

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Petition by Forest Conservation Council,
American Bird Conservancy and Friends of the
Earth for National Environmental Policy Act
Compliance

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2006

Released: April 13, 2006

By the Commission: Commissioner Adelstein issuing a statement and Commissioner Copps concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we resolve the Petition for National Environmental Policy Act Compliance filed by the Forest Conservation Council, American Bird Conservancy, and Friends of the Earth by dismissing it in part, denying it in part, and addressing the remainder, as appropriate, in connection with issues already specified in the Notice of Inquiry into the Effects of Towers on Migratory Birds (Migratory Bird NOI).

II. BACKGROUND

2. In their Petition filed on August 26, 2002, Petitioners assert that the Gulf Coast region is critically important for migratory birds, and that communications towers are having a significant adverse impact on migratory birds in that region. Petitioners then allege that the Commission's actions or inaction with respect to the construction of towers in the Gulf Coast region have violated several federal environmental statutes. Specifically, Petitioners contend: (1) that the Commission has violated the National Environmental Policy Act of 1969 (NEPA) by categorically excluding from environmental review 5,797 communications tower registrations in the Gulf Coast region, and by failing to consider migratory bird concerns in its environmental review of an additional 96 communications tower registrations; (2) that the Commission has violated NEPA by failing to prepare a programmatic Environmental Impact Statement (EIS) addressing the environmental effects of past, present, and future antenna structure registrations in the Gulf Coast region; (3) that the Commission has violated section 7 of the Endangered Species Act (ESA) by failing to consult with the United States Fish and Wildlife Service (USFWS) regarding the effects of its antenna structure registration decisions on listed species; and (4) that the Commission has violated the Migratory Bird Treaty Act (MBTA) by failing to take action to

1 In Re Effects of Towers on Migratory Birds, Notice of Inquiry, WT Docket No. 03-187, 18 FCC Rcd 16938 (2003) (Migratory Bird NOI).

2 42 U.S.C. § 4321 et seq.

3 16 U.S.C. § 1531 et seq.

4 16 U.S.C. § 703.

minimize or eliminate the take of migratory birds. Accordingly, Petitioners request several forms of relief, as set forth in Paragraph 4, below. On September 27, 2002, the Personal Communications Industry Association (PCIA) filed a Motion to Dismiss the Petition.<sup>5</sup>

3. Subsequently, on August 20, 2003, the Commission issued the *Migratory Bird NOI* “to gather comment and information on the impact that communications towers may have on migratory birds.”<sup>6</sup> In response to the *NOI*, the Commission received a number of comments and reply comments that referred to scientific studies of past incidents of migratory birds colliding with communications towers. To help the Commission evaluate these scientific studies, the Commission retained Avatar Environmental, LLC (Avatar), an environmental risk consulting firm. After reviewing the scientific studies referred to by the comments and reply comments, Avatar submitted a report of its findings (Avatar Report),<sup>7</sup> on which the Wireless Telecommunications Bureau sought comment.<sup>8</sup>

### III. DISCUSSION

4. In their Petition, Petitioners seek the following relief:

(1) that the Commission order owners of 5,797 categorically excluded antenna structures which Petitioners identify to prepare environmental assessments (EAs) disclosing the direct, indirect, and cumulative impacts of their structures on migratory birds in the Gulf Coast region;

(2) that the Commission order owners of 96 antenna structures which Petitioners identify and which allegedly have incomplete EAs to supplement their EAs to address the direct, indirect, and cumulative impacts of their structures on migratory birds;

(3) that the Commission immediately commence preparation of an EIS evaluating, analyzing, and mitigating the direct, indirect, and cumulative effects of all past, present, and reasonably foreseeable antenna structure registrations on migratory birds and other protected resources in the Gulf Coast region;

(4) that the Commission comply with Section 7 of the ESA by initiating formal consultation with the USFWS of its antenna structure registration decisions on threatened and endangered species in the Gulf Coast region;

(5) that the Commission refrain from registering any new communications towers in the Gulf Coast region that may adversely affect migratory birds until it has complied

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<sup>5</sup> Because PCIA’s Motion to Dismiss only addresses Petitioners’ first two requests for relief, para. 4, *infra*, and because we dismiss and deny those requests for relief, respectively, on different grounds below, we dismiss the Motion to Dismiss as moot.

