

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Parts 1 and 17 of the) WT Docket No. 08-61
Commission's Rules Regarding Public Notice) RM-
Procedures for Processing Antenna Structure)
Registration Applications)

To: The Commission

PETITION FOR EXPEDITED RULEMAKING

Michael F. Altschul
Andrea D. Williams
Christopher Guttman-McCabe
Marlo A. Go
CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, DC 20036
(202) 785-0081

Patrick Howey
NATIONAL ASSOCIATION OF
TOWER ERECTORS
8 Second Street, SE
Watertown, SD 57201
(888) 882-5865

Jim Goldwater
BOB LAWRENCE & ASSOCIATES, INC.
345 South Patrick Street
Alexandria, VA 22314
(703) 836-3654
*Representative for National Association
of Tower Erectors*

Marsha J. MacBride
Jane E. Mago
Ann West Bobeck
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Michael Fitch
Connie Duresak
Jacqueline McCarthy
PCIA – THE WIRELESS INFRASTRUCTURE
ASSOCIATION
901 N. Washington Street, Suite 600
Alexandria, VA 22314
(800) 759-0300

May 2, 2008

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY.....2

DISCUSSION.....6

I. CONSISTENT WITH THE *REMAND ORDER*, THE FCC SHOULD ADOPT
NOTICE PROCEDURES FOR ASR APPLICATIONS.....6

II. THE FCC SHOULD CLARIFY THAT ENVIRONMENTAL OBJECTIONS TO
ASR APPLICATIONS MUST MEET THE PETITION TO DENY STANDARD10

III. THE PROPOSED RULES PROMOTE CRITICAL INFRASTRUCTURE
DEPLOYMENT AND MEANINGFUL PUBLIC PARTICIPATION.....13

CONCLUSION17

APPENDIX A..... A-1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Parts 1 and 17 of the) WT Docket No. 08-61
Commission’s Rules Regarding Procedures for) RM-
Processing Antenna Structure Registration)
Applications)

To: The Commission

PETITION FOR EXPEDITED RULEMAKING

CTIA – The Wireless Association[®] (“CTIA”), the National Association of Broadcasters (“NAB”), the National Association of Tower Erectors (“NATE”) and PCIA – The Wireless Infrastructure Association (“PCIA”) (collectively, the “Infrastructure Coalition”) respectfully submit this petition for expedited rulemaking to amend Parts 1 and 17 of the rules of the Federal Communications Commission (“FCC” or “Commission”).¹ This petition is filed in response to the remand of the United States Court of Appeals in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (“*Remand Order*”), which directed that the Commission determine “how it will provide notice of pending tower applications that will ensure meaningful public involvement in implementing NEPA procedures.”² As set forth below, the Commission should grant this petition and commence a rulemaking that makes the following two tentative conclusions: (1) the Commission’s rules should be revised to incorporate a notice, comment and approval process for antenna structure registration (“ASR”) applications modeled after the process for transfer and assignment applications; and (2) the Commission’s rules should be

¹ 47 C.F.R. § 1.401.

² *Remand Order*, 516 F.3d at 1035.

revised to clarify that any objection on environmental grounds filed against an ASR application must be filed as a Petition to Deny.³

Infrastructure Coalition members construct, modify, own, operate, lease and manage tens of thousands of communications towers, which provide valuable wireless and broadcasting services to the public nationwide.⁴ As such, their interests are affected by rules governing the processing of tower applications.⁵ The proposed rules will ensure opportunities for meaningful public involvement in the tower application process. The proposed rules will also facilitate processing of ASR applications in an efficient and predictable manner so that dependable communications networks can continue to be rapidly deployed to support the nation's growing wireless, broadcast and public safety needs.

INTRODUCTION AND SUMMARY

In 2002, the American Bird Conservancy *et al.* ("Avian Groups") petitioned the FCC, pursuant to Section 1.1307(c) of its rules, to: (1) order owners of more than 6,000 individual antenna structures in the Gulf Coast region to prepare or amend pending environmental assessments ("EAs") to address impacts on migratory birds; (2) prepare a programmatic environmental impact statement ("PEIS") under the National Environmental Policy Act ("NEPA") analyzing the effects of the FCC's registration of antenna structures on migratory

³ The proposed rules are set forth in Attachment A.

⁴ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the FCC and other federal agencies, and the courts. NATE is a non-profit organization serving as the unified voice of the tower erection, service and maintenance industry. PCIA is a non-profit trade association representing the wireless telecommunications infrastructure industry. CTIA, NAB, NATE and PCIA participated in the appeal before the D.C. Circuit culminating in the *Remand Order*. PCIA also participated directly in the proceeding before the FCC that led to the order reviewed by the D.C. Circuit.

⁵ See 47 C.F.R. § 1.401(c).

birds in the Gulf Coast region; (3) consult with the United States Fish and Wildlife Service (“FWS”) pursuant to the Endangered Species Act (“ESA”) regarding the impact of Gulf Coast towers on threatened and endangered migratory birds; (4) take steps under the Migratory Bird Treaty Act (“MBTA”) to reduce the “takes” from avian-tower collisions in the Gulf Coast region; and (5) provide notice and opportunity to comment on all Gulf Coast ASR applications.⁶ PCIA filed a Motion to Dismiss the Gulf Coast Petition.⁷

In 2003, the Commission issued its *Migratory Bird NOI* “to gather comment and information on the impact that communications towers may have on migratory birds.”⁸ The responsive comments expressed conflicting views on the environmental significance of any birds killed in collisions with towers and what actions, if any, should be taken. As a result, the Commission retained an environmental expert, Avatar Environmental, LLC, to review the record. Avatar issued its report in 2004 and the FCC solicited further comments that were filed in 2005.⁹ While the Commission was deciding whether to proceed with a full rulemaking, it

⁶ American Bird Conservancy et al., Petition for National Environmental Policy Act Compliance (Aug. 26, 2002) (“Gulf Coast Petition”). Because impacts to migratory birds are not among the enumerated environmental “triggers” contained in Section 1.1307, this issue is categorically excluded from environmental processing under the FCC’s rules. See 47 C.F.R. §§ 1.1306, 1.1307(a)-(b). Section 1.1307(c) provides that: “If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. . . .”

