Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
National Environmental Policy Act Compliance for Proposed Tower Registrations	)	WT Docket No. 08-61
	)	
Effects of Communications Towers on Migratory Birds	)	WT Docket No. 03-187

To: The Commission

PETITION FOR RECONSIDERATION

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Summary

The Commission's rejection of the 350-foot safe harbor proposed in the record will unduly burden businesses and public safety entities, and does not take not account the current harsh economic climate or the facts and the plan set forth in the Draft Programmatic Environmental Assessment. Legislation is pending in both houses of Congress to explicitly require that the Commission follow the principles of Executive Order 13563. This legislation would require the Commission to assess the economic impact of its proposed rules and identify any market failure, consumer harm or regulatory barrier to investment before adopting any economically significant rules. To the extent that any barriers are identified, the legislation would require the Commission to demonstrate that the benefits of the regulation outweigh the costs that would be imposed on society. Additionally, this legislation would require the Commission to establish its own shot-clocks so that the public knows how quickly it can expect action from the Commission.

It is well established that the United States is in one of the worst economic downturns since the Great Depression. Since 2001, thousands of businesses, both large and small, have failed. Unemployment is at historic highs and has failed to decrease significantly despite the Government's stimulus efforts. As a result, the overall health of the American economy is frail, which has led to anemic hiring and higher prices for consumers. The Commission's refusal to provide a safe-harbor for antenna towers that are 350 feet above ground level and below contravenes the principles of the pending legislation and Executive Order 13563. The Commission has conceded that antenna structures with a height at or below 350 feet are less likely to have a significant environmental effect. And, it is well established that antenna towers overall have a negligible impact on avian mortality, when viewed in the context of all avian mortality. Despite these showings, the Commission erroneously concluded that it had no authority to adopt a safe harbor, even on an interim basis.

The Court in *American Bird Conservancy* did not require the Commission to require both local and national notice, and even suggested that national notice via the Commission's website would be sufficient. Nonetheless, the Commission adopted the more unwieldy local notice as an adjunct to national notice. While the Commission concluded that local notice could be met through the zoning process, there is no assurance that local governments will be willing to modify their publication processes in order to ensure that all of the information elements required by the Commission are included in the zoning notices. Further, publication in local newspapers will no longer be as effective as it once was, due to significant reductions in print circulation, loss of advertisers, bankruptcies and the closing of newspapers. As a result, the benefits of local publication do not outweigh the burden on small businesses, public safety entities and other licensees.

In its comments, the Blooston Commenters urged the Commission to adopt a "shot-clock" mechanism for processing of Requests for Environmental Processing and Environmental Assessments. The *Order on Remand* contains no discussion whatsoever as to why it should or should not be adopted. As a result, Petitioners are concerned that the Commission's procedures do not sufficiently encourage the efficient processing of Requests for Environmental Processing or Environmental Assessments. The failure of the Commission to consider the shot-clock

proposal contravenes established precedent that agencies respond to "relevant" and "significant" comments. The "shot-clock" proposal met this standard since the Commission adopted such a "shot-clock" for local tower approvals, and Congress has included the adoption of a "shot-clock" mechanism in HR 3309 and its companion legislation as a measure to provide the public with certainty as to when it can expect the Commission to act.

Petitioners recommended the following shot-clocks: (a) for Petitions for Environmental Processing – 30 days after the close of the pleading cycle and (b) for Environmental Assessments ("EAs"), 90 days after the filing of an EA or an amendment to an EA. At the end of the "shot-clock" period, if the Commission has taken no affirmative action, it will be deemed to have issued a "Finding of No Significant Impact" or "FONSI." In those circumstances where the Commission cannot meet its initial "shot-clock" deadline, it may extend the deadline by up to an additional 30 days by issuing a public notice prior to the shot-clock deadline – which deadline will not be eligible for further extension. By following these procedures, the Commission will have had a reasonable opportunity to make its determination without unduly delaying tower construction for those projects that should not have an adverse impact on the environment in general and avian mortality in particular.