<sup>6</sup> *Migratory Bird NOI*, 18 FCC Rcd 16938, para. 1.

<sup>7</sup> See *Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission*, by Avatar Environmental, LLC (filed December 10, 2004) (*Avatar Report*), WT Docket No. 03-187.

<sup>8</sup> *Wireless Telecommunications Bureau Seeks Comment on Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions with Communications Towers, Public Notice*, WT Docket No. 03-187, 19 FCC Rcd 24007 (WTB 2004). See also *Wireless Telecommunications Bureau Extends Period for Comment on Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions with Communications Towers*, WT Docket No. 03-187, 19 FCC Rcd 24778 (WTB 2004).

with NEPA, the ESA and the MBTA, and in making such determinations, the Petitioners recommend that the Commission use the USFWS Voluntary Tower Guidelines;<sup>9</sup>

(6) that the Commission implement public participation procedures set forth in 40 C.F.R. § 1506.8 (*sic*)<sup>10</sup> by providing Petitioners notice and opportunity to comment on all antenna structure registration applications for the Gulf Coast region, regardless of whether the Commission believes these decisions are categorically excluded from NEPA review; and

(7) that the Commission comply with the MBTA by taking steps to reduce or eliminate intentional or unintentional “takes” of migratory birds, developing long-term management plans to conserve migratory birds and their habitats, and incorporating migratory bird impacts into all future NEPA analyses, including those requested in the Petition.<sup>11</sup>

Below we consider each of these requests for relief in turn.

### A. Environmental Assessments on Categorically Excluded Towers

5. We dismiss Petitioners’ request that the owners of 5,797 previously constructed, categorically excluded towers<sup>12</sup> file EAs on the ground that the request lacks specificity. First, while Petitioners are correct that section 1.1307(c) of the Commission’s rules<sup>13</sup> permits them to seek EAs for categorically excluded actions that will have a significant environmental effect, Petitioners fail to meet the requirement that the reasons for an EA be set forth *in detail*. This requirement necessitates that the asserted significant effects of each tower be set forth with specificity, rather than be lumped together under a general rationale, as the Petition does here.

6. Second, Petitioners provide affidavits from 11 different individuals who assert that their enjoyment of bird watching suffers because of the presence of these towers, yet fail to indicate which communications towers affect which affiants.<sup>14</sup> “A petitioner must demonstrate with specificity how the grant of the application would affect its interests, aggrieve or injure the petitioner.”<sup>15</sup> Here, Petitioners

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<sup>9</sup> Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers, U.S. Fish and Wildlife Service (2000) (<http://migratorybirds.fws.gov/issues/towers/comtow.html>) (USFWS Voluntary Tower Guidelines).

<sup>10</sup> We assume Petitioners meant to cite to 40 C.F.R. § 1506.6, Public involvement, rather than 40 C.F.R. § 1506.8, Proposals for legislation.

<sup>11</sup> Petition at 19-20.

<sup>12</sup> *Id.* at Exhibit B. Actions subject to categorical exclusion are those that an agency has found to not individually or cumulatively significantly impact the environment, and that therefore do not require the preparation of either an EA or an EIS. 40 C.F.R. § 1508.4. Under Commission rules, actions that do not fall within the categories specified in section 1.1307(a) or (b) are categorically excluded. *See* 47 C.F.R. § 1.1307(a), (b).

<sup>13</sup> 47 C.F.R. § 1.1307(c). The rule states, in pertinent part:

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.

<sup>14</sup> *Id.* at Exhibit C.

<sup>15</sup> Friends of the Earth and Forest Conservation Council, *Memorandum Opinion and Order*, 17 FCC Rcd 201, 203, para. 8 (WTB/CWD 2002) (*Friends of the Earth*), *appl. for review denied, Memorandum Opinion and Order*, 18 FCC Rcd 23622 (2003).

fail to demonstrate that affiants suffer injury specific to any of the 5,797 communications towers that Petitioners identify. In order to process efficiently the thousands of antenna structure registrations filed annually, it is imperative that petitioners make specific allegations and specify parties that would actually be harmed by each antenna structure.<sup>16</sup> Accordingly, because Petitioners have not met their burden here and their generalized requests would result in an extraordinary administrative burden, we dismiss their request for relief on this matter.<sup>17</sup>

