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FCC Proposal to Require Communications Towers to Protect Migratory Birds

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To: Broadcast Clients
From: Peter Gutmann

The Federal Communications Commission has issued a *Notice of Proposed Rulemaking* to explore measures to reduce collisions of migratory birds with communications towers. The Commission proposes a number of approaches to this problem, and tentatively concludes that medium intensity white strobe lights should be preferred over red obstruction lighting systems.

This proceeding was prompted by a 2002 United States Fish and Wildlife Service estimate that between four to 50 million migratory birds are killed each year in collisions with communications towers. In August 2003 the Commission had issued a *Notice of Inquiry* to gather comment. The Fish and Wildlife Service stood by its claim, while acknowledging a lack of hard data or a reliable research methodology. Other environmental groups stated that the toll could be substantially higher and noted that in poor visibility conditions migratory birds are especially attracted to steady red lights. Indian tribes asserted the birds' cultural and religious significance, as well as their economic importance for hunting and egg gathering. Industry groups challenged the Commission's jurisdiction and questioned the significance of even the maximum number of projected fatalities in light of the sheer number of migratory birds (at least 10 billion per year).

To evaluate scientific studies and reconcile the parties' comments, the Commission retained Avatar, an environmental risk consulting firm, which submitted findings and recommendations. While noting that most of the research and proposals were speculative, Avatar suggested that several factors appear to increase bird mortality, including low visibility weather conditions, taller towers (especially when lit), towers with guy wires, seasonal migration patterns and the behavior of certain avian families, including species that could be threatened or endangered.

The Commission solicited further comments in response to Avatar's report. While most repeated the positions taken in response to the *Notice of Inquiry*, the Michigan Public Safety Communications System presented a new study of searches for bird carcasses in the areas near various communications towers during migration seasons. The mortality near guyed towers was found to be 15 times the level near self-supporting towers, over four times more for towers over 1,000 feet above ground than for those of 380-480 feet, and three times more for towers of comparable height using steady red lights rather than other lighting configurations.

In issuing its current *Notice*, the Commission concluded that it had jurisdiction to protect migratory birds, but only if there is probative evidence that communications towers indeed have significant adverse impact. At the same time, the Commission recognizes a need to balance any new regulations with its statutory responsibility to ensure the construction of towers necessary to meet the communications needs of the public.

At this point, the Commission wishes to explore several regulatory approaches and actions:

- **Lighting Requirements** – The Commission proposes to require medium intensity white strobe lights for nighttime visibility rather than red obstruction lighting, but only to the extent that this would not compromise aircraft navigation safety. As at present, the Commission intends to rely primarily upon FAA determinations of specific lighting requirements for each tower. The Commission expressed sensitivity to the economic impact of a strobe lighting requirement, including installation and maintenance costs, and the environmental impact on neighboring residents. The Commission also seeks comment as to how any new rule should be implemented – an overall modification of licenses to reflect new lighting obligations, a requirement of upgrades only when existing obstruction lights burn out and need to be replaced, or the use of a roll-out period, such as five years after rule adoption.
- **Use of Guy Wires** – Assuming that the scientific record supports limiting the use of guy wires, the Commission wishes to explore additional consequences of such a policy, including impact on tower construction and deployment of communications services. The Commission also seeks to explore the extent to which various tower designs require guy wires, including factors such as height, soil conditions and design features. Interestingly, while Avatar reported that marking guy wires to increase their visibility would reduce avian mortality, it also found that the resulting physical enlargement of the guy wires would increase their wind resistance and risk of breakage.
- **Tower Height** – The Commission seeks to determine whether height restrictions would hinder the deployment of services, including public safety communications in rural areas. The Commission notes that reducing tower height might increase the overall number of towers, and questions the impact of such proliferation upon other environmental values such as historic properties, wetlands and endangered species.
- **Tower Location** – The Commission seeks to explore the impact on migratory bird populations of towers located near specific habitats such as wetlands, near migration corridors such as ridgelines, in areas with a high incidence of fog, low clouds or similar obscuration such as coastlines, or near certain topographic features such as mountains or other high ground.

- **Co-Location** – The Commission wishes to consider whether it should adopt policies that would promote more extensive shared use of tower facilities, including a requirement that applicants certify that co-location opportunities are unavailable or describe co-location alternatives that had been explored.
- **Routine Environmental Processing** – The Commission will explore amending Section 1.1307(a) of its rules to add potential impact on migratory birds to the existing criteria that determine whether proposed construction may significantly affect the environment and thus require further study. Here, the Commission will weigh the benefits and burdens of such an approach, including whether to extend the requirement only to towers that exhibit characteristics that render them more likely to harm migratory birds (*i.e.*: only towers that use certain lighting systems, that require guy wires, that exceed a specified height, or that are in sensitive locations).

Although characterized as a *Notice of Proposed Rulemaking*, the Commission's release does not propose any specific rules. Rather, the *Notice* reads more like a further notice of inquiry that could be challenged on the ground that the Commission is obligated to seek comment on definite rules before they can be implemented. Significantly, in a separate statement Commissioner Adelstein saluted a cooperative effort between the communications industry and environmental and conservation groups to reach a consensus. If successful, those efforts could forestall the need for Commission action. Even so, it would appear that the Commission is moving closer to the adoption of rules to protect migratory birds from communications towers.

A complete copy of the Commission's *Notice of Proposed Rulemaking* is available from the FCC's website, or we would be glad to provide a copy. Comments are due 60 days from publication in the *Federal Register*, with replies 30 days later.

If you would like to discuss any aspect of this matter, please be sure to let us know.

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