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PETITION FOR RECONSIDERATION

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its telecommunications and/or tower owner clients listed in Attachment A hereto (the "Petitioners") hereby requests reconsideration of the actions taken by the Commission in its above-captioned *Order on Remand*[1] which order (a) declines to provide a safe-harbor for antenna structure registrations 350 feet or below in height above ground level, (b) requires antenna structure registration applicants to provide both local and national notice for pending applications for Antenna Structure Registration and (c) did not address the request that the Commission adopt a "shot-clock" for the processing of Requests and Environmental Assessments. The Petitioners respectfully submit that (a) the record in this proceeding supports a safe-harbor for antenna structures 350 feet or below above ground level and (b) that the local notice requirement goes beyond the scope of national notice endorsed by the Court in *American Bird Conservancy,*[2] and would place an unnecessary and undue regulatory burden on small businesses such as the Petitioners. Accordingly, the Commission should modify its interim rules in order to address

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[1] *National Environmental Policy Act Compliance for Proposed Tower Registrations and Effects of Communications Towers on Migratory Birds*, Order on Remand, ___ FCC Rcd. ____ (WT Docket Nos. 08-61 and 03-187) (rel. Dec. 9, 2011) ("*Order on Remand*").
[2] *American Bird Conservancy*, 516 F.3d 1027 (DC Cir. 2008).

these shortcomings. Such action would be consistent with the notice requirements in *American Bird Conservancy*, while at the same time balance the need to minimize adverse environmental impacts against the economic realities facing many businesses (large, medium and small) in the midst of an historical economic downturn.

I. *Statement of Interest*

The Petitioners include small businesses that provide telecommunications service to the public, companies in the tower construction and rental business, businesses that use radio for their internal operations and local governments that use radios for public safety and other functions. In their comments below, the Petitioners (filing as the "Blooston Commenters") urged the Commission to provide a safe-harbor for antenna towers that were 350 feet above ground level or less, and to rely on the *American Bird Conservancy* Court's observation that national notice would be sufficient – both measures to be taken in the name of reducing regulatory and economic burdens.[3] Because the interim rules adopted in the *Order on Remand* will have a substantive effect that adversely affects their economic well-being, the Petitioners have sufficient interest to petition the Commission with respect to the *Order on Remand.*[4]

II. *The Commission's Rejection of the 350-Foot Safe Harbor Unduly Burdens Small Businesses, does not Take into Account the Current Harsh Economic Climate and is Not Supported by the Facts and the Plan Set Forth in the Draft Programmatic Environmental Assessment.*

On November 2, 2011, Representative Greg Walden, Chairman of the Energy and Commerce Subcommittee on Communications and Technology introduced HR 3309 (the *FCC*

[3] Comments of Blooston Commenters filed May 5, 2011 (hereinafter, "Blooston Comments")
[4] *See FCC v. Sanders Brothers Radio Station*, 309 US 470 (1940).

Process Reform Act) to improve the ways in which the Commission operates.[5] Among other things, this legislation would require the Commission to: (a) survey the state of the market place prior to initiating new rulemakings in order to ensure that the Commission has an up-to-date understanding of the rapidly evolving and job-creating market place; (b) identify any market failure, consumer harm or regulatory barrier to investment before adopting economically significant rules and after identifying any such issues, demonstrate that the benefits of the regulation outweigh the costs (while at the same time taking into account the need for regulation to impose the least amount of burden on society); and (c) establish its own shot-clocks so that the public knows how quickly it can expect action from the Commission.[6] This legislation would expressly apply to the Commission the regulatory reform principals that President Obama endorsed in his January 18, 2011 Executive Order 13563.[7] Two bills have been introduced in the U.S. Senate, S. 1784 (the "FCC Process Reform Act") and S. 1817 (the "Telecommunications Jobs Act") which contain language virtually identical to the above-described language in HR 3309.[8]

Executive Order 13563 is very clear that regulations must "protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and new job creation." In so doing, the President has mandated that regulatory agencies must "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." The adoption of Executive Order 13563, and Congress' efforts to apply that Order to the FCC, are not mere window dressing. The United States is in one of the worst sustained

