

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re )  
)  
AMERICAN BIRD CONSERVANCY and ) No. 05-1112  
FOREST CONSERVATION COUNCIL, )  
Petitioners. )

**OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION  
TO PETITION FOR WRIT OF MANDAMUS**

The Federal Communications Commission respectfully opposes the petition for a writ of mandamus filed on April 8, 2005, by the American Bird Conservancy and Forest Conservation Council (collectively the “environmental petitioners”). The remedy of mandamus “is a drastic one, to be invoked only in extraordinary situations,”<sup>1</sup> and the environmental petitioners have not shown that the Commission has engaged in the sort of delay that would warrant a grant of that “extraordinary remedy.”<sup>2</sup> The Court should deny the petition.

The environmental petitioners ask that the Court order the Commission to take final action on their August 2002 petition for environmental compliance,<sup>3</sup> which asserted that millions of birds were being killed by collisions with communications towers registered with the Commission in the Gulf Coast region and that the Commission was required by law to reduce or eliminate these incidents. More generally, the

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<sup>1</sup> Kerr v. United States, 426 U.S. 394, 402 (1976).

<sup>2</sup> Allied Chemical Corp. v. Daiflon, 449 U.S. 33, 35 (1980).

<sup>3</sup> “Petition for National Environmental Policy Act Compliance,” filed by Forest Conservation Council, American Bird Conservancy, and Friends of the Earth (Aug. 26, 2002) (“Petition for Environmental Compliance”).

environmental petitioners complain that the Commission has not taken seriously its responsibilities for the towers under various environmental laws.

As we show below, the Commission has taken many steps in exercise of its regulatory authority to ensure that the antenna towers erected by and for its licensees comply with applicable environmental standards, including steps to address the impact that such towers might have on bird mortality. The agency has adopted detailed rules to implement environmental requirements, and it has applied and enforced those rules. Moreover, the Commission in August 2003 issued a Notice of Inquiry asking for comment and information from all interested parties on a comprehensive list of issues concerning "the impact that communications towers may have on migratory birds."<sup>4</sup> Comments and responses to that notice, including competing studies and reports sponsored by diverse interests, were filed as recently as June 28, 2005. The Commission's staff is now studying those comments, studies and reports with a view toward recommending appropriate action by the agency. Furthermore, the Commission's staff expects that the agency will be in a position to act by the end of the year on the specific petition that is the subject of the mandamus petition before the Court. In these circumstances, where the agency is in the process of addressing a complex and hotly contested issue, there is no justification for the issuance of a writ of mandamus.

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<sup>4</sup> In the Matter of Effects of Communications Towers on Migratory Birds, Notice of Inquiry, 18 FCC Rcd 16938 (2003) ("NOI").

## BACKGROUND

### A. Statutory and Regulatory Framework.

Congress created the Commission “for the purpose of . . . mak[ing] available to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide . . . radio communications service.” 47 U.S.C. § 151. In connection with that overarching public policy, Congress has charged the Commission with “generally encourag[ing] the larger and more effective use of radio in the public interest,” 47 U.S.C. § 303(g), and ensuring “efficient and intensive use of the electromagnetic spectrum,” 47 U.S.C. § 309(j)(3)(D). As a means of implementing Congress’s policies, the Commission has established a system for registering the placement throughout the country of radio transmitting antennas, often mounted on towers, known as “antenna structures.” See 47 C.F.R. §§ 17.2(a), 17.4. Antenna structures are essential for providing a variety of wireless communications and broadcast services to millions of Americans, including services that are critical to public safety and health. For example, communications towers are part of the infrastructure for “911” wireless service used in emergencies to summon police, ambulances, and fire fighters, as well as for public safety communications systems that permit coordination among those emergency responders.

Under the Commission’s rules, structures that meet certain height and location criteria -- generally, towers more than 60.96 meters (200 feet) in height or located in proximity to an airport -- require notification to the Federal Aviation Administration (“FAA”), 47 C.F.R. § 17.7, and must be registered with the Commission prior to construction. 47 C.F.R. § 17.4. See 47 U.S.C. § 303(q). Antenna structures in some

circumstances also can have environmental consequences that may call into play generally applicable environmental statutes.

1. NEPA and its implementing regulations. The National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., requires federal agencies to establish procedures to identify and account for the environmental impact of their major actions. See 42 U.S.C. § 4332. Among other things, NEPA established the Council on Environmental Quality (“CEQ”) to oversee the environmental programs and activities of the federal government. CEQ, in turn, has promulgated rules that inform federal agencies “what they must do to comply with the procedures and achieve the goals” of NEPA. 40 C.F.R. § 1500.1(a). Pursuant to CEQ rules, each federal agency -- including the FCC -- issues its own rules implementing NEPA, which must comply with CEQ rules unless “compliance would be inconsistent with other statutory requirements.” 40 C.F.R. § 1500.3.

