
Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Amendment of Part 1 of the Commission's) WT Docket No. 08-61
Rules Regarding Environmental Compliance) WT Docket No. 03-187
Procedures for Processing Antenna Structure)
Registration Applications)
)
)
)

To: The Commission

**COMMENTS OF THE INFRASTRUCTURE COALITION ON PETITION FOR
EXPEDITED RULEMAKING AND OTHER RELIEF**

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SUMMARY

CTIA - The Wireless Association®, the National Association of Broadcasters, the National Association of Tower Erectors and PCIA - The Wireless Infrastructure Association (collectively, the “Infrastructure Coalition”) respectfully submit their comments on the “Petition for Expedited Rulemaking and Other Relief” filed on April 14, 2009 (“*Petition for Expedited Relief*”), by the American Bird Conservancy, Defenders of Wildlife and National Audubon Society (collectively, the “Petitioners”).

Petitioners request that the Commission adopt new rules on an expedited basis, which they assert are necessary to carry out the mandate of the U.S. Court of Appeals for the District of Columbia Circuit (“Court” or “D.C. Circuit”) in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (“*Remand Order*”) and to comply with the National Environmental Policy Act (“NEPA”), the Endangered Species Act (“ESA”) and the Migratory Bird Treaty Act (“MBTA”). The Infrastructure Coalition opposes the manner in which the Petitioners propose to implement public notice for ASRs, as well as their following additional proposals:

- Amend the Commission’s regulations that implement NEPA, “consistent with Council on Environmental Quality [“CEQ”] regulations and guidance,” to “cure deficiencies” and to ensure that only Commission actions that have no significant environmental effects individually or cumulatively are categorically excluded;
- Prepare a programmatic environmental impact statement addressing the environmental consequences of its ASR program on migratory birds, their habitats and the environment;
- Promulgate rules to clarify the roles, responsibilities and obligations of the Commission, applicants, and non-federal representatives in complying with the ESA; and
- Consult with the U.S. Fish and Wildlife Service on the Antenna Structure Registration (“ASR”) program regarding all effects of towers and antenna structures on endangered and threatened species.

Petitioners’ sweeping proposals far exceed what the Court’s mandate requires of the FCC and its finite resources. As discussed in detail below, the FCC should focus first on carrying out the mandates enunciated by the Court in the *Remand Order*. In particular, the FCC should adopt

the local notice procedures set forth herein for ASR applications to ensure that interested parties have a meaningful opportunity to participate in the ASR process. In adopting any public notice procedures, however, the Commission must ensure that ASR applications are processed in a rapid and predictable manner so that wireless and broadcast communications facilities can continue to be deployed across the country in furtherance of important FCC policies to facilitate the widespread deployment of broadband, broadcast, and critical public safety and homeland security services.

Second, in accordance with the Court remand the Commission should initiate the preparation of a Gulf Coast region Environmental Assessment. Third, the Commission should continue its work in the WT Docket No. 03-187 rulemaking proceeding to address nationwide migratory bird issues based on good science, including peer-reviewed studies, rather than on anecdotal “evidence.”

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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 their comments on the “Petition for Expedited Rulemaking and Other Relief” filed in the above-referenced dockets on April 14, 2009 (“*Petition for Expedited Relief*”), by the American Bird Conservancy, Defenders of Wildlife and National Audubon Society (collectively, the “Petitioners”). Infrastructure Coalition members construct, modify, own, operate, lease and manage tens of thousands of communications towers, which provide invaluable wireless and broadcasting services to the public nationwide while enhancing the nation’s economic competitiveness and security.¹ As such, their interests are directly affected by the rules proposed by Petitioners to govern the processing of tower applications.

¹ 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
(continued on next page)

I. INTRODUCTION

Petitioners request that the Commission adopt new rules on an expedited basis, which they assert are necessary to carry out the mandate of the U.S. Court of Appeals for the District of Columbia Circuit (“Court” or “D.C. Circuit”) in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (“*Remand Order*”) and to comply with the National Environmental Policy Act (“NEPA”), the Endangered Species Act (“ESA”) and the Migratory Bird Treaty Act (“MBTA”). Petitioners’ sweeping proposals, however, far exceed what the Court’s mandate requires of the FCC. As discussed below, the FCC should focus first on carrying out the mandates enunciated by the Court in the *Remand Order*. In particular, the FCC should adopt the local notice procedures set forth herein for Antenna Structure Registration (“ASR”) applications to ensure that interested parties have a meaningful opportunity to participate in the ASR process. However, as the Commission summarized in its April 29, 2009 *Public Notice* soliciting comments, Petitioners request that the FCC undertake several additional actions, which we oppose, including:

- Amend the Commission’s regulations that implement NEPA, “consistent with Council on Environmental Quality [“CEQ”] regulations and guidance,” to “cure deficiencies” and to ensure that only Commission actions that have no significant environmental effects individually or cumulatively are categorically excluded;
- Prepare a programmatic environmental impact statement (“PEIS”) addressing the environmental consequences of its ASR program on migratory birds, their habitats and the environment;

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 being reviewed by the D.C. Circuit.

