August 16, 2011

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *Written Ex Parte Filing*
WT Docket Nos. 08-61 & 03-187

Dear Ms. Dortch:

The Infrastructure Coalition[1] takes this opportunity to briefly address the comments filed on May 12, 2011, by the U.S. Department of Interior on behalf of the U.S. Fish and Wildlife Service ("FWS"). Although the FWS Comments were filed in response to the Wireless Telecommunications Bureau's draft Interim Rules for the Antenna Structure Registration ("ASR") program,[2] the comments principally focus on the establishment of "Final Rules." As will be discussed below, these comments are premature, because the FCC will not consider final rules until after the Commission's current reexamination of its tower siting policies is complete,[3] and draft rules are published for public comment in a notice of proposed rulemaking. This letter solely addresses the issues FWS raises concerning the "final rules" the FCC may establish in the indeterminate future.

Comments concerning final rules will be appropriate if and when requested by the Commission, but that will be *after* the FCC completes its final programmatic Environmental Assessment ("PEA") regarding the ASR program and determines whether to conduct a "more extensive analysis, in the form of a programmatic Environmental Impact Statement [("PEIS")]."[4]

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[1] The Infrastructure Coalition consists of CTIA–The Wireless Association®, the National Association of Broadcasters, the National Association of Tower Erectors, and PCIA–The Wireless Infrastructure Association.

[2] Public Notice, *Wireless Telecommunications Bureau Invites Comment on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program,* WT Docket Nos. 08–61 & 03–187, 26 FCC Rcd 4099 (WTB 2011).

[3] *See* Public Notice, *Federal Communications Commission Announces Public Meetings and Invites Comment on the Environmental Effects of its Antenna Structure Registration Program,* WT Docket Nos. 08–61 & 03–187, 25 FCC Rcd 15953 (2010) ("PEA Scoping Notice"); Public Notice, *Federal Communications Commission Announces Public Workshop for the Programmatic Environmental Assessment of Its Antenna Structure Registration Program,* WT Docket Nos. 08–61 & 03–187, 26 FCC Rcd 1864 (WTB 2011).

[4] PEA Scoping Notice, 25 FCC Rcd at 15953.

The issues under consideration in connection with the PEA are very narrow — the extent to which future tower builds will affect avian mortality — and the Commission should not allow itself to be distracted by broad-ranging comments that are both untimely and outside the scope of the PEA proceeding.[5] The FWS will have ample opportunity to provide its input when the FCC begins to formally consider promulgating final rules.

While the FWS did raise some issues relevant to the PEA, we note that the FWS Comments rely heavily on the two draft Longcore papers that were filed in connection with the PEA.[6] On May 17, however, the Infrastructure Coalition filed Further Comments regarding the PEA that included a detailed critique of the Longcore papers by Environmental Resources Management ("ERM"), a leading environmental consulting organization. ERM concluded that:

> Due to the flaws and uncertainties described herein, the Longcore *et al.* findings should not be considered an accurate or substantiated estimate of avian mortality and risk to bird populations from communications towers and the ASR program and therefore should not be viewed as a scientifically valid determination or consensus in the context of the PEA analysis.[7]

We note that neither the FWS nor Longcore has objected to ERM's methodology or critique. In fact, Longcore's sole public response was to "acknowledge the tower industry's in-kind contribution to our research by paying for a peer review of our manuscripts," stating that any "legitimate critiques" in the ERM Report would be addressed "as these manuscripts make their way through the publication process."[8] The Infrastructure Coalition trusts that the Commission will give due weight to ERM's concerns about the Longcore papers in its evaluation of the FWS Comments.

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[5] For example, the FWS's views on programmatic "take" permits for golden eagles and individual "take" permits for bald eagles are not germane to the matter at hand, the FCC's consideration of the effect of future towers on migratory bird mortality. In addition, the FWS advocates final rules that would implement proposals made in its earlier comments, filed in 2007, which go well beyond the subject matter of either the Interim ASR Rules or the PEA, both of which are limited to towers that are subject to the ASR program. *See* FWS Comments at 1-5.

[6] Travis Longcore *et al.*, *An Estimate of Avian Mortality at Communication Towers in the United States and Canada* (Jan. 14, 2011 draft); Travis Longcore *et al.*, *Species Composition of Birds Killed at Communication Towers in North America* (Jan. 14, 2011 draft). Both Longcore papers were filed on January 14, 2011, in WT Docket Nos. 08-61 & 03-187. The Longcore papers are cited and discussed at pages 6-7 of the FWS Comments, which erroneously refer to them as "final manuscripts" despite the fact that they are explicitly marked as drafts.

[7] ERM, Final Report: Peer Review of Longcore et al. 2011 Draft Papers, at 1 (May 13, 2011) ("ERM Report"), included as Attachment 1 to the Further Comments of the Infrastructure Coalition on the Programmatic Environmental Assessment—Scoping Phase, WT Docket Nos. 08-61 & 03-187 (filed May 17, 2011).

[8] Travis Longcore, quoted in the May 18, 2011, issue of Communications Daily.

The Infrastructure Coalition agrees with the FCC that the PEA is an important and difficult undertaking that will determine whether an EIS is required and has the potential to yield information that will help the FCC better fashion any future regulations. However, the time for consideration of issues surrounding such rules will be after the PEA is concluded. Thus, we urge the Commission not to consider those issues raised by the FWS until the appropriate time. When the time is ripe for consideration of final rules, the Infrastructure Coalition is hopeful that the Commission utilizes the information gleaned from the PEA to develop rules that would simultaneously be responsive to properly validated avian concerns and permit the expeditious buildout of our nation's broadband networks and broadcasting facilities.[9]

Respectfully submitted,

THE INFRASTRUCTURE COALITION

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[9] In that context, we note that the regulatory program that the FWS entreats the Commission to adopt as final rules is out of step with the necessity of addressing both of the Commission's goals. The FWS proposal is so byzantine that it took three pages of bullet points to outline and creates a process that is as open-ended as it is complex.