CEQ rules require federal agencies to classify “major federal actions” according to their environmental impact. 40 C.F.R. § 1508.18. Federal agencies must prepare an environmental impact statement (“EIS”) for any major federal action “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). See 40 C.F.R. § 1507.3(b)(2)(i). An “environmental assessment” (“EA”) -- a consideration of environmental impacts that is less extensive than an EIS -- is required for major actions that may have a significant environmental effect in order to determine whether an EIS is necessary. Categories of actions that individually and cumulatively have no significant environmental impact -- actions that fall within “categorical exclusion[s] predetermined

by the agency,” see 40 C.F.R. § 1508.4 -- generally do not require an EIS or an EA. 40 C.F.R. § 1507.3(b).

The Commission has incorporated CEQ’s three-tier approach into its own NEPA rules. First, these rules require the preparation of an EIS for “any Commission action deemed to have a significant effect upon the quality of the human environment.” 47 C.F.R. § 1.1305.<sup>5</sup> The Commission has identified no category of actions that will always require an EIS and accordingly it decides whether to require an EIS for a specific action on a case-by-case basis.<sup>6</sup>

Second, the Commission’s rules identify specific categories of actions regarding facilities that “may significantly affect the environment and thus require the preparation of EAs by the applicant.” 47 C.F.R. § 1.307(a). As examples, the rule identifies proposed facilities that will be located in a designated wilderness area, a designated wildlife preserve or a flood plain; that may affect threatened or endangered species or habitats (as designated by the United States Fish and Wildlife Service (“FWS”)); that may affect significant historical, architectural or cultural sites (as listed or eligible for listing on the National Register of Historic Places); or that will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). 47 C.F.R.

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<sup>5</sup> In the Matter of Public Employees for Environmental Responsibility (“PEER”), 16 FCC Rcd 21439, 21441 (¶ 3) (2001). See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, FCC 85-626 (released March 26, 1986), 1986 WL 292182 (F.C.C), at ¶ 4 (“1986 Rulemaking Order”).

<sup>6</sup> See, e.g., In the Matter of Western Wireless Corp., 18 FCC Rcd 10319 (2003); In the Matter of Canyon Area Residents for the Environment Request for Review of Action Taken Under Delegated Authority on a Petition for an Environmental Impact Statement, 14 F.C.C.R. 8152 (1999); In re Golden State Broadcasting Corp., 83 FCC 2d 337 (1980).

§§ 1.1307(a). An EA filed under the rule must “explain the environmental consequences of the proposal and set forth sufficient analysis for the . . . Commission [or its staff] to reach a determination that the proposal will or will not have a significant environmental effect.” 47 C.F.R. § 1.1308.

Third, the Commission’s rules provide that actions not within the specified categories for which EAs are required are “deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing.” 47 C.F.R. § 1.1306(a). Nevertheless, even with respect to such facilities, the Commission may require an EA. See PEER, 16 FCC Rcd at 21441 (¶ 3). For example, if “an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit . . . a written petition setting forth in detail the reasons justifying . . . environmental consideration.” 47 C.F.R. § 1.1307(c). The Commission’s staff then will review the submission and determine whether an EA is required. Id. In addition, the Commission’s staff may “determine[e] that the proposal [to build a certain facility] may have a significant environmental impact,” whereupon the staff, “on its own motion, shall require the applicant to submit an EA.” 47 C.F.R. § 1.1307(d). Thus, even though the potential effect on migratory birds (other than endangered and threatened species) is not one of the circumstances routinely requiring an EA, the Commission has considered the

impact of proposed construction projects on migratory birds<sup>7</sup> and in appropriate circumstances has required modifications to protect them.<sup>8</sup>

After the applicant submits an EA, the Commission or its staff seeks public comment and then reviews it, along with any additional information submitted by the applicant or others, to determine whether further environmental processing is warranted. If the Commission or its staff finds that the proposal will not significantly affect the environment, it terminates environmental processing. If the agency determines that the proposal will have a significant impact upon the environment, it will inform the applicant, who will then have an opportunity to amend its application so as to reduce, mitigate, or eliminate the environmental problem. See 47 C.F.R. § 1.1308. If the environmental problem is not addressed adequately, the applicant may not commence construction until the agency concludes further environmental processing, including the preparation of an EIS. See 47 C.F.R. §§ 1.1308(d), 1.1314; In the Matter of Western Wireless Corp., 20 FCC Rcd 1245, 1246 (¶ 2) (2004); 1986 Rulemaking Order, 1986 WL 292182 at ¶ 5.