⁷ Personal Communications Industry Association, Motion to Dismiss (Sept. 27, 2002).

⁸ *Effects of Towers on Migratory Birds, Notice of Inquiry*, 18 FCC Rcd 16938, 16938 ¶ 1 (2003) (“*Migratory Bird NOI*”).

⁹ See Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission by Avatar Environmental, LLC, WT Docket No. 03-187 (filed Dec. 10, 2004); *Public Notice*, “Wireless Telecommunications Bureau Seeks Comment on Avatar Environmental, LLC Report Regarding Migratory Bird Collisions with Communications Towers,” WT Docket No. 03-187, 19 FCC Rcd 24007 (WTB 2004).

issued an order in 2006 addressing the Avian Groups' Gulf Coast Petition.¹⁰ The *Gulf Coast Order* dismissed or denied all of the Avian Groups' requests except the MBTA claim, which the Commission indicated was being considered in the nationwide proceeding initiated by the *Migratory Bird NOI*.¹¹ The Avian Groups then appealed to the D.C. Circuit only claims which were not specific to individual structures.¹²

After considering the remaining issues, the D.C. Circuit affirmed in part and vacated and remanded other issues back to the FCC for further consideration. Specifically, the D.C. Circuit affirmed the Commission's deferral of the MBTA issue to the nationwide proceeding.¹³ It vacated and remanded, however, the NEPA, ESA and notice portions of the *Gulf Coast Order*.¹⁴ On the NEPA issue, the court found, based on the conflicting comments contained in the record of the nationwide proceeding, that "towers 'may' have [a] significant environmental impact."¹⁵ According to the court, Section 1.1307(c) of the FCC's rules therefore "mandate[s] at least the

¹⁰ *Petition for National Environmental Policy Act Compliance, Memorandum Opinion and Order*, 21 FCC Rcd 4462 (2006) ("*Gulf Coast Order*").

¹¹ *See Gulf Coast Order*, 21 FCC Rcd at 4464-69 ¶¶ 5-20. As a result, the PCIA Motion to Dismiss was dismissed as moot. *Id.* at 4463 ¶ 2 & n.5.

¹² In light of the limited scope of the appeal, the FCC's rejection of the Avian Groups' request to order owners of more than 6,000 individual Gulf Coast antenna structures to prepare or amend pending EAs became final.

¹³ *Remand Order*, 516 F.3d at 1031-32. While the appeal was pending, the FCC issued its *Migratory Bird NPRM* in the nationwide proceeding seeking comment on "the extent of any effect of communications towers on migratory birds"; "whether any such effect warrants regulations specifically designed to protect migratory birds"; and "the legal framework governing the Commission's obligations in this area," including pursuant to the MBTA. *See Effects of Communications Towers on Migratory Birds*, WT Docket No. 03-187, *Notice of Proposed Rulemaking*, 21 FCC Rcd 13241, 13256 ¶ 32 (2006) ("*Migratory Bird NPRM*"). The pleading cycle in response to the *Migratory Bird NPRM* ended in 2007.

¹⁴ *Remand Order*, 516 F.3d at 1032-35.

¹⁵ *Id.* at 1033.

completion of an EA before the Commission may refuse to prepare a programmatic EIS.”¹⁶ On the ESA issue, the court directed the FCC to better explain “what kind of showing . . . could demonstrate sufficient environmental effects to justify the ‘programmatic consultation’ [between the FCC and FWS] that Petitioners seek.”¹⁷

The *Remand Order* also vacated and remanded the notice portion of the *Gulf Coast Order*. The court recognized that although “Commission regulations permit parties to file petitions for EAs to be conducted for the otherwise categorically excluded tower applications,”¹⁸ “the Commission provides public notice of individual tower applications only *after* approving them.”¹⁹ Because “[i]nterested persons cannot request an EA for actions they do not know about,” the court directed the Commission on remand to “determine how it will provide notice of pending tower applications that will ensure meaningful public involvement in implementing NEPA procedures.”²⁰ The Infrastructure Coalition submits the instant petition to aid the Commission in carrying out the court’s directive on the notice issue. Expedited processing of this petition is requested in light of the court’s guidance to “proceed with dispatch on remand to resolve the Gulf Coast petition.”²¹

¹⁶ *See id.* at 1034. Pursuant to Section 1.1307(c), if a written petition is submitted setting forth in detail the reasons why a particular action, otherwise categorically excluded, will have a significant environmental effect, the Bureau must review the petition. If the Bureau determines that the action “may have a significant environmental impact,” an EA must be prepared to serve as the basis to decide “whether to proceed with or terminate environmental processing.” 47 C.F.R. § 1.1307(c).

¹⁷ *Remand Order*, 516 F.3d at 1034-35.

¹⁸ *Id.* at 1035 (citing 47 C.F.R. § 1.1307(c)).

¹⁹ *Id.* at 1035 (emphasis in original).

