United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

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Federal Communications Commission
ATTN: Aaron Goldschmidt,
Wireless Telecommunications Bureau
12th St., SW., Room TW-A325,
Washington, DC 20554

Dear Mr. Goldschmidt:

The Department of the Interior (Department) appreciates the opportunity to review and provide comments on the Final Rule for the Federal Communications Commission (FCC) Draft Programmatic Environmental Assessment (PEA) 47 CFR Part 1 [WT Docket No. 08-61; WT Docket 03-187; FCC 11-181]. Comments on the PEA were developed by the Department's Division of Migratory Bird Management, of the U.S. Fish and Wildlife Service (FWS). These comments focus on the impacts of communication towers on migratory birds, and court settlement agreement between the American Bird Conservancy *et al.* and the FCC.

The Department commends the number of positive steps suggested or required in this Final Rule, several of which are the result of past coordination efforts between the FCC and FWS. The following comments identify what we perceive as high risk areas that we suggest the FCC address during their ongoing National Environmental Policy Act (NEPA) review and final rulemaking.

Comments on the Interim Final Rule

P. 3936, Item 4 (*Federal Register*) **FCC COMMENT:** *"Staff will review the EA to determine whether the tower will have a significant environmental effect."*

DEPARTMENT RESPONSE: The Department believes it should be clarified if the FCC will make the final determination of "significance," (not the applicant) after coordination with the FWS as an agency with special expertise. FCC needs to provide more detail on the significance criteria they plan to use, including its mention again on p. 3937, Item 15. Specifically, Section 1.1307(a) of the Commission's NEPA regulations only addresses eight threshold categories for antenna structure review. Currently, unless Federally listed under the Endangered Species Act (ESA), all other migratory birds, regardless of conservation concern, are categorically excluded from this Section. FCC's regulations at 1.1307(b) do not currently address the impacts of radiation on migratory birds (Manville 2005, 2009), and continue to inappropriately base radiation standards on thermal heating, instead of using current methods based on measuring extremely low levels of non-ionizing radiation.

P. 3937, Item 13, **FCC COMMENT:** *"Thus, even though a potentially significant effect on migratory birds is not one of the categories of proposed actions identified in Section 1.1307(a) of the rules as requiring an EA, the Commission has on several occasions considered the impact of particular proposed construction projects on migratory birds and, in appropriate circumstances, has required modifications to protect them."*

DEPARTMENT RESPONSE: The Department recommends the final rulemaking address migratory bird resources issues; detailed suggestions have been provided in previous Departmental comments to the FCC (Manville 2007). Because studies have shown an increasing number of bird deaths are resulting from tower collisions (Longcore et al. 2012a, Manville 2009), the FWS continues to strongly encourage the FCC to change their rules to include migratory bird resources, currently categorically excluded, unless birds are Federally listed under the ESA. The growing level of documented "take" of Birds of Conservation Concern (BCC)(FWS 2008; Longcore et al. 2012b) and other non-listed birds, the growing level of estimated bird mortality from tower collisions (Longcore et al. 2012a), and concerns about impacts from radiation (Manville 2009) help justify this recommendation.

P. 3941, Item 41, **FCC COMMENT:** *"The applicant must also provide local notice of its proposal... local zoning public process. Applicants may provide local notice under both this process and the Commission's procedures implementing Section 106 of the National Historic Preservation Act..."*

DEPARTMENT RESPONSE: Based on this notice procedure, it is uncertain whether the applicant will also be responsible for contacting FWS. If this is deemed by FCC to be the applicant's responsibility, such contact should occur no later than this stage in the application process to increase the use of available conservation measures, and significantly decrease the risk of project delays. Contacts should be made both to the Migratory Bird Program as well as the Endangered Species Program.

P. 3942, Item 51, **FCC COMMENT:** *"Types of actions subject to notice. Under the new environmental notification process, notice will be required for new towers and modifications that could have a significant environmental impact, but not for administrative changes and modifications that are unlikely to have a significant environmental impact."*

DEPARTMENT RESPONSE: The Department recommends FCC provide guidance about the FCC's determination of "significance" in their developing NEPA review. The Department also recommends coordination with the Migratory Bird Program for expertise on migratory birds, and with the Endangered Species Program for expertise on listed species and their critical habitats.

P. 3943, Item 52, **FCC COMMENT:** *"Based on the currently available evidence, the Commission cannot ignore the possibility that a registered tower over 200 feet in height, or a tower under 200 feet that requires FAA notification, may have a significant environmental impact that is not otherwise captured in the Commission's rules. The Commission therefore applies the environmental notification requirement to registered towers under 350 feet in height. Although the Commission decides that such towers will be placed on public notice,*

the Commission contemplates that a particularly clear showing would be required to demonstrate that such towers may have effects on migratory birds."

DEPARTMENT RESPONSE: The Department recommends FCC define what constitutes "a clear showing." A "particularly clear showing" is an undefined concept to which great consequences may be tied. Is the "showing" based on a single time frame, is it collectively based over the lifetime of the project, or does it consider the cumulative impacts of all towers within the project area and the landscape?

