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	)	

COMMENTS OF THE FIXED WIRELESS COMMUNICATIONS COALITION

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The Fixed Wireless Communications Coalition ("FWCC")[1] files this comment on the Petition for Expedited Rulemaking and Other Relief Filed on Behalf of American Bird Conservancy *et al*. ("Petition") in the above-captioned proceeding.[2]

A. SUMMARY

Petitioners allege that communications towers kill many birds. They seek to reduce the numbers of deaths by imposing extraordinarily burdensome procedures on tower operations.

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[1] The FWCC is a coalition of companies, associations, and individuals interested in the fixed service -- *i.e.*, in terrestrial fixed microwave communications. Our membership includes manufacturers of microwave equipment, fixed microwave engineering firms, licensees of terrestrial fixed microwave systems and their associations, and communications service providers and their associations. The membership also includes railroads, public utilities, petroleum and pipeline entities, public safety agencies, cable TV and private cable providers, backhaul providers, and/or their respective associations, communications carriers, and telecommunications attorneys and engineers. Our members build, install, and use both licensed and unlicensed point-to-point, point-to-multipoint, and other fixed wireless systems, in frequency bands from 900 MHz to 95 GHz. For more information, see www.fwcc.us.

[2] *Wireless Telecommunications Bureau Seeks Comment on Petition*, DA 09-904 (released April 29, 2009).

In practice, the proposed rules would add so much cost and delay as to render even minor tower projects not feasible. That would threaten the continuing growth of communications facilities that have successfully served both economic growth and consumer convenience.

Petitioners' proposals would impact tower applications from two main directions.

Today, "categorical exclusions" allow the prompt construction of projects that meet criteria qualifying them as environmentally safe. The concept is doubly beneficial: not only a mechanism for fast approval of urgently needed facilities, but a reward for telecommunications providers that design environmentally sound projects. Yet Petitioners would cut back sharply on categorical exclusions, open avenues for delay from unfounded challenges, and require elaborate documentation even for qualifying projects. Collectively, these all but eliminate the advantages of categorical exclusion as a spur to environmental compliance.

Applications that do not qualify for categorical exclusion require an Environmental Assessment ("EA"). This document is intended to determine whether the project requires an Environmental Impact Statement ("EIS"). Because the latter is far too slow and expensive for most tower projects, applicants have every incentive to put forward plans, and modify them as needed, to arrive at an EA showing no significant impact, so that no EIS is needed.

Petitioners, however, would turn the EA itself into a major obstacle. Their proposed rules for identifying projects that need an EA are impossibly vague. Preparation of an EA would require vast amounts of newly added information, including data on alternatives the applicant is *not* proposing and, unless waived, a "biological assessment" that requires expert consultants and promises to take months. Petitioners also advance rules that allow easy challenges to an EA, thus encouraging additional delay, and added paperwork even for a finding that the project will

have no significant impact. Together, these requirements would make the EA so burdensome that some needed towers could not be built at all – which perhaps is Petitioners' aim.

The irony is that Petitioners' rules, while crippling communications, would have little benefit for birds. According to Petitioners' own data, at least 96 percent of bird deaths from man-made structures result from structures *other than* communications towers. At best, any improvement from Petitioners' measures could affect only the residual 4 percent (or less). That marginal fraction-of-a-fraction gain is too small to justify the great harm to telecommunications.

The FWCC would not oppose reasonable and workable rules that significantly reduce bird mortality without unduly hindering needed facilities. Petitioners have not proposed such rules. Their petition should be denied.

B. INTRODUCTION

Members of the FWCC are suppliers, coordinators, builders, owners, providers, and users of fixed microwave facilities across the country. We operate and maintain the sideways-facing dishes that are commonplace not only on communications towers, but also on buildings and other elevated structures, such as water towers. These carry communications vital to the public interest, including, among others:

- backhaul of emergency 911 calls (from dispatch center to neighborhood first-responder location);
- management and coordination of train movements on freight and passenger railroads;
- supervision of the electric grid, from generating plant to neighborhood substation;
- safe operation of oil and natural gas pipelines over thousands of miles;
- delivery of cable TV signals;
- carriage of long-distance telephone and Internet traffic;
- local backhaul of wireless calls to cell towers;

- interconnecting buildings on academic and business campuses; and
- vast amounts of business data.

The FWCC would support practical, cost-effective rules that result in significant decreases to bird mortality. We oppose rules that would unduly delay or impede the construction or expansion of needed facilities – particularly measures that would increase communications providers' costs, cause delay, or impair service without significantly improving bird safety.