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[5] H.R. 3309, 112th Cong., 1st Sess. 157 Cong. Rec. 7255-56 (2011).
[6] While Petitioners did not raise HR 3309 in their May 5, 2011 comments, the legislation had not yet been introduced at that time.
[7] *See* President Barak Obama, Executive Order 13563 (Jan. 18, 2011), 76 FR 3821 (2011) (hereinafter, "Executive Order 13563").
[8] S. 1784, 112th Cong. 1st Sess. 157 Cong. Rec. S7066 (2011); S. 1817, 112th Cong., 1st Sess. 157 Cong. Rec. S. 7187 (2011).

economic downturns it has ever faced. Since 2001, thousands of businesses large and small have failed; unemployment is at an historic high, and has failed to significantly ebb despite stimulus expenditures that have ballooned the National debt; and operating expenses have sky-rocketed, preventing businesses from hiring more employees and resulting in higher prices for consumers.[9] It is against this backdrop that any new government mandate must be evaluated.

The Commission's refusal to provide a safe-harbor for antenna towers 350 feet above ground level and below contravenes the standards established in HR 3309 and Executive Order 13563, and reflected in existing administrative law precedent. The rules as adopted place undue economic hardships on the Petitioners and other similarly situated telecommunications providers and users as well as tower owners, at a time when these businesses can ill afford added expenses and delays.

In the *Order on Remand*, the Commission conceded that antenna structures at or below the 350-foot level are less likely to have a significant environmental effect on migratory birds or otherwise than taller antenna structures.[10] Nonetheless, the Commission claimed that it could not "dispense" with a public notice requirement for such lower towers, even on an interim basis, because nothing in the *American Conservancy* decision, the National Environmental Protection Act ("NEPA") or the Council on Environmental Quality's implementing rules explicitly permitted such action or that based upon currently available evidence (which is not otherwise identified), it could otherwise ignore the possibility that a tower over 200 feet in height or less

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[9] See, e.g., Unemployment Claims, Consumer Prices Jump (USA Today, September 15, 2011) (http://www.usatoday.com/money/economy/story/2011-09-15/unemployment-claims-consumer-prices/50411534/1); Consumers Battle Weaker Growth, Higher Prices (Reuters, June 15, 2011) (http://www.reuters.com/article/2011/06/15/us-usa-economy-prices-idUSTRE75D2S220110615); The Economy: Lower Growth, Higher Unemployment (The Fiscal Times, April 28, 2011) (http://www.thefiscaltimes.com/Articles/2011/04/28/The-Economy-Lower-Growth-Higher-Unemployment.aspx#page1); To Count New Stimulus Jobs, Help Really Wanted (Wall Street Journal, September 16, 2009) (http://online.wsj.com/article/SB125303986657112935.html?mod=WSJ_WSJ_News_StimulusPackage35_4).

[10] *Order on Remand* at para. 51.

than 200 feet that requires FAA notification could have an environmental impact.[11] However, a review of the record indicates that nothing *prohibited* such action either, and absent something more than a conclusory statement that the Commission was not permitted to do so when the record is otherwise silent is not a sufficient explanation.[12] The Petitioners respectfully submit that the record supports a safe-harbor approach, which would be consistent with the principles of HR 3309, the related Senate bills and Executive Order 13563.

In addition, while the Petitioners understand that the Commission is bound by the Court's decision in *American Bird Conservancy*, the process taken by the Commission to meet the Court's requirements must be balanced in such a manner that human life and property are protected. The Commission cannot lose sight of the vital services that wireless communications and broadcast operations provide to the public. If broadcasters are not able to construct communications towers of sufficient height, the signal propagation will be insufficient to broadcast news, emergency warnings and other relevant information to the American public. Similarly, if wireless carriers face undue regulatory burdens in establishing communications towers that trigger the FAA clearance and FCC registration requirements, they will be required to install additional lower-elevation antenna towers in order to achieve adequate signal coverage. This would impose significant additional costs and delays that would otherwise not be necessary, and slow the expansion of Enhanced 911 coverage to help public safety officials respond to emergency calls more quickly and effectively.