²⁰ *Id.*

²¹ *Id.*

Specifically, the FCC should commence a rulemaking proceeding to implement the public notice portion of the *Remand Order* by issuing a *Notice of Proposed Rulemaking* that makes the following two tentative conclusions. First, the Commission's Part 17 ASR rules should be revised to incorporate a notice, comment and approval process for ASR applications modeled on the successful procedures now in use for transfer and assignment applications. Second, the Commission's rules should be revised to clarify that any objection on environmental grounds filed against an ASR application must be filed as a Petition to Deny, subject to Section 309(d) of the Act and Section 1.939(d). This is consistent with current FCC precedent and rules for objections filed against applications for station licenses. The proposed rule changes implement the court's direction in the *Remand Order* and strike the appropriate balance between prompt processing of ASR applications to facilitate infrastructure deployment and meaningful public participation in the approval process.

DISCUSSION

I. CONSISTENT WITH THE *REMAND ORDER*, THE FCC SHOULD ADOPT NOTICE PROCEDURES FOR ASR APPLICATIONS

As a threshold matter, the Commission has broad discretion to establish suitable notice and comment procedures for ASR applications, consistent with the court's opinion. As the *Remand Order* recognized, the Commission "enjoys wide discretion in fashioning its own procedures,"²² as long as it "compl[ies] with the CEQ regulations and its own regulations."²³ The CEQ regulations require agencies to "[m]ake diligent efforts to involve the public in

²² *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984), *quoted in Remand Order*, 516 F.3d at 1035.

²³ *See Remand Order*, 516 F.3d at 1035. The CEQ, or Council on Environmental Quality, was created by Congress to provide guidance on NEPA and the regulations adopted by Federal agencies to implementing that statute. The FCC's NEPA regulations are set forth at 47 C.F.R. §§ 1.1301 *et seq.*

preparing and implementing their NEPA procedures.”²⁴ These regulations, however, are “general in approach”²⁵ and “do not mandate any particular form of notice.”²⁶ As discussed below, the proposed rules meaningfully involve the public by providing interested parties with notice of and an opportunity to comment on “pending tower applications.” Thus, the proposed rules are consistent with the court’s guidance and the regulations of the CEQ.

The proposed rules are modeled after the streamlined transfer and assignment procedures adopted by the FCC in 2003 to increase the public benefits associated with the use of radio spectrum.²⁷ At that time, the Commission noted that adopting the proposed license assignment and transfer of control procedures would “minimize administrative delays, reduce transaction costs, and otherwise generally facilitate the movement of spectrum toward new, higher valued uses.”²⁸ These goals are equally applicable to the processing of antenna structure applications, which is an integral part of the expansion of critical communications infrastructure necessary to sustain the expansion of wireless and broadcast services nationwide.

²⁴ 40 C.F.R. § 1506.6(a); *see Remand Order*, 516 F.3d at 1035; *see also* 40 C.F.R. § 1506.6(b) (agencies shall “[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected”); *id.* § 1506.6(d) (agencies shall “[s]olicit appropriate information from the public”).

²⁵ *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng’rs*, 511 F.3d 1011, 1025 (9th Cir. 2008) (citing 40 C.F.R. § 1506.6).

²⁶ *Environmental Coalition v. Brown*, 72 F.3d 1411, 1415 (9th Cir. 1995) (citing 40 C.F.R. § 1506.6(b)).

²⁷ *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604, 20607-08 ¶¶ 1, 5 (2003) (“*Secondary Markets Order*”), *recon.*, 19 FCC Rcd 17503 (2004); 47 C.F.R. § 1.948(j).

²⁸ *Secondary Markets Order*, 18 FCC Rcd at 20683 ¶ 195.

As set forth in greater detail in Attachment A,²⁹ the Infrastructure Coalition proposes the following general approval procedures for processing ASR applications to register a new antenna structure, or to increase the overall height and/or change the lighting and marking of an existing registered structure.³⁰

- Day 0: Form 854 applications would be placed promptly on public notice within one week of filing.³¹
- Day 14: Petitions to Deny would be due.³²
 - If a Petition was filed, the applicant would have 10 calendar days plus an additional three days excluding weekends and holidays to file an opposition, and the petitioner would have five days excluding weekends and holidays plus an additional three days excluding weekends and holidays to reply.³³

²⁹ See Attachment A, 47 C.F.R. § 17.4(c)(1) (proposed).

³⁰ Applications on Form 854 for any other action would be processed pursuant to immediate approval procedures, whereby consent and the issuance of a registration number would be reflected in the FCC's ASR System the next day with public notice to promptly follow. Such actions include, but are not limited to, administrative updates, ownership changes, notification of structure dismantlement, cancellation of an existing registration, withdrawal of an application and notification of completion of a previously-approved registered structure. See Attachment A, 47 C.F.R. § 17.4(c)(2) (proposed). To facilitate processing, the Infrastructure Coalition recommends that the Form 854 be revised to require a certification as to whether or not the application qualifies for immediate approval procedures. See § 17.4(c)(2)(i) (proposed).

³¹ Like the weekly public notices for transfer and assignment actions, these public notices would be available through the FCC's web site for easy access and viewing by all interested parties via the Internet.

³² As described in Section II below, any objection to an ASR application filed on environmental grounds must be filed as a Petitions to Deny. In any case where an action requires both an ASR application on FCC Form 854 *and* a service-specific application, the Commission's rules must make clear that any Petition to Deny based on environmental considerations will only be permitted against the *first* filed application for which public notice was issued. See Attachment A, 47 C.F.R. §§ 1.1313(a)(3), 17.4(c)(1)(iii)(D) (proposed). It would be inequitable and interject unnecessary delay for parties to be permitted to burden the Commission's processes by challenging the same action twice.

³³ See 47 C.F.R. §§ 1.4(g)-(j), 1.45(b)-(c), 1.939(c).