## **B. Incomplete Environmental Assessments for Communications Towers**

7. We deny the Petition's request that the owners of 96 constructed towers in the Gulf Coast region supplement their EAs to consider effects on migratory birds.<sup>18</sup> For each of these towers, when the owner of the tower filed its EA, a Public Notice was issued giving interested parties, including Petitioners, the opportunity to comment within a time certain.<sup>19</sup> Petitioners do not assert that the notice for any of these towers was defective, nor do they set forth any arguments that could not have been raised at the time the EAs were under review, and in any event, the Petition lacks the specificity required by Section 1.1307(c), as discussed above. Accordingly, we find that Petitioners are precluded from raising this matter here.

## **C. Environmental Impact Statement on Communications Towers in the Gulf Coast Region**

8. We dismiss Petitioners' request that the Commission immediately commence preparation of an EIS evaluating, analyzing, and mitigating the effects of all past, present, and reasonably foreseeable antenna structure registrations in the Gulf Coast region. Petitioners specifically assert that the Gulf Coast towers have a cumulative effect on migratory birds warranting a Programmatic Environmental Impact Statement (PEIS).<sup>20</sup> The petitioners have not provided sufficient evidence to convince us in this proceeding that the impact of communications towers on migratory birds significantly affects the quality of the human environment and accordingly that the preparation of a PEIS is warranted. We note, however, that we are compiling an extensive record relating to the impact of communications towers on migratory birds in the Migratory Bird NOI proceeding, and the decision we make today does not prejudice any action that the Commission may take based upon the record in that proceeding.

9. On May 1, 2000, the Chairman of the Commission wrote a letter to the Director of the USFWS, noting the dearth of study and research on avian collisions with communications towers and the corresponding absence of consensus within the scientific community. The Chairman indicated that the Commission would take appropriate action regarding migratory birds when there were adequate scientific standards to determine if towers would affect migratory birds.<sup>21</sup> Subsequently, the Commission issued the *Migratory Bird NOI* to develop a record "on scientific research and other related data relevant to migratory bird collisions with communications towers, and on whether such research would support changes within the structure of our current rules and processes specifically related to protection of

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<sup>16</sup> See *Friends of the Earth*, 17 FCC Rcd at 203, para. 8.

<sup>17</sup> We also note that petitioners include in their list, but fail to identify, towers that were constructed before the Commission's rules were adopted, and in some instances even before NEPA was enacted, and so are not subject to those rules. Should petitioners re-file their request for relief on this matter, they are directed to exclude such towers from their requested relief.

<sup>18</sup> See Petition at 13, 14.

<sup>19</sup> See, e.g., Antenna Structure Registration Service Information, *Public Notice*, Report No. CWS 01-77, rel. Aug. 17, 2001 (Geonet Towers, Gulfport, Mississippi, A0208342).

<sup>20</sup> See Petition at 7 and 17.

<sup>21</sup> See Petition, Exhibit H - Letter from William Kennard, Esq., Chairman, Federal Communications Commission, to Jamie Rappaport Clark, Director, USFWS, dated May 1, 2000.

migratory birds.”<sup>22</sup> Section 1.1305 of the Commission’s rules requires the preparation of an EIS for “[a]ny Commission action deemed to have a significant effect upon the quality of the human environment.”<sup>23</sup> While the petitioners claim that towers are a source of avian mortality, we find that they have not shown with specificity in this proceeding that towers have a significant effect upon the quality of the human environment. For example, the petitioners in this proceeding have made no scientific showing that the population of any specific bird species has decreased as a result of collisions with communications towers, thereby making more difficult human observation or research of that species. And, while the petitioners allege generally that towers have an impact upon species protected by the Endangered Species Act,<sup>24</sup> they do not identify any particular species that has been adversely affected.