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[11] *Id.* Interestingly enough, antenna towers that do not require registration with the FCC will not require the filing of an EA or notice to the public.

[12] *See Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995) *citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (holding that an "alternative way of achieving the [stated] objectives . . . should have been addressed and adequate reasons given for its abandonment."); *City of Brookings Municipal Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules.).

These same considerations also apply to the design and implementation of industrial, critical infrastructure and public safety users who construct wide-area systems in order to facilitate efficient communications systems. The costs associated with the siting of additional antenna towers whose height is below the threshold required for notice to the FAA and registration with the Commission can be significant. Apart from the regulatory costs associated with local approvals, there are additional costs associated with the acquisition of real estate, construction of transmitter housings, antenna towers, antenna costs, engineering costs, etc. that would not be required if the licensee could operate from a single location with a higher-elevation antenna. In many cases, local zoning ordinances will limit the ability of licensees to solve this problem by building two or three towers to serve the purpose of one taller structure, as many jurisdictions are taking steps to restrict the proliferation of towers.[13]

Finally, while the US Fish and Wildlife Service disputes the conclusions in the Commission's Draft Programmatic Environmental Assessment of the Antenna Structure Registration Program ("DPEA"), it appears to provide no concrete science to explain why the conclusions in the DPEA are inappropriate. Rather, it claims that the methodology is flawed because it does not rely on the degree of effects upon birds of conservation concern ("BCC") rather than the current scheme.[14] The Petitioners respectfully submit that the DPEA appropriately assessed the impact of antenna towers on avian mortality by utilizing a holistic approach – namely, comparing the impact on avian mortality from antenna towers *vis-à-vis* avian mortality from other sources.[15] Based on this more balanced analysis, it appears that collisions with antenna structures amount to only 0.2

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[13] See, e.g., "Bill to End Tower Proliferation", Frank Lombardi, New York Daily News, November 19, 2003; "Calabasa Cell Tower Moratorium In Effect", Sylvie Belmond, The Acorn, June 16, 2011.
[14] Comments of United States Department of Interior at 4.
[15] DPEA at 6-2 - 6-4.

percent of the avian deaths, and that even with the increase in antenna structures over time and other development, the percentage of avian deaths attributable to such structures is not likely to increase.[16] It is important to note that while there is discussion of antenna structures in general, not all antenna structures require registration with the FCC. As a result, the number of birds that collide with registered antenna towers is actually smaller than the figure attributed to avian mortality caused by collisions with antenna towers (and is otherwise miniscule when compared to avian mortality in the aggregate).[17]

Accordingly, on reconsideration, the Commission should revise its interim rules to provide a safe harbor for antenna structures that are 350 feet above ground level or below. Such action is in the public interest and would balance the need to protect the environment with the need to ensure that human life and property are protected.

III. *The Court in American Bird Conservancy did not Mandate that the Commission Require Both Local and National Notifications from Applicants for Antenna Structure Registrations.*

In its *Order on Remand*, the Commission concedes that the *American Bird Conservancy* Court did not require the imposition of both a local and a national notice requirement. Instead, the Commission recognized that a mechanism for national notification to the public via the Commission's Internet website would be sufficient for the Commission to comply with its

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[16] *Id.* at 6-2. The DPEA relies on research presented by W.P. Erickson, G.D. Johnson and D.P. Young, Jr. in 2005, which summarized and compared avian mortality from antropogenic causes, with an emphasis on collisions; research presented by N. Dauphine and R.J. Cooper in 2009 which evaluated the impact of free range domestic cats on birds in the United States; and 2009 research by D. Klem, Jr., D.J. Farmer, N. Delacretaz, Y. Gelb and P.G. Saenger concerning architectural and landscape risk factors associated with bird-glass collisions in an urban environment that was published in the Wilson Journal of Orthinology.