P. 3944, Item 57, **FCC COMMENT:** *"Exception for certain towers reviewed by other Federal agencies. The Commission provides a very limited exception from the environmental notification process for antenna structures to be located on Federal land... An EA need not be submitted to the Commission if another Federal agency has assumed responsibility for determining whether the facility will have a significant environmental effect and, if it will, for invoking the EIS process..."*

DEPARTMENT RESPONSE: The Department is concerned that other Federal agencies may not have the best standards. As an example, improper use of the FWS's now out of date September 2000 voluntary communication tower guidance has been observed. The Department recommends that once mutually agreed upon FCC rules are final, that the Department develop updated guidance for use by other Federal agencies, to include those recommendations provided to the FCC in 2007 (Manville 2007).

P. 3944, Item 59, **FCC COMMENT:** *"Moreover, from a processing standpoint, applicants can complete the notice process simultaneously with other processes, including environmental reviews that may require consultation with other Federal agencies..."*

DEPARTMENT RESPONSE: The Department recommends revising the sentence to include the review by FWS as an agency with special expertise or jurisdiction by law as use of the term "consultation" may suggest that review by the FWS is limited to the ESA.

P. 3948, Item 80, **FCC COMMENT:** *"The Commission's selection of 450 feet AGL as the threshold for the interim EA filing requirement is consistent with evidence in the Migratory Birds rulemaking record and elsewhere... Data from existing studies show no evidence of large-scale mortality for towers less than approximately this height."*

DEPARTMENT RESPONSE: The FWS is willing to temporarily agree that the 450-ft AGL height threshold is a *"reasonable temporary"* measure for the protection of migratory birds pending completion of the programmatic EA. The FWS continues to recommend that shorter towers also be included within the EA determination. The FWS raises 3 issues with FCC's selection regarding a 450 ft threshold:

1. There have been recent mass mortality events (defined in Longcore et al. 2012a as > 5 bird collision deaths/night/tower) at many communication towers < 450 ft AGL, including unguyed and unlit towers < 200 ft AGL (Manville 2007 comments to the FCC, Manville 2009; A. Manville pers. comm. preliminary 2011 mass mortality reports provided to FWS from short communication towers);

2. The FWS is especially concerned about the effects of towers (including "short" towers) on BCC. In Longcore et al. (2012b manuscript), a meta-analysis review and regression analysis have indicated that at least 12 BCC species have been impacted at the population level by collisions with communication towers. By requiring an EA only on towers > 450 ft AGL, affects to migratory birds – including BCCs – at shorter towers from collisions, habitat fragmentation, site avoidance, and radiation impacts are being ignored; and

3. "Disturbance take" and "take resulting in mortality" to both Bald and Golden Eagles at communication towers must now be considered within project development and tower placement and operation (50 CFR 22.26 and 22.27). While a "take permit" under these new regulations of the Bald and Golden Eagle Act is not required, unpermitted "take" of an eagle is a potential criminal violation of this statute. The cumulative effects of towers on eagles must now additionally be required given the new statutory requirements for acquiring a "take" permit.

The Need for a Programmatic Environmental Impact Statement (PEIS)

The FWS has officially recommended since at least 2000 that FCC conduct a Programmatic Environmental Impact Statement (PEIS) review on the effects of communication towers to migratory birds nationwide, including in a 2000 letter from the FWS's Director to the Commission Chairman. In 2000, a multi-stakeholder group called the Communication Tower Working Group (CTWG) – represented by FCC, the Federal Aviation Administration, the Department of Transportation, the FWS, all the major tower trade associations and several large tower companies, academics, consultants and conservationists – chaired by the FWS, developed a research protocol for conducting a nationwide PEIS assessing the impacts of 250 variably-sized, guyed and unguyed, and randomly selected towers around the country. Participants in the CTWG agreed to the need. No PEIS has been conducted to date and in *ABC et al. v. FCC*, the court stated that FCC could initially prepare an EA in order to determine whether an EIS would be necessary (p. 3938, p. 3940 FR notice). FWS and the Department continue to suggest for the record the need to conduct a PEIS.

New estimates of bird mortality, concerns over disproportionate mortality to Birds of Conservation Concern (FWS 2008), and one endangered species – possibly affecting some species at the population level, the continuing effects of tower and infrastructure lighting, issues dealing with tower height, and the effects of radiation call for the initiation of a PEIS on the FCC's Antenna Structure Registration Program as well as on the overriding effects of communication towers on migratory birds.

The FWS has a continuing interest in working with the FCC to ensure that the impacts to migratory birds are adequately addressed. For continued consultation with the FWS, please contact Ms. Diana Whittington at (703)358-2010 or Diana_Whittington@fws.gov. Dr. Albert Manville, our FWS avian-structural lead for the FWS Division of Migratory Bird

Management, at (703)358-1963 or albert_manville@fws.gov. Should you have any additional Departmental NEPA questions and concerns, please contact Dave Sire at (202)208-6661 or David_Sire@ios.doi.gov . Thank you for the opportunity to provide these recommendations.

Sincerely

Willie R. Taylor
Director, Office of Environmental
Policy and Compliance

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