- Day 21: Two possible events may occur:
 - The Bureau would declare by public notice that it has either granted the application and issued a registration number or denied the application;³⁴ or
 - If any Petitions were filed, or on its own motion in response to an EA submitted with the Form 854, the Bureau would announce by public notice that the application was offlined for an additional 30 days.
- Day 51: If the Bureau determined on Day 21 that an additional 30 days was needed, the Bureau would issue a public notice announcing action on the application (including a registration number, if the application is granted) or indicating that a final 30 days is needed.³⁵
 - If an EA was not submitted and the Bureau determines one is required, the Day 51 public notice would direct the applicant to amend its application to include an EA within 30 days, in which case the public notice process would start anew. The new Day 0 is the date the amended Form 854 containing the EA is placed on public notice as accepted for filing.
 - If the Bureau determines any Petition(s) should be denied and the application granted, the Day 51 public notice would indicate that the grant is effective immediately, issue a registration number, include a concise statement of the reason(s) for denying any Petition(s) and, if needed, indicate that the full text of an order will be released subsequently.³⁶
 - If the Bureau determines any Petition(s) should be granted and the application denied, the Day 51 public notice would announce the denial, include a concise statement of the reason(s) for denying the application and, if needed, indicate that the full text of an order will be released subsequently.

³⁴ As is the case today, interested parties would be able to seek reversal of a grant or denial by filing a petition for reconsideration or an application for review, assuming the applicable rule requirements are satisfied. *See* 47 C.F.R. §§ 1.106, 1.115.

³⁵ The pleading cycle if a Petition to Deny, opposition and reply are filed would conclude approximately 3-4 weeks from the date the Petition is filed on Day 14. *See supra* note 32 and accompanying text. The FCC would thus have approximately 1-2 weeks after the pleading cycle is complete to act by the end of the first 30-day period (Day 51) or announce that a final 30-day period is needed to complete its review.

³⁶ *See, e.g., Public Notice, "FCC Conditionally Grants Qwest Forbearance Relief,"* FCC 07-12, WC Docket No. 05-333 (rel. Feb. 20, 2007) (summarizing terms of agency action granting in part and denying in part a petition and indicating that the text of order would be released on a later date).

- Day 81: If the Bureau determined on Day 51 a final 30 days was needed, the Bureau would issue a public notice announcing action on the application (including a registration number, if the application is granted).
 - If an EA was not submitted and the Bureau determines one is required, the Day 81 public notice would direct the applicant to amend its application to include an EA within 30 days, in which case the public notice process would start anew. The new Day 0 is the date the amended Form 854 containing the EA is placed on public notice as accepted for filing.
 - If the Bureau determines any Petition(s) should be denied and the application granted, the Day 81 public notice would indicate that the grant is effective immediately, issue a registration number, include a concise statement of the reason(s) for denying any Petition(s) and, if needed, indicate that the full text of an order will be released subsequently.
 - If the Bureau determines any Petition(s) should be granted and the application denied, the Day 81 public notice would announce the denial, include a concise statement of the reason(s) for denying the application and, if needed, indicate that the full text of an order will be released subsequently.

These proposed rules maintain predictable timeframes for action on ASR applications needed to ensure continued prompt deployment of communications infrastructure. By providing interested parties with notice of and an opportunity to comment on pending tower applications, the proposed rules are also fully consistent with the court's directive to provide meaningful public input on environmental issues in the ASR process.

II. THE FCC SHOULD CLARIFY THAT ENVIRONMENTAL OBJECTIONS TO ASR APPLICATIONS MUST MEET THE PETITION TO DENY STANDARD

The Commission should clarify that the directive in Section 1.1313 of its rules that an environmental objection be filed as a Petitions to Deny applies to ASR applications.³⁷ Section 1.1313 provides that “[i]n the case of an application to which Section 309(b) of the Communications Act applies, objections based on environmental considerations shall be filed as

³⁷ See Attachment A, 47 C.F.R. § 1.1313(a) (proposed).

petitions to deny”³⁸ Section 309(b) applies to applications covered by Section 308 which, in turn, covers applications for “station licenses.”³⁹ The term “station license” means an instrument of authorization “for the use or operation of apparatus for transmission of energy, or communications, or signals by radio.”⁴⁰ While the Commission has previously treated Section 1.1313’s Petition to Deny provisions as applying to objections filed against a Form 854 application for antenna structure registration,⁴¹ this practice should be codified in Section 1.1313 to avoid confusion.

The Commission should reaffirm and make clear in its rules that a Petition to Deny any application on environmental grounds must be filed in accordance with Section 309(d) of the Act and comply with the procedural requirements in Section 1.939 of the Commission’s rules.⁴² Section 1.41 states that informal pleadings may be filed “[e]xcept where formal procedures are required under provisions of this chapter.”⁴³ Thus, informal objections need not be entertained if Section 1.1313 is revised to require that any environmental objection must be filed as a Petition to Deny.

³⁸ 47 C.F.R. § 1.1313(a).

³⁹ See 47 U.S.C. §§ 308, 309(b).

⁴⁰ 47 U.S.C. § 153(42).

⁴¹ See *Application of American Tower Corporation for Tower Registration with Environmental Assessment*, 21 FCC Rcd 1680, 1680 ¶ 1 & n.2, 1682-83 ¶ 7 (WTB/SCPD 2006) (“*American Tower Corporation*”); *State of Ohio Department of Administrative Services, Application for Antenna Structure Registration - Deersville, OH; Petition to Deny - Forest Conservation Council and the American Bird Conservancy*, 19 FCC Rcd 18149, 18153 ¶ 16 (WTB/SCPD 2004); *Tower Registration of SCANA Communications, Inc.*, 13 FCC Rcd 23693, 23693 ¶¶ 1-2 (WTB/ECID 1998).