- Promulgate rules to clarify the roles, responsibilities and obligations of the Commission, applicants, and non-federal representatives in complying with the ESA; and
- Consult with the U.S. Fish and Wildlife Service (“FWS”) on the ASR program regarding all effects of towers and antenna structures on endangered and threatened species.

It is noteworthy that Petitioners do not cite to any peer-reviewed national studies to support their claims of the number of birds killed at communications towers. The lack of valid empirical data to support the various claims is illustrated by Petitioners’ citation to the FWS’s “estimate” that some four to five million birds are killed at communications towers each year and “that the correct number could be ten times that size.”² These and other numbers bandied about by the Petitioners are not supported by field reports by tower owners or peer-reviewed studies and cannot be accepted by the Commission without rigorous scrutiny.³

Moreover, given its limited resources, the FCC should prioritize its tasks and focus first on the issues subject to the Court’s remand. First, the Commission should adopt an ASR public notice procedure that affords the public a meaningful opportunity to participate by providing local public notice. In adopting any public notice procedures, however, the Commission must ensure that ASR applications are processed in a rapid and predictable manner so that wireless and broadcast communications facilities can continue to be deployed across the country in furtherance of important FCC policies to facilitate the widespread deployment of broadband, broadcast, and critical public safety and homeland security services. Second, in accordance with the Court remand the Commission should initiate the preparation of a Gulf Coast region Environmental Assessment. Third, the Commission should continue its work in the WT Docket

² *Petition for Expedited Relief* at 4.

³ See, e.g., *Comments of Steven Herbert, Chief Engineer of KCRW, KCRI, KCRV and KCRY*, WT Docket Nos. 08-61 and 03-187 (filed May 1, 2009).

No. 03-187 rulemaking proceeding to address nationwide migratory bird issues based on good science, including peer-reviewed studies, rather than defaulting to anecdotal “evidence.”

II. GIVEN ITS LIMITED RESOURCES, THE FCC SHOULD FOCUS FIRST ON THE ISSUES ACTUALLY REMANDED BY THE COURT

In their 53-page *Petition for Expedited Relief*, Petitioners set out a sweeping agenda, including newly-proposed NEPA implementation rules, that far exceeds what the Court’s mandate requires of the FCC. The FCC, however, is an agency with limited resources and as a result cannot address all of the Petitioners’ requests both on an expedited basis and in a thoughtful manner. Fortunately, the Court’s remand does not require the FCC to conduct all of these efforts, and what is required can be accomplished by the FCC if it prioritizes the tasks actually before it. The Commission took an important first step when it initiated WT Docket No. 08-61 on May 1, 2008 “in response to the decision of the Court of Appeals for the District of Columbia Circuit in [the Remand Order].”⁴ Responding to the Court’s remand must be the Commission’s primary focus.

A. BACKGROUND OF THE *REMAND ORDER*

The proceedings leading to the *Remand Order* began in 2002, when 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 PEIS under NEPA analyzing the effects of the FCC’s registration of antenna structures on migratory birds in the Gulf Coast region; (3) consult with FWS pursuant to the ESA regarding the impact of Gulf Coast towers on threatened and endangered migratory

⁴ *FCC Public Notice: Opening of Docket in Response to American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008), DA 08-1040 (rel. May 1, 2008).

birds; (4) take steps under the 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.⁵

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.”⁶ 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 (“Avatar”), to review the record.

Avatar issued its report in 2004,⁷ finding that there is no evidence of “mortality that is of sufficient magnitude and importance that it causes the viability of a particular population or species to be affected”⁸ and that “[t]here are no studies to date that demonstrate an unambiguous relationship between avian collisions with communications towers and population decline of migratory bird species.”⁹ The FCC solicited further comments that were filed in 2005.¹⁰ While

⁵ *American Bird Conservancy et al., Petition for National Environmental Policy Act Compliance* (filed 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 currently 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), however, 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....”

⁶ *Effects of Towers on Migratory Birds, Notice of Inquiry*, 18 FCC Rcd 16938, 16938 ¶ 1 (2003) (“*Migratory Bird NOI*”).

⁷ See Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission by Avatar Environmental, LLC, *et al.*, WT Docket No. 03-187 September 30, 2004 (filed Dec. 10, 2004) (“Avatar Report”).

⁸ Avatar Report at § 3.5.4.