Petitioners say: "The explosion of towers across the United States since 1986 demonstrates that the FCC's rule and the assumptions on which it is based are obsolete."[3] This is just wrong. The growth in towers is driven by the inexorable growth of demand for telecommunications. The years since 1986 have seen the emergence of the Internet, wireless phones, and ubiquitous cable TV, among other innovations, along with vast increases in data handled by older applications, from wireline telephone to air-traffic control. The importance of telecommunications to the U.S. economy, public safety, and the nation's consumers requires the Commission to ensure that its regulations do not impose unnecessary burdens on communications facilities.

In any event, Petitioners' focus on communications towers is an effort to solve the wrong problem. Petitioners provide the following numbers on bird deaths caused by human activities:

- communications towers: 4-50 million;[4]
- building windows: 97-980 million;[5]

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[3] Petition at 15-16 (footnote omitted).

[4] Petition at 4.

- vehicular strikes: 60-80 million;[6]
- power line electrocutions and collisions: "hundreds of thousands to hundreds of millions."[7]

Most of these numbers have extraordinarily high uncertainties, which casts doubt on the underlying methodologies. Before the Commission considers burdensome new regulations, it should establish, with much greater certainty, the extent of any effect that towers may have on migratory bird deaths, the underlying causes, and whether new regulations would significantly reduce that effect. To that end, the Commission might consider undertaking a joint study with the Fish and Wildlife Service, with participation from industry and public interest groups such as Petitioners.

If we take Petitioners' numbers at face value, however, they show the fraction of bird deaths due to communications towers to be extremely low – only 2.5 to 4 percent.[8] Even if no new communications towers were built – even if all existing towers were torn down! – 96 to 97.5 percent of structure-caused bird deaths would continue unabated.

Petitioners seem to regard communications towers as invariably harmful to birds, but the engineers and technicians who routinely climb them find otherwise. Bird habitats are common on towers. The climbers see, in addition to nesting, frequent use of tower structures for roosting and other activities. Migratory birds appear to use some towers as places to stop *en*

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5 Petition at 5.

6 Petition at 5.

7 Petition at 5.

8 Numbers at the low end of each range, ignoring power lines, yield 2.5 percent. Numbers at the upper end of each range, taking 200 million for power lines, give 4 percent.

route. Some birds seem to favor the upper levels, far above buildings and tree-tops. Also common at the higher levels are large birds and particularly birds of prey, who find a comfortable perch from which to scan the terrain below.

Tower climbers are all too familiar with the "white environmental compound" – bird droppings – that coat most towers. Dry, it takes the form of powder and small chunks. When wet, it creates a slipping hazard as a climber moves up the ladder and across the steel. It is invariably necessary to brush this matter off the ladders on the way up. The ubiquity and the sheer quantities of droppings are good evidence that birds like to spend time on communications towers.

The stated purpose of Petitioners' proposed rules is to impose additional procedural safeguards on tower construction and modification, so as to minimize harm to birds. As we show below, however, the certain effect will be to impede and delay *all* tower construction, even that having no impact on birds.

Almost all fixed microwave licensees are subject to construction and build-out provisions, including requirements that service be available to a stated fraction of the population or that substantial service be provided within a specified time period. Holders of licenses for individual microwave links are generally required to place their facilities into operation within 18 months of the date of license grant.[9] Delay in tower construction caused by unnecessarily burdensome environmental rules would unfairly threaten licensees' investments in equipment, real estate, and auctioned spectrum.

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[9] 47 C.F.R. § 101.63(a).

The Commission is charged, among its other responsibilities, with regulating "so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities . . . ."[10] In today's increasingly wireless environment, "adequate facilities" necessarily involves towers. Taking into account the public interest in far-reaching, reliable telecommunications, the Commission must interpret the environmental statutes, alongside the Communications Act, so as to permit the timely construction and expansion of needed tower facilities, at reasonable cost.

C. THE PROPOSED RULES ARE UNWORKABLY VAGUE.

The Petitioners seek to trigger preparation of an EA under language so vague that an applicant will often be unable even to tell whether it needs an EA or not. These are examples of unreasonably vague criteria that, according to Petitioners, should determine whether an EA is required by law:

- "Facilities that may affect public health or safety."[11]
- "Facilities that may have highly controversial environmental effects . . . ." [12]
- "Facilities that may establish a precedent for future action . . . ."[13]

Simple fairness requires that an applicant be able to know its obligations by reading the rules. The proposed wording is so imprecise that almost any tower could conceivably come under some provision – even if, in reality, it offers no reasonable expectation of impact on birds.

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10 47 U.S.C. § 151.