10. Additionally, we note that no consensus exists as to the impact of antenna towers on bird populations or avian mortality. The parties to the *Migratory Bird NOI* have expressed sharply divergent views on the number of birds killed by towers, the significance of such collisions to the environment, the types of towers that endanger birds, and what actions, if any, should be taken. Avatar, an environmental risk consulting firm retained by the Commission to evaluate the evidence compiled in the *Migratory Bird NOI*, found that although the potential for harm exists, “there are no studies to date that demonstrate an unambiguous relationship between avian collisions with communications towers and population decline of migratory bird species.”<sup>25</sup> After Avatar submitted its report, environmental and industry groups submitted conflicting studies concerning the effect of antenna towers on avian mortality and bird populations.<sup>26</sup> The Commission has not yet completed its review of the scientific evidence presented in the Migratory Bird NOI docket and has not yet made any conclusions concerning that evidence.

11. In any event, given the lack of specific evidence in this proceeding concerning the impact of towers on the human environment and the lack of consensus among scientists regarding the impact of communications towers on migratory birds, we decline at this time to prepare a PEIS. We emphasize, however, that our decision not to prepare a PEIS at this time is based solely upon the record in this proceeding. We intend to complete our review of the record in the Migratory Bird NOI proceeding and in the near future to issue a Notice of Proposed Rulemaking in that docket that considers possible further Commission action.

#### **D. Initiating Formal Consultation with the USFWS**

12. We deny the Petition’s request that the Commission initiate formal consultation with the USFWS on the effect that communications towers have on threatened and endangered species in the Gulf Coast region. As set forth below, as required under the ESA, the Commission initiates formal consultation when it is found necessary by the USFWS. Petitioners do not show either that the Commission has failed to initiate formal consultation under these circumstances or that its applicants have failed to follow the procedures necessary to identify when formal consultation is required.

13. Commission rules require that all applicants consider the effect that their communications towers will have on threatened and endangered species, and specifically authorize applicants to contact

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<sup>22</sup> *Migratory Bird NOI*, 18 FCC Rcd at 16938-39, para. 2.

<sup>23</sup> 47 C.F.R. § 1.1305.

<sup>24</sup> Petition at 10.

<sup>25</sup> Notice of Inquiry Comment Review Avian/Communications Tower Collisions, filed by Avatar Environmental, LLC (Dec. 10, 2004) at 5-2.

<sup>26</sup> Land Protection Partners, “Scientific Basis to Establish Policy Regulating Communications Towers to Protect Migratory Birds” (Feb. 14, 2005); Technical Comment on Scientific Basis to Establish Policy Regulating Communications Towers to Protect Migratory Birds, prepared by Woodlot Alternatives (filed June 24, 2005).

the USFWS in assessing such effect.<sup>27</sup> Additionally, in accordance with the interagency coordination regulations,<sup>28</sup> the Commission has formally designated all applicants as non-federal representatives for purposes of Section 7 consultation.<sup>29</sup> This blanket designation contemplates that applicants will participate in informal consultation with the USFWS as a prerequisite to determining, in the first instance, whether a proposed tower “may affect” or is “likely to jeopardize” listed or endangered species or designated critical habitats, and thus, requires the submission of an environmental assessment pursuant to section 1.1307(a)(3). Such participation may entail applicants requesting and receiving species lists, submitting Biological Assessments (BAs) that consider the effect of proposed constructions on any listed species, and providing information to be utilized if formal consultation is required. Upon receipt of a BA concluding that the tower is not likely to adversely affect listed species or critical habitat, the USFWS field office will either provide a written concurrence<sup>30</sup> or seek formal consultation under Section 7 of the Endangered Species Act.<sup>31</sup> Such written concurrence from the field office will end the Section 7 consultation process, and submission of the written concurrence will conclude environmental processing for that tower with respect to the effects on threatened or endangered species. Should the BA not conclude that there will be no adverse effect on listed species or critical habitat, the Commission, as the action agency, must commence formal consultation under Section 7. In other words, formal consultation takes place whenever the USFWS, *i.e.*, the expert agency, believes it necessary, based upon an informal process prescribed by USFWS regulations.<sup>32</sup> Petitioners 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.

14. Petitioners also request that the Commission initiate formal consultation with the USFWS on the cumulative effects that communications towers have on endangered species. Petitioners, however, provide no evidence of any synergies among these or other existing towers that would cause them cumulatively to have significant environmental impacts that they do not have individually. Petitioners also fail to delineate how the various towers would cause effects to environmental resources, to compare the alleged effects with any sort of environmental baseline, or to otherwise provide concrete evidence of cumulative effects. We therefore reject their generalized assertions of cumulative environmental effect on endangered species because the assertions are not supported by concrete evidence. Accordingly, we deny Petitioners’ request on this matter.<sup>33</sup>

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<sup>27</sup> 47 C.F.R. § 1.1307(a)(3) and (Note).