⁹ *Id.* at § 5.1.

the Commission was deciding whether to proceed with a full rulemaking, it issued an order in 2006 addressing the Avian Groups' Gulf Coast Petition.¹¹ 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*.¹² The Avian Groups then appealed to the D.C. Circuit.

The Court affirmed the *Gulf Coast Order* 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 public notice portions of the *Gulf Coast Order*.¹⁴

First, 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 completion of an EA before the Commission may refuse to prepare a programmatic EIS."¹⁶ Second, on the ESA issue, the Court directed the FCC to better explain "what kind of

¹⁰ *Public Notice*, "Wireless Telecommunications Bureau Seeks Comment on Avatar Environmental, LLC Report Regarding Migratory Bird Collisions with Communications Towers," 19 FCC Rcd 24007 (WTB 2004).

¹¹ *Petition for National Environmental Policy Act Compliance, Memorandum Opinion and Order*, 21 FCC Rcd 4462 (2006) ("*Gulf Coast Order*").

¹² *See Gulf Coast Order*, 21 FCC Rcd at 4464-69 ¶¶ 5-20.

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, Notice of Proposed Rulemaking*, 21 FCC Rcd 13241, 13256 ¶ 32 (2006) ("*Migratory Bird NPRM*").

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

¹⁵ *Id.*, 516 F.3d at 1033.

¹⁶ *See id.*, 516 F.3d 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
(continued on next page)

showing . . . could demonstrate sufficient environmental effects to justify the ‘programmatic consultation’ [between the FCC and FWS] that Petitioners seek.”¹⁷ Third, the *Remand Order* 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

B. ADDRESSING THE PETITIONERS’ SWEEPING REQUESTS FOR RELIEF WOULD SLOW THE COMMISSION’S RESPONSES TO THE COURT’S REMAND

The Petitioners expend significant effort arguing that the Commission should totally revamp its NEPA regulations.²¹ Before commencing such a massive undertaking, however, the Commission must recognize that the Court’s *Remand Order* does not require it to do so. In fact, following Petitioners’ requested path would actually delay Commission action on the important issues the Court’s remand requires the Commission to consider.²²

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.*, 516 F.3d at 1035 (citing 47 C.F.R. § 1.1307(c)).

¹⁹ *Id.*, 516 F.3d at 1035 (emphasis in original).

²⁰ *Id.*

²¹ *See Petition for Expedited Relief* at 11-32.

²² The degree of delay the FCC would encounter to address the Petitioners’ laundry list of suggestions is hinted at by the fact that it took the Petitioners nearly a year to prepare and file their *Petition for Expedited Relief* despite their promise in May 2008 to file the petition “shortly.” Comments of American Bird Conservancy, Defenders of Wildlife, and National Audubon Society, WT Docket No. 08-61 at 3 (May 27, 2008) (“we will be filing our own petition for expedited rulemaking shortly that will address (continued on next page)

A careful examination of the *Remand Order* reveals the disparity between what the Court required and what the Petitioners propose. First, the Court does not require the Commission to undertake a nationwide PEIS. To the contrary, while the Court found “there is no real dispute that towers ‘may’ have a significant environmental impact” on migratory birds in the Gulf Coast region,²³ the court also found that the FCC rules do not require a programmatic EIS for the Gulf Coast region. Rather, the Court expressly ruled that “[p]ursuant to its own regulations, the Commission may commence such analysis” of whether a programmatic EIS is necessary “through the preparation of an EA.”²⁴ As discussed in Section IV(B) below in greater detail, the Commission should follow the Court’s instructions to prepare an EA for the Gulf Coast region before starting down a long, arduous path toward a nationwide PEIS that may well prove to be unnecessary. Indeed, the Court noted that the EA could lead to a Finding of No Significant Impact (“FONSI”) and thus obviate the need to conduct an EIS.²⁵

Second, the Court did not require the establishment of an open-ended, complex consultation process with the FWS. With respect to individual towers, the FCC in the *Gulf Coast Order* analyzed its process of delegating to applicants the decision of when to consult with FWS concerning whether an *individual* tower “may affect” listed species,²⁶ and found that “Petitioners

considerations beyond those raised by the narrow petition filed by the Infrastructure Coalition [on the public notice issues remanded by the Court]”).

²³ *Remand Order*, 516 F.3d at 1033-34; *see also id.* at 1029 (generally vacating and remanding the *Gulf Coast Order*, which denied in part and dismissed in part the Gulf Coast Petition “seeking protection of migratory birds from collisions with communications towers in *the Gulf Coast region*”) (emphasis added); *id.* at 1031 (describing among the issues before the Court the Avian Groups’ contention that “NEPA . . . require[s] changes to the Commission’s rules and procedures regarding communications towers in *the Gulf Coast region*”) (emphasis added). As the Infrastructure Coalition demonstrated in the pending nationwide migratory bird proceeding, there is insufficient broad-based, peer-reviewed evidence for the FCC to conclude that any avian-tower impacts significantly affect the human environment. *See* Comments of the Infrastructure Coalition, WT Docket 03-187 (filed Apr. 23, 2007).