11 Sections 1.1307(a)(9) (proposed). Petitioners compiled their proposed rules in an Appendix, Petition at 46-53.

12 Sections 1.1307(a)(11) (proposed).

13 Sections 1.1307(a)(13) (proposed).

Language this vague can only impair the efficient deployment of communications facilities, and will almost certainly result in endless litigation.

D. THE PROPOSED RULES WOULD EFFECTIVELY ELIMINATE CATEGORICAL EXCLUSIONS.

"Categorical exclusions" are activities that meet stated criteria calculated to establish they will have no environmental impact.[14] By rule, these activities do not require an EA.

The availability of these exclusions serves two socially useful purposes. First, they offer a route to speedy approval for urgently needed communications facilities. Second, they provide a powerful incentive for communications providers to plan facilities that meet the criteria (so as to avoid the cost and delay of an EA), and hence which cause no environmental harm. The categorical exclusions thus directly serve the key interests of both communications providers and environmentalists.

Petitioners seek to amend the rules on categorical exclusions in three respects.

First, they would remove from categorical exclusion every new antenna structure (regardless of height), every increase in height (regardless of degree), and every change in lighting or marking -- even lighting changes intended to reduce impact on birds.[15]

Second, they would allow anyone to allege that an otherwise categorically excluded action "may" have a significant environmental effect – with no need to explain the allegation in detail.[16] The consequence of such an allegation is an automatic Bureau review.[17] Under this

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14 47 C.F.R. § 1.1306.

15 Section 1.1306(b)(4) (proposed).

16 Section 1.1307(c) (proposed).

17 47 C.F.R. § 1.1307(c).

wording change, even the most casual and unsupported allegation could stop a project in its tracks. The lack of requirements for specific factual allegations and standing will invite third parties to use unsupported template filings to frustrate the Commission's processes.

Third, Petitioners would require extensive documentation for a decision to proceed under categorical exclusion.[18] That would have to include, "[a]t a minimum,"

- names of interested and affected people, groups, and agencies contacted;
- the determination that no extraordinary circumstances exist;
- a list of the people notified of the decision; and
- "a concise written record of the Bureau or Commission's decision to implement an action categorically excluded . . . ."[19]

The requirements would burden precisely those activities the Commission has determined to be environmentally harmless.

Any one of these proposals would largely undercut the social benefits of categorical exclusion. Taken together, they all but read categorical exclusions out of the rules entirely.

E. THE PROPOSED RULES WOULD ADD TO THE COST AND DELAY OF PREPARING AN EA.

Activities that are not categorically excluded require an EA, which is assembled mainly to help determine whether a much more complex EIS is necessary. Preparation of an EIS is so expensive and time-consuming that most providers would abandon plans for a tower rather than undertake it. In practice, as a result, the EA is usually the last step, as well as the first.

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[18] Section 1.1306(c) (proposed).

[19] Section 1.1306(c) (proposed).

Petitioners' proposed rules would considerably expand the content of an EA. Newly required material would include information not only on the proposed activity, but also on *alternatives* to the proposed activity, and on environmental consequences of the alternatives.[20] This makes no sense. The purpose of the EA is to evaluate the proposed activity. The applicant might wish to consider alternatives if the EA would otherwise trigger an EIS – in fact, the rules encourage it to do so.[21] But the action proposed in the EA should stand or fall on its own merits. Assessing alternatives in the EA would multiply the cost and time involved without adding useful content.

The proposed rules would add a new requirement for public notice when an EA is being prepared, and would obligate the Bureau or Commission to consider comments, whether solicited or not.[22] This provision seems calculated to give Petitioners and their allies a tripwire to hold up the Commission's consideration.

Finally, the proposed rules would add significantly to the paperwork for a finding of "no significant impact": namely, a "statement of reasons" for the finding.[23] Such a finding means, by definition, that the proposed action will not have significant impact on the environment. Asking for "reasons" is like asking for proof of a negative. The effect of this proposal may be tied to another of Petitioners' requests – that notice of the finding be given not just to the

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[20] Sections 1.1308(b)(1) (proposed), 1.1311(a)(9) (proposed).

[21] 47 C.F.R. § 1.1308(c) (giving applicant at the EA stage "an opportunity to amend its application so as to reduce, minimize, or eliminate environmental problems").

[22] Section 1.1308(b)(2) (proposed).

[23] Section 1.1308(d) (proposed).

community, but to the public at large.[24] The combination of rules would enable Petitioners and their allies, wherever located, to routinely challenge a finding of no significant impact by bringing petitions for reconsideration or review, on the ground that the stated reasons are insufficient. Even petitions that are ultimately denied will nonetheless serve to delay the construction or expansion of towers that have been found to be environmentally safe.