⁴² See Attachment A, 47 C.F.R. §§ 1.1307(c) (proposed), 1.1313(a) (proposed); see also § 17.4(c)(3) (proposed).

⁴³ 47 C.F.R. § 1.41.

Under both the statute and Section 1.939, a petitioner must set forth specific allegations of fact sufficient to make a *prima facie* case that grant of the application would not be in the public interest.⁴⁴ Such allegations must be supported by affidavit of a person with personal knowledge of the facts alleged.⁴⁵ The Commission has previously applied the evidentiary standards in Section 1.939(d) to objections filed against ASR applications,⁴⁶ and has made clear that the Petition to Deny reference in Section 1.1313 incorporates the mirror Section 309(d) standard.⁴⁷ Thus, the requested rule changes simply codify in the Commission's rules the established practice of the Agency. Application of these basic and longstanding requirements to objections filed against ASR applications is a critical component of any notice and comment process for ASR applications. Without these measures, the FCC would be severely hampered in its efforts to ensure that its resources were being expended considering bona fide objections rather than frivolous objections designed to delay or block infrastructure deployment.

For similar reasons, the Commission should also clarify that objections not meeting these requirements will be treated as informal objections subject to dismissal.⁴⁸ Such clarification is needed to ensure that informal objections are not used as a backdoor attempt to avoid and abuse

⁴⁴ 47 U.S.C. § 309(d); 47 C.F.R. § 1.939(d).

⁴⁵ 47 U.S.C. § 309(d); 47 C.F.R. § 1.939(d).

⁴⁶ See *American Tower Corporation*, 21 FCC Rcd at 1680 ¶ 1 & n.2, 1682-83 ¶¶ 7-8, 1685 ¶ 15 (stating, in the context of a challenge against an ASR application, that “[p]etitions to deny an application must comply with the procedural requirements in Section 1.939 of the Commission’s rules”).

⁴⁷ See *Missouri RSA No. 7 Limited Partnership dba Mid-Missouri Cellular*, 13 FCC Rcd 15390, 15396-97 ¶ 12 (WTB/CWD 1998) (“Section 1.1313 of the Commission’s NEPA rules states that ‘objections based on environmental considerations shall be filed as petitions to deny.’ Under section 309(d) of the Communications Act . . . , a party filing a petition to deny an application must make specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.”).

⁴⁸ See Attachment A, 47 C.F.R. §§ 1.1313(b) (proposed); 47 C.F.R. § 17.4(c)(3)(i) (proposed).

the Petition to Deny process.⁴⁹ It is well established that Commission consideration of informal objections, if at all, is purely discretionary,⁵⁰ and that an informal objection is not accorded status equivalent to an objection.⁵¹ Were this not the case, the purpose of the Petition to Deny rules easily could be evaded and the Commission's processes abused. Thus, consistent with precedent, objectors should be on clear notice that their objections are subject to dismissal without further consideration if they fail to meet the Petition to Deny requirements applicable to objections filed against any application, including an application for antenna structure registration.

III. THE PROPOSED RULES PROMOTE CRITICAL INFRASTRUCTURE DEPLOYMENT AND MEANINGFUL PUBLIC PARTICIPATION

It is critical that any rule changes that provide opportunities for public participation also ensure that ASR applications are processed in a rapid and predictable manner so that wireless

⁴⁹ See *County of Albemarle Informal Objections Against Application for Wireless Radio Station Authorization (FCC Form 601) with Environmental Assessment*, File No. 0000986878, *Memorandum Opinion and Order*, 18 FCC Rcd 10647, 10649 ¶ 8 (WTB/CWD 2003) (“Petitions to deny filed against an application placed on public notice as accepted for filing must be filed . . . in accordance with Sec. 1.939 of the Commission’s rules. It is important for the orderly processing of applications and petitions that parties adhere to the Commission’s pleading practices outlined in Part I of the Commission’s rules. Therefore, we dismiss the [filers’] objections for failure to file their pleadings as petitions to deny in accordance with the Commission’s rules.”).

⁵⁰ See, e.g., *National Ready Mixed Concrete Co.*, 21 FCC Rcd 5151, 5152 n.7 (WTB/PSCID 2006) (“[R]eview of informal objections and responsive pleadings is discretionary with the Commission.”); *Automobile Club of Southern California*, 16 FCC Rcd 2934, 2936 ¶ 6 (WTB/PSPWD (2001) (“[W]e may consider informal pleadings, though we are not required to consider them.”); *Colorado RSA 7B(2) Limited Partnership*, 13 FCC Rcd 22079, 22081 n.17 (WTB/CWD 1998) (same).

⁵¹ See, e.g., *Knox Broadcasting, Inc.*, 12 FCC Rcd 3337, 3338 ¶ 3 (1997) (“The filing of a petition to deny establishes a filer’s ‘party’ status, provided that the filing satisfies the statutory requirements. . . . [H]ad [the filer] filed comments . . . , this action would not permit us to treat [filer] as a ‘party to the proceeding’”); *Dick Broadcasting Company*, 8 FCC Rcd 3897, 3897 (1993) (finding that an informal objector does not have “party” status to seek reconsideration).

and broadcast communications networks can continue to be deployed across the country.⁵² This result is compelled by the Telecommunications Act of 1996, which directs the FCC to take steps to encourage the deployment of advanced telecommunications capability by minimizing barriers to infrastructure investment.⁵³ Moreover, the Commission has recognized the critical role infrastructure plays in many areas, including facilitating the buildout of 700 MHz services, which have the most aggressive buildout requirements in history,⁵⁴ supporting the widespread

⁵² For example, while a Petition to Deny establishes party status for purposes of seeking reconsideration of agency action, filing an informal objection does not. *See, e.g., Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073, 1227 (2004) (“2004 NPA”) (any FCC environmental action plan must “promote the timely deployment of necessary communications infrastructure while, at the same time, improving the Commission’s ability to protect valuable . . . environmental resources”) (Joint Statement of Chairman Michael K. Powell and Commissioner Jonathan S. Adelstein).

