BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Draft Environmental Notice Requirements	)	WT Docket 08-61
and Interim Procedures Affecting	)	WT Docket 03-187
the ASR Program	)	

To: The Commission

COMMENTS OF NTCH, INC.

As a long-standing Commission licensee and constructor of scores of towers around the United States, NTCH, Inc. ("NTCH") offers these comments regarding the notice requirements and interim procedures proposed in the Commission's Public Notice of March 25, 2011 (DA 11-558).

We begin by candidly noting the very real tension that pulls the policy-maker in diametrically opposite directions on this issue. On the one hand, there is the policy of preserving an environment that is clean and safe for people and animals, a policy which NTCH strongly supports and tries to implement in all of its construction projects, whether required by law or not. On the other, there is the compelling and increasingly urgent mandate of the National Broadband Plan to get broadband out there to the public – especially in rural areas where telecommunications service is scarce or non-existent. That mandate, as the Commission explicitly recognized in the Plan,[1] requires the construction of new towers around the country to accommodate the new telecommunications facilities that will form the broadband network of the future. This imperative means that the crucial work of erecting communications towers must be

[1] National Broadband Plan at Chapter 6.

impeded as little as possible while also taking care to minimize any collateral damage to birds. A third important element in the mix is the court-imposed obligation to ensure that members of the public have a meaningful opportunity to participate in construction projects that may impact the environment.

The Commission's unenviable task here is to accommodate all three of these needs without disserving any of them. NTCH appreciates that the Commission has tried to balance the competing interests, but in our view the Commission's proposed procedures will dramatically impede and delay tower construction while actually doing little to further the cause of protecting birds. The interests of both groups can be better met with some small but important adjustments to the procedure proposed by the Commission. The objective should be to give reasonable notice to the public regarding construction that could have some significant environmental impact, allow a fair time for comment by persons who have a legitimate interest in the matter and who can present a concrete, fact-based reason to suggest that further environmental processing is required, and then evaluate those objections promptly so that the tower proponent can determine quickly whether the adverse environmental considerations are too serious or too irremediable to justify building the tower.

Unfortunately, the procedure set for in the March 25 PN is far too time-consuming and unwieldy. We can see the entire process for a tower which does not actually pose any threat to the environment consuming at least a year of time and considerable agency resources. The elements of the procedure which can be abbreviated without harm – and which need to be abbreviated – are discussed below.

1. Notice procedures. The procedure first involves the unnecessary steps of filing a preliminary Form 854-like form, publishing a notice in a local newspaper that explains the

complaint process, and only then publishing a "national notice" on the FCC's website. We must remind ourselves here that the object is to provide reasonable notice to the public that something is being contemplated that could be of interest so they have an opportunity to intervene. Nothing more was required by the Court, and nothing more is needed. In this regard, the FCC for at least 40 or 50 years has been giving the public notice of matters which may be of interest by simply publishing them in weekly releases that routinely tell people what is being proposed and how and when comments may be filed. There is no need to re-invent the wheel when a perfectly acceptable tried-and-true notice procedure that works for all other Commission business is already in place.

The Commission should simply require the filing of a real Form 854 but with a block to check that this is a "pre-construction" 854. The Commission would publish the filing of the 854 in a regular weekly public notice, much as it does now with ASR registrations that call for environmental processing. The notice would be somewhat lengthier now because more proposed constructions would be included, but in principle it would have exactly the same effect: formally alerting the public that something is being proposed in a particular locale, with all of the details available in the ASR database. This would serve as both the local notice and the "national" notice since it is effectively available to everyone. We imagine that environmental groups and bird enthusiasts will routinely monitor these notices to see if there is anything that might be of concern. There is no more need to incur the expense and delay of publishing a "local" notice than there has been for routine broadcast tower constructions or modifications in local communities. If no Request for further environmental processing is filed, the pre-construction Form 854 would automatically become a permanent 854 after the time for filing Requests has expired without the need for further filings by anyone.

Delay becomes an issue since many local publications appear only weekly or even semi-monthly, so there could be considerable lag time between submitting the local notice and having it appear. Meanwhile, the FCC process would be on hold. Plus, under the Commission's proposal, the FCC would then require a subsequent notification of completion of the local publication so that it could proceed with the "national notice." In most cases, there would be no comment of any kind and some 60-90 days of precious construction time would have been needlessly lost, followed by (under the Commission's proposal) the filing of yet another Form 854 containing all the same information that was in the original one.

NTCH's proposal reduces the process to a simple two-step procedure: the tower proponent files a Form 854 and the FCC publishes the filing in a weekly release. If no one timely requests further processing, the matter would be considered closed and the tower construction could commence promptly. This fully accomplishes the public notice required by the Court without at the same time creating unnecessary complications and paperwork. Paperwork Reduction Act considerations also argue for simplification of the process.[2]

2. Public participation. The Commission proposes to give the public 30 days to comment on proposed construction after the "national" notice is filed. Mindful of the need for expediting this process, NTCH considered whether 15 days might be a more suitable time to afford the public to comment on proposed towers. After all, most assignment and transfer applications filed in the Wireless Services, including very complex ones, allow the public only 14 days to comment or object. Given the Court's concern for affording the public a reasonable opportunity to join in, however, we suggest that 20 days would give potential objectors a generous amount of time to review the proposal and determine whether further inquiry was

[2] 44 U.S.C. 3506.

necessary. In special cases, potential objectors could request more time to prepare their filings, but such extensions should not be routinely entertained.

