
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)
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To: The Commission

REPLY COMMENTS OF THE INFRASTRUCTURE COALITION

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SUMMARY

In initial comments, numerous commenters echoed the Infrastructure Coalition's opposition to the vague and overbroad rule change proposals contained in the *Petition For Expedited Relief* submitted by the American Bird Conservancy, Defenders of Wildlife and National Audubon Society (collectively, the "Petitioners"). Although every party to this proceeding -- telecommunications service providers, public safety groups, broadcasters, tower companies, aviation safety interests and the Petitioners -- agrees that the FCC needs to respond to the mandate of the U.S. Court of Appeals for the District of Columbia Circuit ("Court") in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) ("*Remand Order*"), a substantial divide exists between what Petitioners and all other commenters believe the FCC must do and the priorities among each task.

All sectors of the economy filing initial comments opposed the *Petition For Expedited Relief* because the Petitioners' proposed rule changes far exceed the scope of the Court's mandate, are based on non-peer reviewed estimates of avian mortality, and fail to balance communications needs with environmental concerns. Indeed, the record in this proceeding reflects a broad-based concern by wireless carriers, broadcasters, fixed microwave carriers, public safety licensees, and aviation safety interests that the Petitioners' proposals would endanger: a) the ability of licensees to meet public demand and provide new services; b) the provision of public safety services on a timely and cost-effective basis; and c) aviation safety. In addition, the Petitioners' proposals threaten to bring tower siting to a grinding halt, making it difficult or impossible for 700 MHz licensees to meet the FCC's stringent, time-based, build out requirements. Similarly, adoption of Petitioners' proposed rule changes would undermine the President's and Congress' intent that the American Recovery and Reinvestment Act of 2009 ("ARRA") jump start our nation's economy by impeding an infrastructure grantee's ability to timely construct tower sites.

In contrast to the overbroad relief requested by Petitioners in their *Petition For Expedited Relief*, the Infrastructure Coalition has provided a clear path that will permit the FCC to meet the Court's mandates while continuing to meet its obligations under the Communications Act of 1934, as amended, to promote the growth of nationwide communications networks and broadcast services and the introduction of new and advanced services. The Infrastructure Coalition urges the FCC to expeditiously adopt and implement its proposal to create a local public notice procedure for Antenna Study Registrations that will provide meaningful public participation, to initiate a Gulf Coast regional Environmental Assessment, and also to take steps to fill the near vacuum of peer-reviewed data on avian mortality in WT Docket No. 03-187.

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

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”) hereby submit their reply comments on the “Petition for Expedited Rulemaking and Other Relief” filed in the above-referenced dockets (“*Petition for Expedited Relief*”), by the American Bird Conservancy, Defenders of Wildlife and National Audubon Society (collectively, the “Petitioners”).¹

I. INTRODUCTION

In our initial comments, the Infrastructure Coalition opposed the sweeping agenda proposed by Petitioners in their *Petition for Expedited Relief* because their proposals far exceed what is necessary to carry out the mandate of the U.S. Court of Appeals for the District of Columbia Circuit (“Court”) in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (“*Remand Order*”).² We discussed how the FCC should focus on the mandates in the

¹ The *Petition for Expedited Relief* was placed on public notice on April 29, 2009 (DA 09-904).

² Comments of the Infrastructure Coalition on Petition for Expedited Rulemaking and Other Relief, WT Docket Nos. 08-61 and 03-187 (filed May 29, 2009) (“Infrastructure Coalition Initial Comments”) at 2-4.

Remand Order and, given the enormity of these tasks, prioritize them as follows, so that the FCC can complete them as expeditiously as possible given their finite resources.

First, the FCC should adopt local notice procedures for Antenna Structure Registration (“ASR”) applications to ensure that interested parties have a meaningful opportunity to participate in the ASR process. Thus, the Infrastructure Coalition provided in its comments a step-by-step description of the local notice procedure along with rule changes required to implement the procedures.³ In fashioning its new ASR public notice procedures, the FCC must consider its statutory obligations to foster the growth of nationwide wireless networks and broadcast stations as well as the introduction of new services.⁴ Thus, the Commission must ensure that ASR applications are processed in a rapid and predictable manner so that wireless and broadcast communications facilities and services can continue to be deployed across the country. Second, in accordance with the *Remand Order* the Commission should initiate the preparation of a Gulf Coast region Environmental Assessment (“EA”). Third, rather than defaulting to anecdotal ‘evidence’ of avian-tower collisions, the Commission should take all steps necessary to fill the void of peer-reviewed data that exists in the WT Docket No. 03-187 rulemaking proceeding. Only then can the Commission engage in informed, rational decision making that will address key migratory bird issues.

