

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

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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.