[17] The Petitioners submit that it is inappropriate to consider avian mortality due to antenna towers in a vacuum. This is because while 5 million may seem like a large number, when considered in conjunction with the total annual avian mortality from other man-made causes, the number is actually quite small and insignificant.

regulatory obligations.[18] Nonetheless, the Commission adopted a more burdensome local notice requirement on top of the national notice requirement endorsed by the Court in *American Bird Conservancy*. In so doing, the Commission stated that "[l]ocal notice [would] compliment[] the broad approach of national notice by enabling persons likely to be directly affected by the potential environmental effects of proposed antenna structures at specific locations to raise concerns of which national entities may not be aware."[19] While the Petitioners do not dispute that local notice might be more convenient for some members of the public, the local notice requirement is not effective enough to justify the imposition of additional burdens on small businesses. Hence, the local notice requirement is inconsistent with HR 3309, the related Senate bills and Executive Order 13563.

Rule Section 17.4(c)(3) contemplates that local notice will be made through publication in a local newspaper of general circulation or by following other appropriate means such as through the public notification provisions of the relevant zoning process.[20] The notice provisions that are typically used in connection with zoning applications may or may not be suitable, depending upon the method of public notice utilized by the locality involved and whether or not the locality is willing to revise its processes to meet the new descriptive information requirements of Rule Section 17.4(c)(3). If that is the case (and the Petitioners have no reason to believe that most localities will be willing to change their internal processes to meet a new Commission mandate), proponents of antenna structures requiring notice to the FAA will be forced to rely on newspaper publication for local notice.

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[18] *Order on Remand* at para. 61 ("National notice provided online at the Commission's website was an approach suggested by the court."); American *Bird Conservancy* at 1035.
[19] *Order on Remand* at para. 62.
[20] Rule Section 17.4(c)(3) provides in pertinent part that "local notice shall contain all of the descriptive information as to geographic location, configuration, height and anticipated lighting specifications reflected in the submission required pursuant to paragraph (c)(2) of this section. It must also provide information as to the procedure for interested persons to file Requests for environmental processing . . . , including any assigned file number, and state that such Requests may only raise environmental concerns."

Unlike when the Commission adopted local notice provisions for NEPA-related proceedings and radio broadcast applications, the newspaper publication industry is no longer the most effective means of disseminating information. Rather, there have been significant declines in both readership and advertising, since much of the public now obtains their news information over the Internet for free.[21] This has led to the bankruptcy of newspaper publishing companies of all sizes, and the disappearance of numerous newspapers in the United States. Because the classified sections have been replaced by various Internet sites as the "go-to" place to find employment, purchase used cars, etc., classified sections in large newspapers, such as The Washington Post, are now only a few pages at most – as opposed to the10 or 15 pages that they once occupied.

Thus, the likelihood that a "local notice" will even be seen by its intended target audience is unlikely, which is in direct contrast to the Commission's assumption that local citizens will always have the opportunity to become aware of antenna structure construction/modification proposals through local publication. In view of the *American Bird Conservancy* Court's recognition that national notice is sufficient, and given the fact that publication of local notices through newspapers of general circulation is no longer likely to reach their intended target audiences, the Commission should modify its rules to rely solely on its Internet website to provide the requisite notice to the public, so that additional burdens on small businesses, public safety agencies and other industry members are not created.[22]

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[21] *See e.g.*, http://www.nytimes.com/2008/04/28/business/media/28paper.html

[22] If the Commission is still concerned that the public might not be aware of proposed antenna structures, it can conduct a public education program, much like it did for the DTV transition.