II. THE PETITION FOR EXPEDITED RELIEF GARNERED STRONG OPPOSITION FROM MANY SECTORS OF THE ECONOMY.

The initial comments on the *Petition for Expedited Relief* generally fell into one of two camps. Submissions by Defenders of Wildlife and members of various Audubon societies support the byzantine rule changes proposed in the *Petition for Expedited Relief* without regard to the fact that the Petitioners' proposals far exceed the requirements of the mandate in the

³ *Id.* at 16-28.

⁴ *See, e.g.*, 47 U.S.C. §§ 151, 157, 307.

Remand Order. In addition, there is not any recognition by these commenters of the adverse impact the proposals would impose on the economic, public safety and societal benefits derived from communications towers that are authorized under the Commission’s rules.

Commenters representing numerous sectors of our nation’s economy staunchly opposed the *Petition for Expedited Relief*. Specifically, in addition to the Infrastructure Coalition, representatives of public safety, air navigation, rural and nationwide commercial mobile radio service (“CMRS”) providers, individual broadcasters, and the terrestrial fixed microwave communications industry, all vigorously opposed the Petitioners’ sweeping – and unnecessary – proposals. The record of both dockets is replete with criticisms of the defects of the data relied upon by the Petitioners (*e.g.*, lack of peer-reviewed studies, and insufficiency of data regarding whether, and to what extent, tower height, location and other site-specific conditions are a factor).⁵ As described below, commenters also note that adoption of the Petitioners’ proposed rules likely would bring the economic and societal benefits of new communications towers to a grinding halt.

For example, the Association of Public Safety Communications Officials-International, Inc. (“APCO”), the nation’s oldest and largest public safety communications organization, noted that “[t]imely processing of public safety applications is essential, as the proposed facilities are often intended to remedy immediate communications problems” and “[c]onstruction scheduling is also critical, especially where there are seasonal constraints.”⁶ In light of these very critical needs, APCO expressed its concern that “the procedures urged upon the Commission [by the

⁵ *See, e.g.*, Comments of Verizon Wireless, WT Docket Nos. 08-61 and 03-187 (filed May 29, 2009) (“Verizon Wireless Comments”) at 10; Comments of Maranatha Broadcasting Company, Inc., WT Docket Nos. 08-61 and 03-187 (filed May 29, 2009) (“Maranatha Comments”) at 2; Comments of AT&T Mobility LLC F/K/A Cingular Wireless LLC, WT Docket Nos. 03-187 (filed April 23, 2007) at 25; Reply Comments of American Tower Corporation, WT Docket Nos. 03-187 (filed May 23, 2007).

⁶ Comments of APCO in Response to Petition for Expedited Rulemaking and Other Relief, WT Docket Nos. 08-61 and 03-187 (filed May 29, 2009) (“APCO Comments”) at 2.

Petitioners] *would prevent or delay the deployment of radio communications systems necessary for the protection of life, health and property.*”⁷

Aviation Spectrum Resources, Inc. (“ASRI”), the company responsible for managing the spectrum of the air transport industry, was even stronger in its opposition. It stated that “Petitioners’ proposals, if implemented, ultimately *will jeopardize the lives and safety of pilots, flight crews, passengers, first responders, and numerous others.*”⁸ ASRI noted the fact that “air navigation is already suffering from a lack of tower space and a dearth of new tower construction, particularly along the Gulf of Mexico”⁹ and that Petitioners’ proposals would significantly increase the burden associated with building and modifying tower structures.¹⁰

CMRS carriers, including rural carriers represented by the National Telecommunications Cooperative Association (“NTCA”) and nationwide carrier Verizon Wireless, also filed in opposition. NTCA faults the Petitioners for basing their proposals on extrapolations on migratory bird mortality derived from incomplete studies and irreproducible results.¹¹ It is concerned that “the ongoing economic downturn is being felt by rural wireless providers, and adding regulations for existing towers and antennas, or modifications of existing towers and antennas, will increase the regulatory costs for small rural providers and their rural customers.”¹² Verizon Wireless was also highly critical of the data provided by avian groups to date, noting the absence of peer-reviewed scientific study evidence to support claims that communications

⁷ *Id.* (emphasis added).

⁸ Comments of Aviation Spectrum Resources, Inc., WT Docket Nos. 08-61 and 03-187 (filed May 29, 2009) (“ASRI Comments”), at 1 (emphasis added).

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ National Telecommunications Cooperative Association Initial Comments, WT Docket Nos. 08-61 and 03-187 (filed May 29, 2009) (“NTCA Comments”) at 8-9.