⁵³ Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (directing the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . regulating methods that remove barriers to infrastructure investment”) (reproduced in the notes under 47 U.S.C. § 157); *see also Remarks of Jonathan S. Adelstein, Commissioner, Federal Communications Commission; PCIA - Wireless Infrastructure Show, Orlando, FL, 2007* FCC LEXIS 7144, *2 (Oct. 2, 2007) (“I see it as our role to promote the expansion of communications infrastructure. The construction of communications towers and other improvements will drive the rapid deployment so many people want.”).

⁵⁴ *See, e.g., Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd 15289, 15348 (2007) (acknowledging that notwithstanding the excellent propagation characteristics of 700 MHz spectrum, “towers will be needed to serve a given license area” in order to meet the stringent buildout requirements for 700 MHz spectrum); *id.* at 15351 ¶ 164 (“[W]e are mindful of the significant capital investment and logistical challenges associated with building a regional or nationwide system without an existing infrastructure.”); *see also Written Statement Of The Honorable Kevin J. Martin, Chairman, Federal Communications Commission; Before the Committee on Energy and Commerce, U.S. House of Representatives*, 2008 FCC LEXIS 3348, *9 (Apr. 15, 2008) (“To help ensure that rural and underserved areas of the country benefit from the new services that this spectrum will facilitate, the Commission adopted the most aggressive build-out requirements ever applied to wireless spectrum.”).

deployment of broadband services, including to rural and underserved areas;⁵⁵ serving as the backbone of the transition to digital television;⁵⁶ and underpinning critical public safety and homeland security services.⁵⁷ Thus, the adoption of prior notice rules must minimize any delay to communications infrastructure deployment in order not to frustrate these important FCC policies.⁵⁸

The proposed rules promote both goals, without disrupting, and indeed helping to enhance, the nation's economy and competitiveness, public safety and ability to receive

⁵⁵ See, e.g., *Connected On the Go Broadband Goes Wireless; Overview of the Wireless Broadband Access Task Force Report*, 2005 FCC LEXIS 1087, *16-17 (2005) (“Sufficient infrastructure, particularly antennas and towers, is critical to ensuring the degree of reliability, higher speeds, and lower latency that are required to provide high-quality broadband services.”); *Written Statement Of The Honorable Kevin J. Martin, Chairman, Federal Communications Commission; Before the Committee on Energy and Commerce, U.S. House of Representatives*, 2007 FCC LEXIS 5523, *17 (July 24, 2007) (“The government must set the right rules and policies in place to encourage the deployment of the next generation of infrastructure and the introduction and [sic] new and innovative services over this infrastructure.”).

⁵⁶ See, e.g., *Remarks of Jonathan S. Adelstein, Commissioner, Federal Communications Commission; PCIA - Wireless Infrastructure Show, Orlando, FL*, 2007 FCC LEXIS 7144 (Oct. 2, 2007) (“Towers will . . . form the backbone of the transition to digital television . . .”).

⁵⁷ See, e.g., *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd 15289, 15569 (2007) (“[O]ur wireless infrastructure, including commercial wireless infrastructure, plays an important role in supporting public safety and homeland security.”) (statement of Commissioner Deborah Taylor Tate); *Remarks of Jonathan S. Adelstein, Commissioner, Federal Communications Commission; PCIA - Wireless Infrastructure Show, Orlando, FL*, 2007 FCC LEXIS 7144, *2 (Oct. 2, 2007) (“Towers . . . are used around the clock by public safety and are a critical component of our nation's homeland security efforts.”); *2004 NPA*, 20 FCC Rcd at 1227 (“The construction of communications towers and other infrastructure improvements is essential . . . for public safety and homeland security.”) (Joint Statement of Chairman Michael K. Powell and Commissioner Jonathan S. Adelstein).

⁵⁸ It would be inequitable for the Commission to create stringent buildout requirements that, if not met, could result in the loss of a license, and then subsequently design a procedure that interjected such delay into the siting process that it became impossible for licensees to meet the buildout requirements. See, e.g., *Written Statement of The Honorable Kevin J. Martin, Chairman, Federal Communications Commission; Before the Committee on Commerce, Science & Transportation, U.S. Senate*, 2007 FCC LEXIS 9317, *17-18 (Dec. 13, 2007) (In order to help spur broadband deployment, it is important to minimize or “remove[] regulatory obstacles that discourage[] infrastructure investment and slow[] deployment.”).

emergency information. On the one hand, they provide for meaningful public involvement in the ASR application process – the concern at the fore of the D.C. Circuit’s remand on the notice issue. On the other hand, they include predictable processing timeframes and clear standards for filing environmental objections to ASR applications, thereby minimizing any delay in the deployment of communications infrastructure. Accordingly, the proposed rule changes serve the public interest and should be adopted.⁵⁹

⁵⁹ See, e.g., *Remarks of Jonathan S. Adelstein, Commissioner, Federal Communications Commission; PCIA - Wireless Infrastructure Show, Orlando, FL, 2007* FCC LEXIS 7144, *2-3 (Oct. 2, 2007) (A “streamlined and tailored . . . review process for communications towers and other Commission-licensed facilities” is “a good way to manage our communications infrastructure – in a manner that best preserves our nation’s environmental . . . resources while still facilitating deployment.”).