The Commission requires applicants initially to certify, in accordance with guidelines set out in its rules, whether construction of a proposed facility falls within a category of action that requires an EA. An applicant may be subject to enforcement

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<sup>7</sup> E.g., In the Matter of County of Leelanau, Michigan, 9 FCC Rcd 6901, 6903 (1994) (¶ 8 & n.11) (1994); Caloosa Television Corp. 3 FCC Rcd 3656, 3658 (¶11) (1988), recon. denied, 4 FCC Rcd 4762 (1989); In the Matter of T-Mobile and the Pierce Archery Proposed Antenna Tower, 18 FCC Rcd 24993, 24997 (¶ 13) (2003); Letter from Linda Blair, Mass Media Bur., FCC, to Tanja L. Kozicky, 11 FCC Rcd 4163, 4166 (Aud. Serv. Div. 1996); In re Application of Baltimore County, Maryland, 4 FCC Rcd 5068, 5071 (¶¶ 23-25) (1989), review denied, 5 FCC Rcd 5616 (1990).

<sup>8</sup> See In the Matter of County of Leelanau, Michigan, 9 FCC Rcd at 6905 (¶ 17).

action if it certifies incorrectly that the construction is of a type for which an EA is not required. For example, the Commission could impose a forfeiture for violation of section 1.17 of its rules, see 47 C.F.R. § 1.17, if an applicant certifies that the construction will have no significant environmental effect without having a reasonable basis to believe its certification is correct. PEER, 16 FCC Rcd at 21446 (¶ 13). See Amendment of Section 1.17 of the Commission's Rules, 18 FCC Rcd at 4016, 4020-21 (¶¶ 10-12) (2003).

2. ESA. The Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, establishes a national policy of conserving, as practicable, species of fish, wildlife and plants threatened with extinction. The ESA requires “[e]ach Federal agency . . . , in consultation with and with the assistance of the Secretary [of the Interior], [to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .” 16 U.S.C. § 1536(a)(2). The Secretary of the Interior maintains a list of endangered or threatened fish, wildlife, and plants. See Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1064 (D.C. Cir. 2003).

To comply with the ESA, the Commission amended its rules in 1988 to require the preparation of an EA whenever facilities “(1) may affect any listed threatened or endangered species or designated critical habitats; or (2) are likely to jeopardize the continued existence of any proposed endangered or threatened species, or result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the [ESA].” 47 C.F.R. § 1.1307(a)(3). See

Amendment of the Commission's Environmental Rules, 3 FCC Rcd 4986 (¶ 3) (1988).<sup>9</sup>

Under these rules, the Commission, in processing such actions, is to solicit and consider the comments of the FWS. 47 C.F.R. § 1.1308 Note.

As described above, the ESA requires “consultation” with the Secretary of the Interior to ensure that tower facilities will not harm any endangered species. Under the Secretary’s regulations, “[a] Federal agency may designate a non-Federal representative to conduct informal consultation” in satisfaction of the ESA, as long as “the ultimate responsibility for compliance . . . remains with the Federal agency.” 50 C.F.R. § 402.08. The regulations authorize an agency to designate a “permit or license applicant” as the non-Federal representative. Id. The Commission has issued a “blanket designation” to “all FCC licensees, applicants, tower companies and their representatives” to “contact and work with the FWS to ensure that any effects on threatened and endangered species and their critical habitats are evaluated” in the tower construction process.<sup>10</sup>

3. MBTA. The Migratory Bird Treaty Act (“MBTA”) is a criminal statute enacted in 1918 to implement a convention between the United States and Great Britain (on behalf of Canada) for the protection of migratory birds. See Humane Society of the

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<sup>9</sup> The CEQ and FWS reviewed and approved these rule amendments. Amendment of the Commission's Environmental Rules, 3 FCC Rcd at 4988, n.5.

<sup>10</sup> Letter from Susan Steiman, associate general counsel, FCC, to Steve Williams, director, FWS (July 9, 2003). Other federal agencies have designated industry personnel as non-federal representatives for ESA consultation. See, e.g., Pacific Gas and Electric Company, 108 FERC 61556, 61875 (¶ 19), 2004 WL 1460023 \*3 (2004) (FERC designating Pacific Gas and Electric Company as non-federal representative).

United States v. Glickman, 217 F.3d 882, 883 (D.C. Cir. 2000).<sup>11</sup> Section 703 of the MBTA provides that “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird,” unless permitted by FWS. 16 U.S.C. § 703. While some courts of appeals have determined that the MBTA does not apply to federal agencies,<sup>12</sup> this Court, in Humane Society of the United States v. Glickman, 217 F.3d at 883, held that the Department of Agriculture had violated the MBTA by instituting a program to “manage” Canada geese by measures that included killing them. The term “taking” under the MBTA has been construed narrowly to “describe[] physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918”<sup>13</sup> -- and not otherwise lawful conduct that “indirectly results in the death of migratory birds.”<sup>14</sup>

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<sup>11</sup> The MBTA has since been amended to cover conventions with Mexico, Japan, and the former Soviet Union. See Hill v. Norton, 275 F.3d 98, 100-01 (D.C. Cir. 2001).