<sup>28</sup> 50 C.F.R. § 402.08.

<sup>29</sup> See Letter from Susan H. Steiman, Associate General Counsel, Federal Communications Commission, to Steve Williams, Director, United States Fish and Wildlife Service, Department of Interior (July 9, 2003), <http://wireless.fcc.gov/siting/endangeredspeciesletter.pdf>.

<sup>30</sup> See 50 C.F.R. § 402.13(a).

<sup>31</sup> 16 U.S.C. § 1532 *et seq.*

<sup>32</sup> See 50 C.F.R. § 402.13 (providing that informal consultation includes all discussions between FWS and either the Federal agency or the non-Federal representative designed to determine whether formal consultation is required); and § 402.12(c) (providing that the non-Federal representative may request a list of any listed or proposed species or proposed critical habitat that may be present in area of proposed construction and prepare any required biological assessment, that a biological assessment is not required if no listed species or critical habitats are present, and that formal consultation is not required if the biological assessment reflects there are no listed species or critical habitats likely to be affected).

<sup>33</sup> See *In the Matter of Public Employees for Environmental Responsibility*, 16 FCC Rcd 21439, 21448 (2001) (rejecting generalized assertions of cumulative environmental effect that were not described or supported by concrete evidence).

### E. Registering New Communications Towers in the Gulf Coast Region

15. Petitioners request that the Commission refrain from registering any new communications towers in the Gulf Coast region that may adversely affect migratory birds until it has complied with NEPA, the ESA and the MBTA, and in making such determinations, Petitioners recommend that the Commission use the USFWS Voluntary Guidelines. Petitioners' request for a suspension of tower construction is a request for injunctive relief in the form of a stay on Commission action. Because Petitioners have not met the criteria for issuance of a stay, we deny their request.

16. The Commission evaluates petitions for stay under well-settled precedent. To warrant a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>34</sup>

17. We find that Petitioners have not satisfied any of these criteria. As explained throughout this Order, we do not accept Petitioners' assertion that the Commission is in violation of NEPA, the ESA or the MBTA, and therefore cannot conclude that Petitioners are likely to prevail on the merits of this claim. Petitioners also fail to show irreparable harm if a stay is not granted; to the contrary, many towers to be constructed within the Gulf Coast region will require completion of an EA under section 1.1307(a) or (b), and Petitioners may request an EA for other towers upon a specific detailed showing pursuant to section 1.1307(c). Thus, Petitioners fail to demonstrate that each tower could not be reviewed on an individual basis. Furthermore, because a stay on construction of towers needed for reliable wireless communications would hinder the availability of both commercial and public safety communications, the interest of wireless consumers and safety personnel, as well as the public interest, would be harmed if we were to grant the stay. And insofar as Petitioners recommend reliance on the USFWS Voluntary Tower Guidelines, we have sought comments on these guidelines in the *Migratory Bird NOI* and we are considering them in that context. Accordingly, we deny Petitioners' request for relief in this matter.

### F. Public Participation Procedures for Communications Tower Construction

18. We deny Petitioners' request that the Commission provide Petitioners "notice and opportunity to comment on all antenna structure registration applications the FCC is contemplating in the Gulf Coast region, regardless of whether the FCC believes these decisions are categorically excluded from NEPA review," as Petitioners state is contemplated under public participation procedures specified in the CEQ rules.<sup>35</sup> This request is unsupported as a matter of law. As required by Section 1507.3(a) of the CEQ rules,<sup>36</sup> the Commission's rules on public participation were coordinated with CEQ to assure compliance with its requirements.<sup>37</sup> In addition, Petitioners cite no authority for the proposition that CEQ public participation requirements must be extended to categorically excluded actions, which, by definition, identify those that do not individually or cumulatively have a significant impact and that do not require the preparation of either an EA or an EIS.<sup>38</sup> Moreover, even if they were applicable to categorically excluded actions, the CEQ rules do not require the kind of personal notice that petitioners appear to request. That is, while Petitioners seek notice on all antenna structure registration applications

<sup>34</sup> See In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Order*, 20 FCC Rcd 641 (2005) citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*); see also *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>35</sup> See Petition at 20.