CONCLUSION

For the foregoing reasons, the FCC should commence an expedited proceeding to implement the notice portion of the Remand Order by issuing a *Notice of Proposed Rulemaking* that makes the tentative conclusions recommended herein and in Attachment A.

The foregoing is verified to be true and correct based upon information and belief.

Respectfully submitted,

/s/ Andrea D. Williams
Michael F. Altschul
Andrea D. Williams
Christopher Guttman-McCabe
Marlo A. Go
CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, DC 20036
(202) 785-0081

/s/ Patrick Howey
Patrick Howey
NATIONAL ASSOCIATION OF
TOWER ERECTORS
8 Second Street, SE
Watertown, SD 57201
(888) 882-5865

/s/ Jim Goldwater
Jim Goldwater
BOB LAWRENCE & ASSOCIATES, INC.
345 South Patrick Street
Alexandria, VA 22314
(703) 836-3654
*Representative for National Association
of Tower Erectors*

/s/ Ann West Bobeck
Marsha J. MacBride
Jane E. Mago
Ann West Bobeck
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

/s/ Jacqueline McCarthy
Michael Fitch
Connie Durcsak
Jacqueline McCarthy
PCIA – THE WIRELESS INFRASTRUCTURE
ASSOCIATION
901 N. Washington Street, Suite 600
Alexandria, VA 22314
(800) 759-0300

May 2, 2008

APPENDIX A

Proposed Rule Changes

§ 1.61 Procedures for handling applications requiring special aeronautical study.

* * * * *

(a) Antenna Structure Registration is conducted by the Wireless Telecommunications Bureau as follows:

(1) Each antenna structure owner that must notify the FAA of proposed construction using FAA Form 7460-1 shall, upon proposing new or modified construction, register that antenna structure with the Wireless Telecommunications Bureau using FCC Form 854.

(2) **The FCC Form 854 shall be processed in accordance with the procedures in §17.4(c).** If an Environmental Assessment is **submitted or is determined by the Bureau to be** required under §1.1307, the Bureau will address the environmental concerns prior to processing the registration.

(3) If a-final FAA determination of "no hazard" **data** is not submitted along with FCC Form 854, processing of the registration may be delayed or disapproved.

* * * * *

(5) Upon **grant** receipt of FCC Form 854, ~~and attached final FAA determination of "no hazard,"~~ the Bureau prescribes antenna structure painting and/or lighting specifications or other conditions in accordance with the FAA airspace recommendation and returns a completed Antenna Structure Registration (FCC Form 854R) to the registrant. If the proposed structure is disapproved the registrant is so advised.

* * * * *

§ 1.1307(c) Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(c) If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition **to deny** setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (See §1.1313.) The Bureau shall review the petition and consider the environmental concerns that have been raised. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA (see §§1.1308 and 1.1311), which will serve as the basis for the determination to proceed with or terminate environmental processing.

* * * * *

§ 1.1313 Objections.

(a) In the case of an application to which Section 309(b) of the Communications Act applies, or an application for Antenna Structure Registration filed on FCC Form 854, objections based on environmental considerations shall be filed as petitions to deny. Any such petition to deny shall be filed in accordance with Section 309(d) of the Communications Act, and must comply with the provisions of §1.939(d) as well as the general requirements concerning pleadings and other papers (see §§1.45 through 1.52).

(1) Petitions filed against a pending FCC Form 854, and any responsive pleadings, also must comply with the procedures in §17.4(c).

(2) Petitions filed against a pending service-specific application, and any responsive pleadings, also must comply with the rules applicable to that service.

(3) In any case where an action requires both an application for Antenna Structure Registration filed on FCC Form 854 and a service-specific application, petitions to deny based on environmental considerations will only be permitted against the first application for which public notice is provided. Petitions to deny based on environmental considerations filed against any subsequent application(s) for which public notice is provided for the same action will be dismissed as untimely.

(b) Any objection not meeting the requirements of paragraph (a) of this section will be treated as an informal objection and may be dismissed without further consideration. ~~Informal objections which are based on environmental considerations must be filed prior to grant of the construction permit, or prior to authorization for facilities that do not require construction permits, or pursuant to the applicable rules governing services subject to lotteries.~~

§ 17.4 Antenna structure registration.

* * * * *

(c) If an Environmental Assessment is required under §1.1307 of this chapter, the Bureau will address the environmental concerns prior to processing the registration. Processing of FCC Form 854 applications. Applications for Antenna Structure Registration will be processed pursuant to the general approval procedures set forth in paragraph (c)(1) of this section unless they are submitted and qualify for the immediate approval procedures set forth in paragraph (c)(2) of this section:

(1) General approval procedures. Applications on Form 854 to register a new antenna structure, or to increase the overall height or change the lighting and/or marking of an existing registered antenna structure, will be processed pursuant to these general approval procedures.

(i) To be accepted for filing, the application must be sufficiently complete and contain all necessary information and certifications requested on the applicable form, FCC Form 854.

(ii) An application that is acceptable for filing will be placed on public notice within one week of filing.

(iii) Objections to the application filed on environmental (see §1.1307(c)) or other grounds must be filed as petitions to deny in accordance with Section 309(d) of the Communications Act and must comply with the provisions of §1.939, except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing and must be filed manually with the Office of the Secretary until electronic filing via the Antenna Structure Registration System is available.

(A) Any objection not meeting these requirements will be treated as an informal objection and may be dismissed without further consideration.

(B) Oppositions to petitions to deny and replies may be filed and must comply with the provisions of §1.939(c), (f) and §1.45.