<sup>12</sup> Sierra Club v. Martin, 110 F.3d 1551, 1555 (11<sup>th</sup> Cir. 1997) (“The MBTA, by its plain language, does not subject the federal government to its prohibitions.”). See also Newton County Wildlife Association v. USFS, 113 F.3d 110, 115 (8<sup>th</sup> Cir. 1997), cert. denied, 522 U.S. 1108 (1998) (tentatively concluding that MBTA does not apply to federal agencies).

<sup>13</sup> City of Sausalito v. O’Neill, 386 F.3d 1186, 1225 (9<sup>th</sup> Cir. 2004), quoting Seattle Audubon Society v. Evans, 952 F.2d 279, 302 (9<sup>th</sup> Cir. 1991). Accord Newton County Wildlife Association v. USFS, 113 F.3d at 115.

<sup>14</sup> Newton County Wildlife Association v. USFS, 113 F.3d at 115 (“[I]t would stretch [the MBTA] far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds.”). This Court, in Humane Society of the United States v. Glickman, 217 F.3d at 888, recognized without disapproval the line of cases holding that the MBTA does not apply to economic conduct indirectly resulting in bird deaths.

On the basis of this judicial precedent, the Commission has questioned whether the MBTA applies to “a federally authorized tower structure.”<sup>15</sup>

B. The Petition for Environmental Compliance.

In August, 2002, several environmental groups, including the petitioners American Bird Conservancy and Forest Conservation Council, filed with the Commission a Petition for Environmental Compliance asserting that antenna structures have had a significant adverse impact to migratory birds in the Gulf Coast region and that the Commission’s registration of such structures in this region violates NEPA, the ESA and the MBTA. The environmental groups asked the Commission to require owners of 5,797 antenna structures, registered and constructed in the Gulf Coast region, to prepare EAs analyzing the impact of their structures on migratory birds. They requested the Commission to order owners of 96 additional antenna structures in that region to supplement their EAs to address the effect of their structures on migratory birds. In addition, these parties asked the Commission to “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.” Petition for Environmental Compliance at 19. Until that EIS is prepared, the environmental groups sought a “suspension of all future antenna structure registrations in the Gulf Coast region that may adversely affect migratory birds.” *Id.* at 3.

The environmental groups asked the Commission to initiate formal consultation with the FWS on the effects of its antenna structure registration decisions on threatened

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<sup>15</sup> In the Matter of Leelanau, Michigan, 9 FCC Red at 6903 (¶ 8).

and endangered species in the Gulf Coast region and to implement public participation procedures for all antenna structure registration applications in that region. Petition for Environmental Compliance at 20. They also asked the Commission to “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.”

Id.<sup>16</sup>

On February 13, 2003, three environmental groups (including the petitioners here) filed a petition for a writ of mandamus in this Court, asking the Court generally to require the Commission to fulfill its duties with respect to the impact of towers on migratory birds under NEPA, ESA and MBTA.<sup>17</sup> After ordering the Commission to respond, the Court in July 2003 denied the petition for mandamus (although it noted that the denial was “without prejudice to renewal in the event of significant additional delay”).<sup>18</sup> The following month, the Commission issued its NOI to address the issue of the effect towers might have on migratory birds. 18 FCC Rcd 16938.

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<sup>16</sup> The Personal Communications Industry Association (“PCIA”) filed a motion to dismiss the Petition for Environmental Compliance. PCIA claimed that the petition was untimely filed and that the environmental groups had failed to serve the owners of the affected antenna structures. PCIA also claimed that the Commission lacks authority to grant the requested relief under NEPA because that statute does not cover assessments of environmental effects after federal authorization has been obtained or authorize alterations of completed projects. Personal Communications Industry Association’s Motion to Dismiss (Sept. 30, 2002). The petitioners did not file an opposition to PCIA’s motion, and the PCIA motion remains pending before the agency.

<sup>17</sup> In re Forest Conservation Council, Inc., Friends of the Earth, Inc., and the American Bird Conservancy, Inc., D.C. Circuit No. 03-1034 (filed February 13, 2003).

<sup>18</sup> Order (filed July 2, 2003).

The Commission's staff expects that the agency will be in a position to act on this order by the end of the year.

C. Pending Administrative Proceedings.

The Commission in recent years has taken several actions to address the issue of bird collisions with communications towers. Some of these actions are described below.

1. The Notice of Inquiry. As noted above, the Commission in August 2003 initiated an inquiry to develop a record on how, and to what extent, migratory birds may be affected by communications towers. NOI, 18 FCC Rcd 16938. The Commission sought comment on existing scientific research concerning the number of migratory bird collisions with communications towers and the role that specific factors -- such as the lighting, height and type of antenna structure; the weather, location, and physical features of the site; as well as migration paths -- may have in increasing or decreasing the incidence of such collisions. Id. at 16938 (¶ 1). The Commission also asked "whether certain measures might minimize any adverse impacts of communications tower siting and construction on migratory birds, whether any such measures are supported by adequate and reliable empirical and/or scientific evidence, and how the use of such measures may affect" the provision of efficient and reliable communications services.

