlying the nature and impact of activities encompassed by a categorical exclusion may have changed over time.

Id. at 75637.

The FCC's categorical exclusion was adopted in 1986, before the boom in wireless telecommunications technology. The explosive growth in the number and height of towers across the United States in the last 20 years necessitates a comprehensive review of the FCC's categorical exclusion and the assumptions on which it is based.[3]

As the Commission is aware, CEQ regulations allow federal agencies to establish categorical exclusions for "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (emphasis added). Environmental analysis of agency actions is thus required *except* in limited, narrowly defined and justified circumstances. And where extraordinary circumstances dictate, environmental review is required for otherwise excluded activities. In contrast, the FCC's NEPA regulations turn that standard on its head and establish the general standard that environmental analysis is not required except in limited, narrowly defined and justified circumstances. Thus, the Commission's NEPA regulations sweepingly exclude *all* Commission actions, including registration of antenna structures, from environmental review except for certain categories specifically identified in the regulations. 47 C.F.R. § 1.1306(a). The FCC's approach to environmental review of its actions is flatly inconsistent with the CEQ regulations, and based on CEQ's recently-issued guidance, revision of the FCC's categorical exclusion is long overdue.

The CEQ final guidance sets forth procedures for the FCC to follow in revising its categorical exclusion. As the guidance notes, categorical exclusions or analogous procedures developed by other agencies or entities, notably state agencies, academic and professional institutions, and other federal agencies can provide useful ideas or support for an agency's new or revised categorical exclusion. Id. at 75634. To revise its categorical exclusion, including the extraordinary circumstances that require NEPA review of otherwise excluded projects, the FCC should review and consider procedures such as those adopted by states such as New Jersey; procedures adopted for NEPA review of cultural resources; and procedures adopted for NEPA review of wind farms. For example, the commission could

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[3] For example, in 1985, there were 599 cell towers in commercial use, a number that grew to over 220,000 sites in 2008. 2008 CTIA Semi-Annual Wireless Industry Survey, available at http://files.ctia.org/pdf/CTIA_Survey_Mid_Year_2008_Graphics.pdf (last visited April 2, 2009).

consult with FWS and consider adopting the FWS guidance on siting and operation of towers as part of the categorical exclusion or establishing categories of towers, based on lighting, height, support structure, and location. Some minor ASR actions, such as administrative changes, changes in ownership, dismantlement of towers, minor changes/corrections to existing towers; tower repair; and replacement of tower parts may be categorically excluded. For towers in the lowest category of risk to birds, no NEPA review might be appropriate; taller towers with guy wires may require extensive NEPA review, and towers in between could require NEPA review only where specific circumstances exist. As with any categorical exclusion, the list of extraordinary circumstances requiring NEPA review is critical to ensuring that projects creating significant adverse impacts are evaluated on a timely basis.

As part of our Petition for Expedited Rulemaking, at 46-48, we proposed a revised categorical exclusion. We urge the Commission to consider that proposal and the additional ideas discussed above as part of its alternatives analysis.

2. Alternatives to comply with the ESA and the MBTA must be considered.

The ESA mandates unequivocal and powerful actions to protect species listed under the ESA. Federal agencies, before taking any action that may affect listed species – including the issuance of a federal permit, license, or other approval that may affect listed species, must request information from the appropriate federal wildlife service regarding whether any species which is listed or proposed to be listed may be present in the area of such proposed action. Notwithstanding that there can be no question FCC-registered communications towers have taken and continue to take birds listed under the ESA, the Commission has failed to consult with FWS regarding the impacts of these registrations in accordance with Section 7 of the ESA. To address this failure, our Petition for Expedited Rulemaking, at 51-53, proposed a new section to clarify the roles and responsibilities of the FCC and applicants in carrying out the ESA's mandate and to clarify the use of NEPA documents in ESA compliance. We also urged the Commission to consult with FWS regarding its MBTA obligations and to prepare and enter into an MOU with the FWS outlining how the FAA will implement the MBTA. We urge the Commission to consider our proposals as alternatives to be evaluated.