<sup>36</sup> 40 C.F.R. § 1507.3(a).

<sup>37</sup> See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, *Report and Order*, 60 Rad. Reg. 2d (P & F) 13, FCC 85-626, para. 3 (rel. Mar. 26, 1986).

<sup>38</sup> 40 C.F.R. § 1508.4.

in the Gulf Coast region, CEQ rules provide for the agency mailing notice to those who have requested it on an *individual* action.<sup>39</sup> Accordingly, there is no basis for providing the relief that Petitioners seek.

#### G. Commission Compliance with the Migratory Bird Treaty Act

19. Petitioners contend that the Commission must take steps to reduce intentional or unintentional takes of migratory birds, develop long-term management plans to conserve migratory birds and their habitats, and incorporate migratory bird impacts into NEPA analyses.<sup>40</sup> We are already considering this general request in other contexts. We note that as an initial matter, the Commission has considered, where appropriate, the impact that tower constructions have on migratory birds as part of our overall obligation to consider the impact of authorized facilities on the environment.<sup>41</sup> Beyond such considerations, as discussed above, the Commission has issued the *Migratory Bird NOI*, and the Wireless Telecommunications Bureau has subsequently sought comment on the report issued by Avatar that analyzed the existing scientific data on avian collisions with communications towers. Because that proceeding already addresses Petitioners' concerns as to Commission action under the MBTA, we will consider them within that proceeding.<sup>42</sup> As mentioned above,<sup>43</sup> we anticipate issuing a Notice of Proposed Rulemaking in that proceeding in the near future.

#### IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Section 1.1307(c) of the Commission's Rules, 47 C.F.R. § 1.1307(c), the Petition for Environmental Compliance, filed by the Forest Conservation Council and the American Bird Conservancy, dated August 26, 2002, IS DENIED, in part, and IS DISMISSED, in part, as reflected above.

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<sup>39</sup> 40 C.F.R. § 1506.6(b)(1).

<sup>40</sup> See Petition at 19.

<sup>41</sup> See Leelanau County, Michigan, *Memorandum Opinion and Order*, 9 FCC Rcd 6901, 6903, para. 8 (1994); see also State of Ohio Department of Administrative Services - Application for Antenna Structure Registration - Deersville, OH, *Memorandum Opinion and Order*, 19 FCC Rcd 18149 (WTB/SCPD 2004).

<sup>42</sup> As the Commission has noted, it is "not clear" whether the MBTA applies to the Commission's registration of antenna structures. In the Matter of Leelanau, Michigan, *Memorandum Opinion and Order*, 9 FCC Rcd 6901, 6903, para. 8 (1994). The MBTA, a criminal statute, makes it unlawful for persons, associations, partnerships, and corporations to "take" or "kill" migratory birds. The federal courts of appeals are divided as to whether a federal agency is a "person" subject to the MBTA. Compare *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) ("plain language" of MBTA "does not subject the federal government to its prohibitions") and *Newton County Wildlife Association v. USFS*, 113 F.3d 110, 115 (8th Cir. 1997), cert. denied, 522 U.S. 1108 (1998) (tentatively concluding that MBTA does not apply to federal agencies) with *Humane Society of the United States v. Glickman*, 217 F.3d 882, 883 (D.C. Cir. 2000) (MBTA applies to federal agencies).

Even apart from the issue regarding the applicability of the MBTA to federal agencies, it is far from certain that this statute would prohibit the Commission from authorizing the construction of antenna structures because some birds may collide with those structures. A number of courts have construed the term "taking" under the MBTA narrowly to "describe[] physical conduct of the sort engaged in by hunters and poachers." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004), quoting *Seattle Audubon Society v. Evans*, 952 F.2d 279, 302 (9th Cir. 1991). But see *Moon Lake Electric Association, Inc.*, 45 F. Supp.1070 (D. Colo. 1999). While such conduct includes the "management" of migratory birds by measures that include their capture and killing (*Humane Society of the United States v. Glickman*, 217 F.3d at 883), it does not include otherwise lawful economic conduct that "indirectly results in the death of migratory birds," *Newton County Wildlife Association v. USFS*, 113 F.3d at 115. See *Seattle Audubon Society v. Evans*, 952 F.2d at 303.