Of greater concern here is the mischief that could be done by obstructionists who seek to use the process only to delay telecommunications progress. Simply by filing a Request for further environmental processing, such a malefactor could throw a wrench into the works that would, in a practical sense, hold up construction indefinitely.[3] For example, a recent proposal by one of NTCH's owners to erect a single wind tower to generate clean, cheap, renewable energy for his community has been stopped for years by the simple unsupported suggestion that endangered owls whose habitat is hundreds of miles away *might* fly down near the tower and be injured. It is impossible to prove that the owls will *not* decide one day to fly hundreds of miles from their native region and strike the tower, so a project that is overwhelming useful to society is being impeded by a kind of misguided environmentalism that benefits neither man nor animals.

This is not to say that there won't be situations where input from the environmental community would be very valuable indeed. The Commission's procedures should facilitate such involvement without encouraging – or tolerating – mere attempts to delay for the sake of delay. To preclude merely obstructive or delaying filings, the Commission should require of those requesting further environmental processing the same degree of seriousness that it demands of petitioners to deny: a) They must establish their standing as persons in the local community potentially affected by the tower; b) They must present concrete facts specific to the particular proposed tower that support the need for further environmental inquiry; All such facts must be

[3] Because of the difficulty of resolving environmental issues and historical preservation issues, the Commission's staff, as a practical matter, usually attempts to mediate such disputes between the parties. This process is itself very time-consuming and, while often successful, occasionally ends up requiring a decision on the merits years later.

supported by sworn affidavits or other evidence which can be officially noticed; and c) the burden must be on the person requesting environmental processing to demonstrate the perceived harm. As with the owl example cited above, it is always easy to suggest that some environmental harm *could* conceivably happen and impossible to prove that it won't. But the more useful approach is to require the demonstration of a solid factual basis to believe that harm will occur if the tower is constructed. Such a showing need not, of course, be conclusive – that is why a further environmental assessment would have to be done to fully evaluate the facts raised and determine whether they do indeed present a basis for denying or modifying the proposed construction. These safeguards – which track the Commission's longstanding standards for challenging any Commission application – should serve to welcome input from persons who are actually contributing to the process while discouraging mere obstructionists.

3. Timing. Critical to the success of this entire undertaking is speed of processing. Once a Requester has filed a Request, the proposed rules provide for a standard Opposition-Reply pleading cycle. NTCH suggests that at that point – within two weeks of the close of the pleading cycle – the parties should be required to meet (with or without Commission staff presence) to see if they can resolve their differences. Often a modification of the proposal can serve to obviate a particular problem once the problem has been identified. This collaborative process will likely resolve many environmental objections without the need for further Commission action. A revised Form 854 would be filed reflecting the agreed modifications, the Request for further processing would be withdrawn, and the ASR registration would be accepted as if there had been no objection without the need for an Order or other ado.

Where the parties do not resolve the issue between themselves, the Commission should commit itself to prompt review of the matter. It should realistically take no more than 60 days to

review the pleadings and determine whether a threshold showing has been made that further environmental review is necessary. If no further review is necessary, the Commission should deny the request and accept the registration as originally filed. If further review is warranted, the Commission should so ordain, and the proponent of the tower would then have 60 days to either modify its proposal or provide an assessment demonstrating that there will in fact be no significant environmental harm. The original objector would have an opportunity to comment on the assessment submitted. The Commission would have 90 days to then make a determination with respect to the tower. These time frames generously allow all parties and the Commission adequate time to handle their part of the process while moving the process forward without delay.

In conclusion, NTCH has three more general suggestions. First, the Commission should make it clear that the procedures proposed in the March 25 PN apply only to ASR registrations which are currently required by the rules (*i.e.*, towers over 200 feet, towers in an airport glide path, or towers constituting major environmental actions). All other towers are categorically exempt. This seems to have been the Commission's intent, but some in the industry have expressed uncertainty on this point. At the same time, the Commission should continue to allow tower constructors to register towers even when they are *not* required by the rules, as is the Commission's practice now. Such voluntary registrations should not subject a proponent to the environmental procedures outlined in the PN because they are presumptively unnecessary. The Form 854 could handle this by a simple question asking whether the filing is voluntary or mandatory, with only mandatory ones going onto the public notice/environmental assessment track. Finally, in setting the threshold for towers of presumptive concern at 450 feet, the Commission seems to have heard the input of NTCH and others that no perceptible danger to

birds is posed by relatively short towers. In our experience, it is only the very tall towers (500 feet or above) that pose any danger at all. By limiting the presumptive need for environmental assessment to towers at that level, the Commission has avoided imposing wholly unnecessary burdens and delays on an industry already struggling mightily to meet the mushrooming tower needs of this Century.

Respectfully submitted,

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