Id.<sup>19</sup> The Commission stated it would consider "further action," on the basis of the

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<sup>19</sup> The Commission in particular asked for comments on the scientific basis and use of the FWS Tower Siting Guidelines, NOI, 18 FCC Rcd at 16952-53 (¶¶ 30-31). The Commission has made those guidelines available on the FCC's web site ([wireless.fcc.gov/siting/environment.html#usfish](http://wireless.fcc.gov/siting/environment.html#usfish)). In addition, the Commission more generally sought comment on what additional study or studies may be needed, what variables the research should address, and what types of procedures it should use to monitor the issue of bird mortality. 18 FCC Rcd at 16951 (¶ 25).

record compiled in the proceeding, “including possible amendments of its environmental rules.” Id.

The Commission received approximately 265 responses to its NOI from a variety of commenters, including telecommunications and infrastructure support companies, environmental groups, trade associations, agencies, and individuals. The parties 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.

Environmental groups cited studies claiming that “sizable kills occur on a regular basis,”<sup>20</sup> whereas some industry groups relied on studies concluding that tower collisions were not common.<sup>21</sup> FWS “acknowledge[d] that the overall extent to which communications towers kill migratory birds is not well known,” but it provided what it called a conservative estimate of four to five million bird deaths a year.<sup>22</sup> Some parties claimed that NEPA obligates the Commission to consider the effect of towers on bird mortality,<sup>23</sup> others asserted that NEPA review is not required because communications

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<sup>20</sup> Joint Comments of the American Bird Conservancy, Friends of the Earth, Forest and Conservation Council (Nov. 11, 2003) at 5 (“ABC/ FoE/Forest Comments”).

<sup>21</sup> E.g., Comments of Washington State Association of Broadcasters (Nov. 6, 2003), Exh. at 1 (citing a study showing that migratory bird collisions with towers in that State are “rare” and that “[t]owers provide respite for migratory birds and homes for resident flocks”); Comments of PCIA (Nov. 12, 2003) at 4 (study concludes that bird collisions with communications towers are “isolated” events that “do not significantly contribute to migratory bird mortality rates”). See also Reply Comments of Cingular Wireless and SBC Communications (Dec. 11, 2003) at 13-14.

<sup>22</sup> FWS Comments, at 2, 4 (Nov. 18, 2003).

<sup>23</sup> E.g., ABC/ FoE/Forest Comments at 1-4.

towers are not a significant cause of avian mortality. Some commenters maintained that communications towers do not affect the size of migratory bird populations.<sup>24</sup> Citing to FWS data showing that at least 97 million birds die from colliding with building windows; up to 174 million birds are killed by power transmission lines; 72 million birds are poisoned by pesticides and 60 million birds die in automobile collisions,<sup>25</sup> some of the parties claimed that the estimated four to five million birds killed in tower collisions account for less than ½ of one percent of human-caused bird mortality.<sup>26</sup>

Many commenters, asserting that existing studies are outdated or lack scientific validity, called for further research.<sup>27</sup> The FWS told the Commission that “additional research is imperative.”<sup>28</sup>

The parties also did not agree on whether specific characteristics of communications towers -- such as the type, height, siting, and lighting -- contribute to bird mortality, and what further actions, if any, the Commission should take to protect migratory birds. Environmental groups urged the adoption of a number of specific

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<sup>24</sup> E.g., CTIA/NAB Comments at 14-15.

<sup>25</sup> E.g., Sprint Comments (Nov. 12, 2003) at 4-6; Comments of Cingular Wireless LLC and SBC Communications, Inc.

<sup>26</sup> E.g., Comments of the Cellular Telecommunications & Internet Association and National Association of Broadcasters (“CTIA/NAB”) (Nov. 12, 2003) at 9. Some parties cited to a study concluding that eight times more birds die in attacks by domestic cats in Wisconsin than die in collisions with communications towers nationwide. E.g., Sprint Comments at 5; Cingular/SBC Comments at 3.

<sup>27</sup> E.g., Comments of the American Petroleum Institute (Nov. 12, 2003) at 3; Comments of Cingular Wireless LLC and SBC Communications at 12 (Nov. 12, 2003); Reply Comments of PCIA (Dec. 11, 2003) at 6-8.