IV. *The Commission Failed to Consider the Shot-Clock Mechanism Proposed by the Blooston Commenters*

A review of the *Order on Remand* reflects that the Commission apparently did not consider the "shot-clock" mechanism proposed by the Blooston Commenters for Requests for Environmental Processing and Environmental Assessments.[23] While the Order recognizes the Blooston Commenters' contribution to the record, it is simply silent about the shot-clock proposal, containing no discussion whatsoever as to why it should or should not be adopted. As a result, the Petitioners are concerned that the Commission's procedures do not sufficiently encourage the efficient processing of Requests for Environmental Processing or Environmental Assessments ("EAs") by proponents of antenna structures. The Commission is obligated to consider Petitioners' shot-clock proposal. Courts have long held that an agency must respond to "relevant" and "significant" comments. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977); *see also United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252-53 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (stating that once a comment is "significant enough to step over the threshold requirement of materiality," the "lack of agency response or consideration becomes a concern").
The opportunity to comment is meaningless unless the agency responds to significant points raised by the public. *Portland Cement Ass'n v. Ruckelshaus*, supra, 486 F.2d at 393-394. Indeed, FCC Rule Section 1.425 states: "The Commission will consider all relevant comments and material of record before taking final action in a rulemaking proceeding and will issue a decision incorporating its finding and a brief statement of the reasons therefore." The significance of the shot-clock proposal is demonstrated by the fact that the Commission held a rule making to

[23] Blooston Comments at 13 – 14.

implement a shot-clock for local tower approvals;[24] and Congress has included the adoption of shot-clocks in HR 3309 as an important measure to prevent undue regulatory burdens on American business.

In order to ensure the timely processing of such requests and EAs, while ensuring that the construction of antenna towers are not unduly delayed, the Petitioners urge the Commission to adopt a "shot-clock" mechanism that is similar to the measure adopted by the Commission in the *Shot Clock Order*, in connection with the processing of state and local zoning applications for the siting of wireless communications facilities. Petitioners believe that a similar mechanism would be appropriate for the evaluation of requests for environmental processing and EAs and recommend the following shot-clocks: (a) for Petitions for Environmental Processing – 30 days after the close of the pleading cycle and (b) for EAs, 90 days after the filing of an EA or an amendment to an EA. After the shot-clock period ends, if the Commission has taken no affirmative action, it will be deemed to have issued a "Finding of No Significant Impact" or "FONSI". In those circumstances where the Commission cannot meet the initial shot-clock deadline, it may extend the deadline by up to an additional 30 days by issuing a public notice prior to the shot-clock deadline – which deadline will not be eligible for further extension. By following these procedures, the Commission will have had a reasonable opportunity to make its determination without unduly delaying tower construction for those projects that should not have an adverse impact on the environment in general and avian mortality in particular. Otherwise, there will be an undue delay in the construction of antenna structures needed for the rapid

[24] *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, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*Shot Clock Ruling*); *Order on Reconsideration*, 25 FCC Rcd 11157 (2010), *appeal pending*

deployment of broadband, public safety networks and industrial communications facilities needed to bolster our economy.

Conclusion

Wherefore, for the reasons stated above, the Commission should (a) create a safe-harbor for proposed antenna structures that do not exceed 350 feet in height above ground level, (b) amend Section 17.4(c)(3) to eliminate the local notice provision and (c) adopt a "shot-clock" for the processing of Requests and Environmental Assessments.

Respectfully submitted,

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Attachment A

AAA Oregon/Idaho
Aqualand Communications, Inc.
Baxter Healthcare Corporation
Brink's Incorporated
Cal-Ore Telephone Co.
CL Tel Wireless, Inc.
Consolidated Edison Company of New York, Inc.
Consolidated Telcom
Custer Telephone Cooperative, Inc.
Dumont Telephone Company
Harrisonville Telephone Company
Hinton Telephone Company of Hinton, Oklahoma
JB Towers, LLC
Midwest AWS Limited Partnership
Mobile Communication Service, Inc.
Mobile Phone of Texas, Inc.
Northeast Louisiana Telephone Company
Ocean, County of
Peninsula Telephone Company
Radio Communications Systems, Inc
Rochester Genesee Regional Transportation Authority
Smithville Communications, Inc.
Smithville Spectrum, LLC
Star Communications
The Ponderosa Telephone Co.
Vector Security, Inc.
Venture Communications Cooperative
West Texas Rural Telephone Cooperative, Inc.
xG Technology, LLC
Yadkin Valley Telecom