¹² *Id.* at 3.

towers adversely affect migratory bird populations.¹³ It expressed grave concern “that the expansive regulations proposed by Petitioners would seriously impede wireless facilities siting, and make it far more difficult for carriers to deploy new broadband wireless services for the benefit of the public and meet their FCC-mandated build-out requirements.”¹⁴

Individual broadcasters also opposed the Petitioners’ proposals. Maranatha Broadcasting Company, Inc. stated that “adoption of new across-the-board, one-size-fits-all rules on all broadcast licensees would – considering the isolation and infrequency with which such [avian mortality] ‘events’ occur, and the absence of any scientific consensus about the possible link between towers, the ‘events’ and the proposed remedies – impose unjustifiable costs, regulatory burdens and uncertainties on broadcast licensees.”¹⁵ Moreover, a broadcast engineer with over 30 years of experience working with numerous towers stated that he has not witnessed any evidence of large or small bird deaths, suggesting that the Petitioners’ proposals are overbroad.¹⁶

Finally, the Fixed Wireless Communications Coalition (“FWCC”) (a coalition of entities interested in terrestrial fixed microwave communications, including manufacturers, engineering firms, and licensees) was critical of the Petitioners’ proposed rules because they “would add so much cost and delay as to render even minor tower projects not feasible,” even though by Petitioners’ own data at least 96 percent of bird deaths from man-made structures result from structures other than communications towers.¹⁷ FWCC also notes that the Petitioners’ proposed

¹³ Verizon Wireless Comments at 10-11.

¹⁴ *Id.* at ii.

¹⁵ Maranatha Comments at 2.

¹⁶ Comments of Steven Herbert, Chief Engineer of KCRW, KCRI, KCRV and KCRY, WT Docket Nos. 08-61 and 03-187 (filed May 1, 2009).

¹⁷ Comments of the Fixed Wireless Communications Coalition, WT Docket Nos. 08-61 and 03-187 (filed May 29, 2009) (“FWCC Comments”) at 2-3.

rules are unworkably vague and would not provide adequate guidance to allow applicants to determine their obligations.¹⁸

III. MANY COMMENTERS AGREE THAT THE FCC MUST BALANCE COMMUNICATIONS NEEDS WITH ENVIRONMENTAL CONCERNS.

As described above, commenters from virtually every segment of the communications industry are concerned that adoption of Petitioners' proposals will cripple construction of communications towers essential to meet public demand for broadcast television and radio services, CMRS and public safety wireless services, backhaul of emergency 911 calls, carriage of long distance and Internet traffic, business communications to support the safe operation and management of critical infrastructure such as natural gas pipelines, the electric grid, and railroads, as well as for air navigation safety.

Accordingly, in responding to the *Remand Order*, including the efforts undertaken to design appropriate ASR public notice procedures, the Commission must balance its responsibilities under the Communications Act of 1934, as amended, to promote the growth of nationwide communications networks and broadcast services as well as the introduction of new and advanced services.¹⁹ As the initial comments indicate, adoption of the Petitioners' proposals may render it impossible for licensees to meet the strict build-out requirements that the Commission imposes on virtually all licenses it issues, including the especially aggressive build-out obligations placed on 700 MHz licensees.²⁰

Moreover, as Verizon Wireless and the Infrastructure Coalition point out, the Petitioners' proposed sweeping rules and requirements would undermine a key objective of the American

¹⁸ *Id.* at 7-8.

¹⁹ *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3rd Cir. 1983); *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981). Indeed, an agency is plainly permitted to balance costs and benefits when establishing regulations. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 54 (1983).

²⁰ FWCC Comments. at 6; Verizon Wireless Comments at 5-7.

Recovery and Reinvestment Act of 2009 ("ARRA"), to promote construction of new wireless broadband infrastructure and job creation,²¹ especially in the near term. Fostering achievement of ARRA's goals is essential, as President Obama has described it as the "first step in getting our economy back on track."²² The goal of the ARRA to jump-start our flagging economy through building of broadband infrastructure would be undermined if the FCC were to adopt the unwieldy tower siting process proposed by Petitioners.

IV. THE COMMENTS EXHIBIT WIDESPREAD SUPPORT FOR EXPEDITIOUSLY IMPLEMENTING A PUBLIC NOTICE PROCEDURE FOR ASR APPLICATIONS.

The initial comments exhibit broad support among various industry sectors for an ASR public notice process that would afford interested parties a meaningful opportunity to review and comment on proposed antenna structures without injecting undue delay and uncertainty into the tower siting process. The Infrastructure Coalition proposed an ASR public notice process in its Petition for Expedited Rulemaking filed last year²³ whose core tenets were widely supported by commenting parties representing service providers from nearly all sectors, including the public safety community.²⁴ Several of the comments filed last month in response to the Avian Groups' *Petition for Expedited Relief* reveal that there continues to be broad support for a public notice process such as that proposed by the Infrastructure Coalition, which fairly and effectively balances the need for public comment with the need for an efficient tower siting process. Those

²¹ Verizon Wireless Comments at 7-8, citing American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009); Infrastructure Coalition Initial Comments at 14.