F. THE PETITION REQUESTS ADDITIONAL SUPERFLUOUS RULES

The Commission's Rules currently include several provisions geared to compliance with the Endangered Species Act.

The rules make an EA mandatory for facilities that may affect threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of any proposed endangered or threatened species, or are likely to result in the destruction or adverse modification of proposed critical habitats.[25] In appropriate cases, the EA will lead to a full-scale EIS.

Further, the Commission is already required to solicit and receive input from the Department of the Interior with respect to actions that may affect listed threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of any proposed endangered or threatened species, or are likely to result in the destruction or adverse modification of proposed critical habitats.[26]

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[24] Section 1.1308(d) (proposed).

[25] 47 C.F.R. § 1.1307(a)(3).

[26] 47 C.F.R. § 1.1308(b) (Note), *citing* 47 C.F.R. § 1.1307(a)(3).

Petitioners now seek to add a new section to the rules, over 1,000 words long, adding multiple provisions that relate solely to the Endangered Species Act. In particular, the proposal would add extremely detailed agency consultation requirements *prior to preparing an EA*.[27] These include a 30-day response period just to begin the process,[28] with the potential for much greater delays as the process unfolds.[29]

One element requires particular mention. The proposed rule *by default requires* an extremely detailed and specific "biological assessment" (BA) *unless* the consulted agency indicates that the proposed project is "not likely" to adversely affect a specific listed species or its designated critical habitat.[30] The required contents of the BA – listed in the footnote below – appear calculated to draw out the approval process for as long as possible.[31] The inclusion of

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[27] Section 1.1320(b)(2) (proposed).

[28] Section 1.1320(b)(2)(iii) (proposed).

[29] We will not burden the record by repeating all of the requirements here. *See* Petition at 51-53.

[30] Section 1.1320(b)(5)(ii) (proposed).

[31] "The biological assessment must contain the following information for each species contained in the consulted agency's species list:

"(A) Life history and habitat requirements;

"(B) Results of detailed surveys to determine if individuals, populations, or suitable, unoccupied habitat exists in the proposed project's area of effect;

"(C) Potential impacts, both beneficial and negative, that could result from the construction and operation of the proposed project, or disturbance associated with the abandonment, if applicable; and

"(D) Proposed mitigation that would eliminate or minimize these potential impacts.

"(E) Review of the literature and other information.

"(F) Analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

"(G) Analysis of alternate actions considered by the non-Federal representative for the proposed action." Section 1.1320(b)(5)(ii) (proposed).

required elements like "Review of the literature and other information," and "Analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies" will inevitably add months or more to the EA. Because other rules proposed by Petitioners would greatly cut down on categorical exclusions, and correspondingly increase the activities that require an EA, these requirements – all of which must be carried out before the EA – threaten to impede a lot of towers.

We note that some of these steps include personnel requirements. The consultations on listed species may include "discussions with experts (including experts provided by the consulted agency) . . . ."[32] Similarly, "All surveys must be conducted by qualified biologists . . . . In addition, the biological assessment must include the following information: (A) Name(s) and qualifications of person(s) conducting the survey . . . ."[33] Satisfying the content requirements for the BA would also entail extensive employment of experts. Although doubtless proposed for other reasons, adoption of these rules might increase employment opportunities for some of Petitioners' members and affiliates. On the other hand, if the proceeding continues to polarize the parties into birds *versus* towers, it may become difficult to find experts holding the requisite qualifications who are willing to work with tower applicants. Either way, writing expert qualifications into the rules may have unanticipated consequences.

CONCLUSION

Whether intended or not, the main effect of the proposed rules will be additional cost and delay, and ultimately will deprive the public of needed communications facilities. That outcome

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[32] Section 1.1320(b)(5)(i) (proposed).

[33] Section 1.1320(b)(5)(iii).

would be contrary to both the public interest and the Commission's statutory mandate for a "rapid, efficient . . . radio communication service with adequate facilities . . . ."[34] We urge the Commission to recognize that communications towers account for only a very small fraction of bird deaths due to human activity. Any new rules must balance practical, economically feasible measures to protect birds against the needs of the American public for ubiquitous, reliable, and up-to-date communications services. The Petition must be denied.

Respectfully submitted,

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May 29, 2009

[34] 47 U.S.C. § 151.

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that true copies of the foregoing Comments of the Fixed Wireless Communications Coalition were sent by first class mail, postage prepaid, this 29th day of May, 2009, to the following:

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