3. Alternative lighting schemes to help limit bird mortality must be explored.

As noted above, tower lighting is a key factor in bird mortality at communications towers. According to leading scientists in the field, eliminating steady-burning aviation safety lights (L-810s) could reduce bird deaths by up to 70%. *See generally* Gehring, *Communication towers, lights, and birds*, *supra,* at 512. Indeed, the authors note that:

> By simply removing the L-810 lights from all communication towers nationwide, it is possible that one to two million or more bird collisions with communication towers might be averted each year ....
>
> ... Although avian fatalities would not be completely eliminated, the numbers of avian fatalities would undoubtedly be greatly reduced.

Id. at 512-13. *See generally* Longcore, *Height, Guy Wires, and Steady-Burning Lights, supra* at 489.

Given strong evidence that steady burning aviation warning systems contribute to bird mortality at communications towers, the Commission should consult with the FAA on the status of their efforts to allow changes to their lighting schemes as a result of their conspicuity study and the status of changes to the advisory lighting circular. Because these lighting schemes may change or new schemes may be created to allow for extinguishing steady burning lights or to allow them to be changed to blinking lights we are not specifying by letter which lighting schemes are preferred but generally the schemes that do not require or allow steady burning lights are preferred over those that do require or use steady burning lights.

To the extent permitted by the FAA, the Commission should evaluate the alternative of requiring, or at a minimum encouraging, flashing lights instead of steady burning lights in their review of ASRs. Please recall that the FAA issued a memo to Regional Air Traffic Division Managers in April 2004 clarifying the FAA's preference for blinking lights over steady burning lights because of impacts to migratory birds. *See* Advisory Circular (AC) 70/7460-1.

To encourage lighting changes to less impactful styles on existing towers, the Commission should evaluate the alternative of establishing a rule that changes in lighting styles from a more impactful style to a less impactful style will not require any environmental review, but merely notice to the Commission.

Although it is anticipated that the FAA may change its advisory lighting circular to permit tower owners and operators to shut off steady burning side lights or at a minimum to synchronize the blinking on existing towers, such changes may not be mandatory. It is also unclear what options will apply to new towers. The Commission can save birds by making changes to protect birds a mandatory condition for license applicants and license renewal. Furthermore, the Commission should consider options for encouraging lighting changes on all towers as soon as possible.

The Commission should also evaluate, in collaboration with the FAA, a lighting system under development, OCAS, which electronically senses planes coming within a prescribed distance of a tower and turns on warning lights.

The Commission should also study lighting at buildings associated with towers (television and radio stations) as such lighting is also known to impact birds.

These and other possible lighting alternatives to the current system need to be evaluated.

4. Alternatives that promote collocation and shorter towers to help limit bird mortality must be studied.

Alternatives that encourage collocation should be evaluated. For example, the FCC could consider establishing a rebuttable presumption for collocation where an existing tower or structure is found within a prescribed distance from the proposed location of a new tower. The applicant would need to show that the existing structure is not available before

obtaining permission for a new tower. The FCC could consider fast-tracking applications for collocation to make that option attractive. And the FCC could consider requiring new and retrofitted towers to accommodate additional antennas, e.g. six additional antennas, to satisfy future demand.

Options for reducing tower height and the use of guy wires need to be explored. As leading researchers have concluded: "Our results also support the prediction that many more avian collisions occur at taller towers. Data indicate that 68%-86% fewer fatalities were registered at guyed towers 116-146 m AGL than at towers >305 m AGL." Gehring & Kerlinger, *Avian collisions at communication towers: I. The role of tower height and guy wires*, *supra*, at 9. Research confirms that using unguyed towers in place of guyed towers of the same height – and of the same lighting – can also reduce bird deaths. Bird kills at unguyed towers using steady-burning lights ranged from 5 to 22 times less than at guyed towers. Gehring, *Communication towers, lights, and birds*, *supra*, at 511-12, tables 3-4. *See also* Gehring & Kerlinger, *Avian collisions at communication towers: I. The role of tower height and guy wires*, *supra*, at 9 ("bird fatalities may be prevented by 69% - 100% by constructing unguyed towers instead of guyed towers").