²² *Remarks of President Barack Obama, Address to Joint Session of Congress* (Feb. 24, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/.

²³ Petition for Expedited Rulemaking filed by CTIA – The Wireless Association, National Association of Broadcasters, National Association of Tower Erectors, and PCIA – The Wireless Infrastructure Association, WT Docket No. 08-61 (filed May 2, 2008).

²⁴ See Comments of APCO, WT Docket No. 08-61 (filed May 9, 2008); Comments of Crown Castle USA Inc., WT Docket No. 08-61 (filed May 27, 2008); Comments of American Tower Corporation, WT Docket No. 08-61 (filed May 27, 2008).

commenters range from nationwide wireless service providers to small rural carriers, public safety organizations and tower construction and maintenance companies.²⁵

In its May 29, 2009 comments filed in response to the *Petition for Expedited Relief*, the Infrastructure Coalition further refined (and simplified) its public notice process while retaining those elements of its original proposal that received such broad support in 2008. The Infrastructure Coalition's proposal still provides the public with an opportunity to comment on proposed antenna structures via the ASR application process.²⁶ At the same time, the Infrastructure Coalition's proposal retains measures intended to bring certainty to the tower siting process, and to deter the submission of frivolous pleadings. For example, parties opposing a particular structure would be required to file a Petition to Deny, and to comply with the associated procedural requirements, so that limited FCC resources are not spent addressing frivolous or unsupported challenges.²⁷

The Infrastructure Coalition's proposal also includes reasonable timeframes by which challengers must file petitions to deny, applicants must file EAs when required by the FCC, and the FCC must reach a decision regarding the potential environmental impact of a proposed facility.²⁸ These timeframes would introduce certainty into the new ASR public notice process, and allow applicants to better plan and implement the deployment of facilities in furtherance of their construction obligations. Other commenting parties²⁹ also urge the Commission to exercise care when adopting a public notice mechanism so that undue delay and burden are not injected

²⁵ See Verizon Wireless Comments at 10; NTCA Comments at 4, 7 and 8; APCO Comments at 2-3; ASRI Comments at 7.

²⁶ Infrastructure Coalition Comments at 21-22 and 27-28.

²⁷ *Id.* at 23-26.

²⁸ *Id.* at 27-28.

²⁹ Verizon Wireless Comments at 2, 5-7; ASRI Comments at 6-7; APCO Comments at 2-3; NTCA Comments at 5, 7-8; FWCC Comments at 10-11.

into the process. Some of those parties suggest that the Commission adopt rules that would exempt certain ASR filings from the public notice requirement.³⁰ The Infrastructure Coalition agrees and has proposed the adoption of exceptions to the ASR public notice process.

For example, the Infrastructure Coalition noted in its initial Comments that certain ASR filings, such as those that are administrative in nature,³¹ should not be subject to a public notice requirement because they do not pertain to the operating parameters of a proposed facility. In addition, certain filings related to existing, previously-approved structures should not be placed on public notice. Specifically, ASR modifications to make minor corrections in data for an existing facility, and the repair or replacement of an existing antenna structure with a facility that does not increase the overall height of the original structure, should not be subject to the ASR public notice process. As these types of filings require only a modification of the existing ASR for the facility, as opposed to a new ASR registration, they need not be subject to a separate public notice requirement. In contrast to the Petitioners' open-ended public notice and consultation processes, the Infrastructure Coalition's proposal will create certainty and uniformity that will benefit the public as well as service providers. By implementing the Infrastructure Coalition's proposal, the FCC could take a major step towards fulfilling its mandate to make available nationwide communications services and to foster broadband deployment. Further, the FCC would create an environment in which the ARRA's goals of promoting broadband deployment and stimulating the nation's economy could be accomplished. Simultaneously, the FCC would fulfill the Court's directive ensuring that interested parties have a meaningful opportunity to participate in the ASR process.

³⁰ ASRI Comments at 5.

³¹ *E.g.*, administrative updates, ownership changes, notification of structure dismantlement, cancellation of an existing registration, withdrawal of an application, notification of completion of a previously-approved registered structure, and corrections to data for constructed registered towers. *See* Infrastructure Coalition Comments at 17-18.

V. CONCLUSION

There is one matter on which the Infrastructure Coalition and the Petitioners agree -- that an ASR public notice process should be expeditiously implemented. However, unlike the Petitioners, the Infrastructure Coalition recognizes that the Commission faces a daunting task to respond to the Court mandate in the *Remand Order*. The Commission should not be distracted by the numerous proposals in the *Petition for Expedited Relief* that not only go far beyond the Court's directives, but would lead to unnecessary and interminable delays in the construction of communications towers. In its initial comments, the Infrastructure Coalition provided a clear, comprehensive path for the Commission to timely comply with the Court's mandate, while still moving forward to authorize the construction of essential communications facilities.

Respectfully submitted,

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