<sup>28</sup> FWS Comments, at 6.

measures, such as siting and lighting restrictions on individual towers, rule changes, and the preparation of a programmatic EIS.<sup>29</sup> Industry groups disputed that the record evidence supported the adoption of these measures.<sup>30</sup> APCO International, an association of public safety officials, while not taking a position on the extent of bird killings, emphasized “the vital role of communications towers in the protection of life, health and property.”<sup>31</sup> APCO told the Commission that police officers, firefighters and emergency medical personnel “depend upon ubiquitous, reliable radio communications systems,”<sup>32</sup> and urged the Commission to consider the public health and safety ramifications of any proposed changes. Others noted a need to evaluate the possible risk to air traffic safety before adopting new lighting or painting requirements.<sup>33</sup>

In April 2004, the Commission retained Avatar Environmental LLC, an environmental risk consulting firm, to evaluate the scientific studies cited in the record. Avatar found “no studies to date that demonstrate an unambiguous relationship between avian collisions with communications towers and population decline of migratory bird species.”<sup>34</sup> Avatar also found that “biologically significant tower kills have not been

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<sup>29</sup> ABC/ FoE/FCC Comments at 17-20.

<sup>30</sup> E.g., CTIA/NAB Comments at 15-26.

<sup>31</sup> Letter from Vincent R. Stile, President, APCO International, Inc. to Michael Powell, Chairman, FCC (Dec. 10, 2003) at 1.

<sup>32</sup> Id. at 2. See Comments of the American Petroleum Institute (Nov. 12, 2003) at 5-6.

<sup>33</sup> CTIA/NAB Comments at 35.

<sup>34</sup> Notice of Inquiry Comment Review Avian/Communications Tower Collisions, filed by Avatar Environmental, LLC (Dec. 10, 2004) at 5-2.

demonstrated in the literature.”<sup>35</sup> While Avatar identified certain characteristics of communications towers (i.e., height and guy wires), that increased the danger to migratory birds, Avatar determined that there was “substantial uncertainty associated with the magnitude of bird collisions and causative factors.”<sup>36</sup> Avatar called for additional research<sup>37</sup> and proposed a variety of short-range and long-term solutions.<sup>38</sup>

The Avatar report generated substantial discussion and controversy in the numerous comments and studies filed in response to that report. For example, the FWS in its comments told the Commission that it concurred with Avatar’s conclusion that “it is impossible to directly correlate collisions to impacts on bird populations.”<sup>39</sup> On February 14, 2005, several environmental groups, including petitioners, submitted a study in rebuttal to the Avatar Report -- the Longcore study -- which concluded that communications towers are a significant cause of bird deaths and can contribute to a population decline in some migratory bird species.<sup>40</sup> Industry groups on June 24, 2005

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<sup>35</sup> Id. at 5-2.

<sup>36</sup> Id.

<sup>37</sup> Id. Avatar asserted that “over the last five decades of monitoring bird populations, the number of bird mortalities at towers is reported to be decreasing while the number of towers is increasing.” Id. at 3-15.

<sup>38</sup> Avatar Report at Table 5-1.

<sup>39</sup> FWS Comments (Feb. 11, 2005) at 1-2. In its reply comments, however, FWS stated that towers had a significant impact on the population of migratory songbirds. FWS Reply Comments at 2 (Mar. 9, 2005).

<sup>40</sup> Land Protection Partners, “Scientific Basis to Establish Policy Regulating Communications Towers to Protect Migratory Birds” (Feb. 14, 2005) (“Longcore study”). The study also concluded that factors such as tower height, guy wires and lighting affect bird mortality. Id. at 14-27.

submitted a study prepared by Woodlot Alternatives, Inc. that concluded that the statistical analyses in the Longcore study were flawed and that its conclusions about avian mortality were inaccurate.<sup>41</sup>

The pleading cycles in the tower inquiry now have been completed. The Commission staff currently is evaluating the record evidence and considering what measures, if any, to recommend in light of that evidence.

2. The Michigan Agreement. On September 17, 2003 -- while its tower inquiry was pending -- the Commission's staff, as part of its enforcement of ESA and NEPA, entered into a "Memorandum of Agreement" with the State of Michigan's Department of State Police and Department of Information Technology ("MSP").<sup>42</sup> The agreement requires MSP to comply with Commission and FWS regulations in its construction of a public safety communications system.<sup>43</sup> In addition, the agreement obligates MSP to participate in and facilitate the implementation of an avian collision study that will research the role, if any, of tower height, lighting, and guy wires in bird collisions at selected Michigan towers. The Commission's staff worked closely with the Migratory

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<sup>41</sup> Technical Comment on Scientific Basis to Establish Policy Regulating Communications Towers to Protect Migratory Birds, prepared by Woodlot Alternatives (filed June 24, 2005). These parties also disputed Avatar's finding that factors such as height and guy wires affect avian mortality.

<sup>42</sup> The agreement is available at <http://wireless.fcc.gov/siting>.