As discussed above, among the alternatives to be explored, the Commission should consider the option of categorizing towers by height (and guy wires) and imposing registration standards and procedures that impose more stringent requirements on taller and guyed towers. This can be done either as part of a revised categorical exclusion, as discussed above, or as part of the rules on registration procedures.

5. **Alternatives for siting towers to protect birds and environmentally sensitive landscapes should be explored.**

The current categorical exclusion requires an EA by the applicant for facilities, e.g. towers, to be located in designated wilderness areas and wildlife preserves and for facilities that may affect listed threatened or endangered species or designated critical habitats or are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats. The Commission should expand the exclusion, based on CEQ regulations, to cover facilities that *may affect* such natural resources and unique geographic characteristics as historic or cultural resources; parks, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; national monuments; migratory birds, especially Birds of Conservation Concern; and other ecologically significant or critical areas.

6. **An alternative, revised method for processing ASR applications that requires FCC staff, rather than registration applicants, to identify and evaluate environmental effects of towers will comply with the FCC's environmental obligations.**

Current FCC guidance to applicants describes the NEPA review procedures for the agency's ASR program: "FCC Form 854 (Application for Antenna Structure Registration) contain[s]

question 28[4], which asks whether the licensee's proposed action may have a significant environmental effect requiring an EA. *If the licensee indicates "NO" to this question, no environmental documentation is required to be filed with the Commission.*" FCC, Compliance with Commission's Rules Implementing the National Environmental Policy Act of 1969, http://wireless.fcc.gov/siting/npaguid.html (emphasis added).

While NEPA regulations allow applicants or consultants to prepare environmental documents, the agency must retain control of and responsibility for the process. To satisfy that legal obligation, the FCC must outline what information is required, independently evaluate the information, and take responsibility for its accuracy. 40 C.F.R. § 1506.5(a). The FCC cannot fulfill these obligations so long as the FCC has no biologists and no environmental staff capable of independently assessing tower impacts on the environment and, specifically, on migratory birds. Instead, the FCC relies on self-certification by the applicants and post-construction enforcement action to remedy NEPA violations that come to its attention. This enforcement scheme, coupled with administrative proceedings and/or penalties, fines or forfeitures, is contrary to the purpose and intent of NEPA.

The purpose of NEPA is to require a federal agency to consider carefully the environmental consequences of its actions before it acts. The FCC's certification scheme cannot fulfill that purpose and is therefore flatly inappropriate means of achieving NEPA compliance. Therefore, the FCC should evaluate alternative procedures for conducting its own review and evaluation of environmental impacts.

7. **An alternative, interim approach for evaluating environmental impacts of towers should be adopted while the FCC revises its review procedures for communications towers.**

In May 2010, we joined with the Infrastructure Coalition of four industry groups in presenting to the Commission interim standards for the ASR program that are based on the height of proposed towers and certain replacement towers. In addition, we called on the Commission to adopt and utilize a preferred lighting scheme for changes to existing towers and new towers to minimize adverse impacts to birds. The parties to this agreement anticipated that it would take the Commission a period of time to complete its environmental review of the ASR program, and in the interim, the recommended standards would conserve birds.

As part of the Commission's PEA, it should evaluate the interim standards to determine their effectiveness in meeting the Commission's telecommunications mission and its responsibilities to comply with the environmental laws.

Conclusion

We urge the Commission to identify and evaluate the full scope of environmental impacts

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[4] It is actually question 38 on FCC Form 854 that asks this critical question. *See* Application for Antenna Structure Registration, http://www.fcc.gov/Forms/Form854/854.pdf (last visited April 2, 2009).

of communications towers and all reasonable alternatives for addressing the environmental impacts of its ASR program. This process will assure sound decision making and compliance with the Commission's obligations under the environmental laws.

Respectfully submitted,

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