<sup>43</sup> See para. 11, *supra*.



21. IT IS FURTHER ORDERED that the Motion to Dismiss filed by the Personal Communications Industry Association IS DISMISSED as moot.

Federal Communications Commission

Marlene H. Dortch  
Secretary

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS,  
CONCURRING IN PART, DISSENTING IN PART**

*RE: Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance.*

The U.S. Fish and Wildlife Service conservatively estimates that collisions with communications towers kill more than four million birds per year. Some estimates put the figure as high as forty million bird kills annually. Migratory birds are particularly vulnerable as they fly south to the southern United States, Mexico and beyond for the winter. Now it goes without saying that communications towers are important for America – allowing us to watch television, listen to the radio, make mobile phone calls and increasingly get wireless broadband connectivity. One of the most important priorities of this Commission is to facilitate this deployment of communications technologies – but we need not be oblivious to related concerns as we go about our work. Nor need we become “The Reluctant Environmentalist.” In truth, we are not faced with an all-or-nothing proposition. I am confident that the Commission, with some sustained effort and commitment, can manage the expansion of communications towers while also preserving the country’s environmental resources for future generations. Evidence suggests, for example, that something as simple as tower lighting changes might significantly reduce bird mortality.

Today’s action says less about the impact of communications towers on migratory birds than it does about past Commission failure to do its job. It was in 2003 that we initiated our *Migratory Bird* proceeding. Many of the issues still unresolved in that proceeding are the same issues underlying the Petitioners’ request before us. We need to get on with this job. More research may need to be done – and some serious inter-agency dialogue and coordination are in order. We should be working closely with the U.S. Fish and Wildlife Service, the Federal Aviation Administration, federally-recognized Indian Tribes and other interested stakeholders to resolve the outstanding issues. The Commission has not taken any recent action in this regard. I am encouraged, however, that my colleagues have expressed a willingness to move forward with a Notice of Proposed Rulemaking in the *Migratory Bird* proceeding. I commend Commissioner Adelstein for his leadership in pushing for this result – and I concur in this aspect of the decision. But I must respectfully dissent from the remainder of the decision that dismisses the Petitioners’ request for action, because it fails to analyze substantively the issues underlying it.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance; Memorandum Opinion and Order*

While I do not fully embrace this Memorandum Opinion and Order, I am willing to vote in favor of our ruling today because of the agreement to my request to consider a Notice of Proposed Rulemaking in the larger proceeding addressing the important issue of the potential effects of communication towers on migratory birds. I believe that this omnibus proceeding, which unfortunately has languished for some time, is the correct procedural vehicle for addressing these important issues, and I am pleased that I am able to push that review forward.

While I am sympathetic to a number of issues raised in the petition before us today, the petition just is not the right vehicle for these overarching concerns. This is particularly true when you consider the rebuilding efforts that will be so critical to the Gulf Coast area over the next several months, particularly with a new hurricane season rapidly approaching. Rebuilding the communications infrastructure in the areas that were hit so badly by last season's hurricanes is priority one, especially when you consider the critical role of communications in our disaster relief efforts. During the opening session of the Commission's Hurricane Katrina Independent Panel, for example, we have heard from the Louisiana State Police how local and state communications towers were actually blown down during the hurricane, which led to a severe limitation of critical communications support for public safety and first responders in the area.

I am hopeful that our NPRM will provide a thorough and thoughtful review into the potential effects of communication towers on migratory birds. I look forward to asking questions on what steps we should take in light of the scientific data that exists on this troubling phenomenon. Migratory birds are a prized natural resource, and conservation of the population and their habitats for future generations is an important goal.

Of course, communication towers represent a critical component in the continued deployment of basic and advanced telecommunications services. Towers not only will form the backbone of the transition to digital television, they also are used everyday by our nation's homeland security and public safety communities to effectively and quickly respond to those who need our help the most.

It is critical that the Commission balance these important interests as we consider a NPRM in the proceeding and develop a strategic approach for dealing with the impact that communication towers may have on migratory birds. I thank the Chairman and my colleagues for their willingness to move forward in this proceeding.