<sup>43</sup> MSP, a non-federal representative, had not fully complied with the ESA informal consultation process. The FWS contacted the Commission's staff expressing concern that certain facilities in MSP's system may affect migratory birds and species listed under the ESA. The staff's response included ordering MSP to cease and desist from construction and operation of those facilities pending resolution of the FWS's concerns. See Memorandum of Agreement at 3. The agreement requires MSP's compliance with the relevant environmental regulations. Id. at 4-5.

Bird Division of FWS on the implementation of the study, which was reviewed by the FWS staff. The study is designed to provide information that should be helpful in identifying reasonable and cost-effective measures that might minimize the effect of communications towers on migratory birds.<sup>44</sup>

### ARGUMENT

Relief in the nature of mandamus is a "drastic remedy," Will v. United States, 389 U.S. 90, 104 (1967), reserved for "really extraordinary causes," Ex Parte Fahey, 332 U.S. 258, 260 (1947).<sup>45</sup> "[T]hose invoking the court's mandamus jurisdiction must have a clear and indisputable right to relief; and even if the [litigant] overcomes all these hurdles, whether mandamus relief should issue is discretionary." In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). The petitioners have failed to show that this case is "one of the exceptionally rare cases," In re Barr Laboratories, 930 F.2d 72, 76 (D.C. Cir.), cert. denied, 502 U.S. 906 (1991), that warrant a judicial decree directing agency action.

#### I. Petitioners Have Failed To Establish Egregious Delay.

As this Court has recognized, "the time agencies take to make decisions must be governed by a 'rule of reason.'" See, e.g., Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 90 (D.C. Cir. 1984) ("TRAC"). The application of the rule of reason to a claim of unreasonable delay "is ordinarily a complicated and nuanced task

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<sup>44</sup> Avian Collision Study Plan for the Michigan Public Safety Communications System (Sept. 12, 2003). The document is available at <http://wireless.fcc.gov/siting>.

<sup>45</sup> See In re Brooks, 383 F.3d 1036, 1041 (D.C. Cir. 2004), quoting Cobell v. Norton, 334 F.3d 1128, 1137 (D.C. Cir. 2003) (A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations."); In re United Mine Workers of America, 190 F.3d 545, 548 (D.C. Cir. 1999), quoting Community Nutrition Institute v. Young, 773 F.2d 1356, 1361 (D.C. Cir. 1985), cert. denied, 475 U.S. 1123 (1986) (same).

requiring consideration of the particular facts and circumstances before the court.”

Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003). A number of factors are relevant, including the “complexity of the task” before the agency, *id.* at 1101, whether the agency is confronted with “competing priorit[ies],” whether there is a “congressional timetable” for action, whether “human health and welfare” are involved, and “the nature and extent of the interests prejudiced by delay.” TRAC, 750 F.2d at 80. In the end, however, the “issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful.” *Id.* at 1101.

Moreover, a judicial “finding that delay is unreasonable does not, alone, justify judicial intervention.” In re Barr Laboratories., 930 F.2d at 74. A court still must determine whether delay is “so egregious as to warrant mandamus.” TRAC, 750 F.2d at 79. As shown below, the petitioners have not demonstrated the sort of egregious delay that justifies the grant of extraordinary relief.

A. The Agency Is Making Progress On Issues That Are Complex And Controversial. In applying the rule of reason to claims of agency delay, the Court must take into account the nature of the issues before the agency and the agency’s progress to date in resolving them. In re Monroe Communications Corp., 840 F.2d 942, 946 (D.C. Cir. 1988). The Petition for Environmental Compliance raises highly controversial and “complex scientific, technological, and policy questions,” and the agency “must be afforded the amount of time necessary to analyze such questions.” Sierra Club v. Thomas, 828 F.2d at 799. See also In re Monroe Communications Corp., 840 F.2d at 946. To resolve these issues fully, the Commission must make a number of specific

determinations on highly disputed matters relating to the impact of communications towers on migratory birds.

The Commission has taken a number of steps towards making these determinations. The Commission initiated an inquiry to address the impact of communications towers on bird mortality; and it has compiled a massive record in that inquiry -- including scientific studies filed by petitioners and others -- that can provide the basis for an agency decision. The agency provided for review of that record by Avatar, an expert environmental risk consulting firm; and it sought and received public comment on Avatar's report.<sup>46</sup> Indeed, the Longcore study, which is relied on heavily by the petitioners in their mandamus petition, was filed in response to the Avatar report in the tower inquiry in February 2005, and a rebuttal to that study was filed less than two months ago.<sup>47</sup>

Although the Commission has not yet ruled on the Petition for Environmental Compliance, it has only recently concluded the process of gathering the information that the petitioners themselves deem to be highly relevant to a proper resolution of that

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<sup>46</sup> There is no merit to the petitioners' complaint the Commission's decision to initiate the tower inquiry and seek public comment is a "dilatory" tactic designed to "provide[] the regulated industry [with] an opportunity to downplay bird deaths at communications towers." Mandamus Petition at 23. It was plainly appropriate for the agency to decide to compile a factual record that would enable it to ascertain the scope and nature of the problem alleged by petitioners before taking action.