(C) The petition and any responsive pleadings shall comply with the requirements set forth in §§1.45 through 1.52 of this chapter.

(D) In any case where an action requires both an application for Antenna Structure Registration filed on FCC Form 854 and a service-specific application, petitions to deny on environmental grounds will only be permitted against the first application for which public notice is provided. Petitions to deny on environmental grounds filed against any subsequent application(s) for which public notice is provided for the same action will be dismissed as untimely. Petitions to deny on non-environmental grounds that pertain to the antenna structure must be filed against the FCC Form 854. Petitions to deny on non-

environmental grounds that relate to the proposed service must be filed against the service-specific application.

(iv) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Bureau will issue a public notice (A) affirmatively consenting to the application and issuing a registration number, (B) denying the application or (C) stating that the application has been offlined for an additional 30 days for further review, if any petitions to deny were filed or if an environmental assessment (“EA”) was filed.

(v) No later than 30 days following the issuance of any public notice pursuant to paragraph (c)(1)(iv) determining that the application will be offlined for further review, and 51 days from the date of the public notice listing an application as accepted for filing, the Bureau will issue a public notice announcing action upon the application (including a registration number, if the application is granted) or indicating that a final 30-day period for review is needed.

(A) If, in response to a petition to deny alleging that a particular action will have a significant environmental effect, and any responsive pleadings, the Bureau determines that the action may have a significant environmental effect and that an EA is required (see §1.1307(c)), the action by the Bureau upon the application will be to direct the applicant, by public notice issued on Day 51, to amend its application by filing an EA within 30 days. The amended Form 854 will then be processed pursuant to the procedures in paragraph (c)(1) of this section.

(B) If, in response to any petition to deny, the Bureau determines to grant the application and deny the petition(s), the Bureau will announce the action and issue a registration number by public notice issued on Day 51. That public notice will indicate that the grant is effective immediately, include a concise statement of the reason(s) for denial of all substantive issues raised in the petition(s) and, if needed, indicate that the full text of an order will be released subsequently.

(C) If, in response to any petition to deny, the Bureau determines to deny the application and grant the petition(s), the Bureau will announce the action by public notice issued on Day 51. That public notice will include a concise statement of the reason(s) for denial of the application and, if needed, indicate that the full text of an order will be released subsequently.

(vi) No later than 30 days following the issuance of any public notice pursuant to paragraph (c)(1)(v) determining that the application will be offlined for a second, final 30-day review period, and 81 days from the date of the public notice listing an application as accepted for filing, the Bureau will issue a public notice announcing action upon the application (including a registration number, if the application is granted).

(A) If, in response to a petition to deny alleging that a particular action will have a significant environmental effect, and any responsive pleadings, the Bureau determines that the action may have a significant environmental effect and that an EA is required (see

§1.1307(c)), the action by the Bureau upon the application will be to direct the applicant, by public notice issued on Day 81, to amend its application by filing an EA within 30 days. The amended Form 854 will then be processed pursuant to the procedures in paragraph (c)(1) of this section.

(B) If, in response to any petition to deny, the Bureau determines to grant the application and deny the petition(s), the Bureau will announce the action and issue a registration number by public notice issued on Day 81. That public notice will indicate that the grant is effective immediately, include a concise statement of the reason(s) for denial of all substantive issues raised in the petition(s) and, if needed, indicate that the full text of an order will be released subsequently.

(C) If, in response to any petition to deny, the Bureau determines to deny the application and grant the petition(s), the Bureau will announce the action by public notice issued on Day 81. That public notice will include a concise statement of the reason(s) for denial of the application and, if needed, indicate that the full text of an order will be released subsequently.

(vii) Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(2) Immediate approval procedures. Applications on Form 854 for any action other than those specifically listed in paragraph (j)(1) of this section will be processed pursuant to these immediate approval procedures. Such actions include, but are not limited to, administrative updates, ownership changes, notification of structure dismantlement, cancellation of an existing registration, withdrawal of an application and notification of completion of a previously-approved registered structure.

(i) To qualify for immediate approval procedures, the application must be sufficiently complete and contain all necessary information and certifications requested on the applicable form, FCC Form 854, including a certification that the applicant qualifies for these immediate approval procedures.

(ii) Provided the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent and the issuance of a registration number will be reflected in the FCC's Antenna Structure Registration System on the next business day following the filing of the application. Consent to the application is not deemed granted until the Bureau affirmatively acts on the application, as reflected in the FCC's Antenna Structure Registration System.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice promptly issued after grant, and is subject to reconsideration (see §§ 1.106(f), 1.108, 1.113).

* * * * *

(f) **Following the grant of the Form 854,** ~~t~~The Commission shall issue, to the registrant, FCC Form 854R, Antenna Structure Registration, which assigns a unique Antenna Structure Registration Number. The structure owner shall immediately provide a copy of Form 854R to each tenant licensee and permittee.

* * * * *

CERTIFICATE OF SERVICE

I, Craig E. Gilmore, hereby certify that on this 2nd day of May, 2008, copies of the foregoing "Petition for Expedited Rulemaking" were served by first class mail upon the following:


George Fenwick
American Bird Conservancy
P. O. Box 249
4249 Loudoun Avenue
The Plains, VA 20198-0249

John Talberth
Center for Sustainable Economy
(formerly Forest Conservation Council)
1704-B Llano Street, Suite 194
Santa Fe, NM 87505

Brian Dunkiel
Shems Dunkiel Kassel & Saunders PLLC
91 College Street
Burlington, VT 05401

Jennifer Chavez
Stephen Roady
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036-2212

Robert M. Gurs
APCO International
1725 DeSales Street, NW
Suite 808
Washington, DC 20036



Craig E. Gilmore