²⁴ *Remand Order*, 516 F.3d at 1034.

²⁵ *See id.*, 516 F.3d at 1034.

²⁶ *See Gulf Coast Order*, 21 FCC Rcd at 4467-68 ¶ 13.

have not demonstrated that the owners of any of the communications towers that it identifies have failed to participate in informal consultation with the USFWS as authorized by the Commission's environmental processing procedures or that there was any basis to initiate formal Section 7 consultation with the USFWS.”²⁷ The Court did not disturb that finding. Thus, the *Remand Order* does not alter the current process for analyzing whether an *individual* tower may affect listed species, and the recommendations of the Infrastructure Coalition herein are limited to *programmatic* consultation considerations.

With respect to programmatic consultation, the court took issue with the FCC's explanation²⁸ of why it did not need, pursuant to Section 7 of the ESA, to consult with the FWS concerning the cumulative effect of Gulf Coast ASRs on threatened and endangered species.²⁹ However, the Court did not order consultation with the FWS. Instead, the Court required the Commission to provide an explanation that would “describe[] what kind of showing in the ESA context could demonstrate sufficient environmental effects to justify the ‘programmatic consultation’ that Petitioners seek.”³⁰

As the Infrastructure Coalition has previously recommended,³¹ rather than attempt to define the myriad factual circumstances under which programmatic consultation may be

²⁷ *Id.* at 4468 ¶ 13; see *Remand Order*, 516 F.3d at 1034-35.

²⁸ The Commission declined to require consultation, citing the lack of “evidence of any synergies” among towers that “would cause them cumulatively to have significant environmental impacts.” *Gulf Coast Order*, 21 FCC Rcd at 4467 ¶ 14, cited in *Remand Order*, 516 F.3d at 1034.

²⁹ According to the Court, Section 7 and its implementing regulations generally require federal agencies to ensure that their actions are “not likely to jeopardize” any threatened or endangered species, and to consult with the FWS to make this determination if a proposed action “may affect” any ESA-listed species. See *Remand Order*, 516 F.3d at 1034 (citing 16 U.S.C. §§ 1536(a)(2), 1536(a)(4); 50 C.F.R. §§ 402.10, 402.14(a)-(b)).

³⁰ *Remand Order*, 516 F.3d at 1035.

³¹ See Letter to Jeffrey S. Steinberg, Deputy Chief, Infrastructure Policy, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC, from CTIA, NAB, NATE, and PCIA, WT Docket No. 08-61 at 5 (May 9, 2008).

required, the Commission's better course is to consider, during the preparation of the programmatic EA recommended above, whether ASRs in the Gulf Coast region cumulatively may affect ESA-listed species based upon the standard in the CEQ regulations. To provide unbiased scientific analysis, the FCC should work with an independent environmental expert to inform its determination³² or, alternatively, hire a biological expert. With this expertise, the FCC will be better positioned to determine whether the "incremental impact" of "reasonably foreseeable future" ASRs in the Gulf Coast region, when added to other past and present ASRs in the region, may result in a "collectively significant action[]" regarding any particular listed species.³³ Only if the FCC makes an affirmative finding that the cumulative impact of its ASR program in the Gulf "may affect" listed birds should the agency then initiate programmatic consultation for the Gulf Coast with the FWS, pursuant to Section 7 of the ESA, to determine whether its program cumulatively is likely to jeopardize listed birds in the Gulf Coast region.³⁴

Third, the Court did not impose a timeframe for ruling on MBTA matters. The Court found that the Commission acted reasonably when it deferred consideration of the MBTA issues to the nationwide proceeding designed to obtain additional relevant information.³⁵ The Commission initiated WT Docket No. 03-187 to gather information on related issues, and it recently noted that the staff of the Federal Aviation Administration ("FAA") indicated that the

³² One option would be to utilize the services of Avatar to aid the Commission in making this determination.

³³ See 40 C.F.R. § 1.1507.

³⁴ See *Remand Order*, 516 F.3d at 1034 ("If an agency determines that an action 'may affect' endangered or threatened species or critical habitats, the agency must initiate formal consultation with the [FWS]"); see also *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005) ("The determination of possible effects is the Federal agency's responsibility.") (quoting 51 Fed. Reg. 19926, 19949 (June 3, 1986)); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) ("If the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.").

³⁵ *Remand Order*, 516 F.3d at 1032.