<sup>47</sup> In addition, the agency has entered into an agreement, as part of the settlement of a particular enforcement action, that requires the MPSC to undertake an avian collision study -- a study that currently is producing important research into the role of height, lighting, and guy wires in avian collisions. Avian Collision Study Plan for the Michigan Public Safety Communications System (Sept. 12, 2003). The petitioners in their mandamus petition rely upon the preliminary results of that ongoing study. Mandamus Petition at 10-11.

petition. Significant submissions in the NOI proceeding were filed as recently as June 2005, and there is no reason to believe that the agency will not act promptly now that the record before it is complete. Indeed, as noted above, we are informed that the Commission's staff anticipates that the agency will be in a position to take action no later than the end of the calendar year.

B. The Agency Has Important Competing Priorities. Any evaluation of a claim of egregious agency delay must also take account of the agency's discretion to allocate its limited resources among competing priorities of equal or greater urgency. See In re Barr Laboratories, 930 F.2d at 77; In re Monroe Communications Corp., 840 F.2d at 945-46; TRAC, 750 F.2d 80.<sup>48</sup> The Commission takes seriously its responsibilities under the environmental statutes -- and has devoted substantial time and resources to addressing the issue of bird collisions at communications towers. But there are competing legislative mandates that have also required the agency's immediate attention. Thus, while petitioners' claims have been pending, the Commission has been obliged to give expedited treatment to cases in which Congress prescribed explicit time limits for agency action, including numerous forbearance, complaint, tariff, and biennial review proceedings.<sup>49</sup> The Commission has at the same time completed a complicated

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<sup>48</sup> Congress gave the Commission substantial discretion in the timing of administrative action. See 47 U.S.C. § 154(j) (Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"). See also FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142 (1940) (Administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties").

<sup>49</sup> E.g., In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, 20 FCC Rcd 9361 (2005) (forbearance); 2004 Biennial Regulatory Review, 20 FCC Rcd 124

proceeding addressing another environmental issue: the impact of towers on historic properties.<sup>50</sup> Finally, consistent with its obligation to exercise its authority under the Communications Act to “promot[e] safety of [human] life . . . through the use of wire and radio communication,” 47 U.S.C. § 151, the Commission has given priority to actions designed to protect the life of human beings.<sup>51</sup>

As this Court has recognized, “[t]he agency is in a unique -- and authoritative -- position to view its projects as a whole, estimate the prospects of each, and allocate its resources in the optimal way.” In re Barr Laboratories, 930 F.2d at 77.<sup>52</sup> The petitioners in this case give the Court “no basis for reordering agency priorities.” Id.

3. There Is No Applicable Statutory Deadline. In evaluating whether the pace of agency action is reasonable, the Court also considers whether Congress has established in the agency's enabling statute a timetable or other indication of the speed with which it expects the agency to proceed. TRAC, 750 F.2d at 80. While Congress has established

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(Wireless Telecommunications Bureau, 2004); In the Matter of July 1, 2004 Annual Access Charge Tariff Filings, 19 FCC Rcd 24937 (2004).

<sup>50</sup> See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 20 FCC Rcd 1073 (2004), petition for review pending, CTIA-The Wireless Association v. FCC, D.C. Cir. No. 05-1008 (filed Jan. 7, 2005).

<sup>51</sup> See, e.g., In the Matter of Improving Public Safety Communications in the 800 MHz Band, 19 FCC Rcd 14969, recon. granted in part, 19 FCC Rcd 25120 (2004) (FCC reconfigures the 800 MHz band to protect public safety communications systems from unacceptable interference so policemen, sheriffs, firefighters and other public safety officials can communicate effectively in emergency situations); In the Matter of IP-Enabled Services, FCC 05-116 (released June 3, 2005) (Commission adopts rules requiring providers of interconnected voice over Internet Protocol (VoIP) service to make available enhanced 911 services to their customers).

<sup>52</sup> See Nader v. FCC, 520 F.2d 182,195 (D.C. Cir. 1975) (“[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.”).

numerous deadlines for Commission action,<sup>53</sup> it has not prescribed a specific deadline for agency resolution of the matters raised in the Petition for Environmental Compliance. The Court “must conclude that Congress’ failure to impose a deadline was not inadvertent” and consider the absence of a statutory time limit as a “factor counseling against judicial intervention.” Sierra Club v. Thomas, 828 F.2d 783, 797 n.99 (D.C. Cir. 1987).<sup>54</sup>

Petitioners argue that implicit timing provisions in the ESA and NEPA require agency action “to prevent adverse effects before they occur,” *i.e.*, before registration and construction of towers take place. Mandamus Petition at 21 (emphasis omitted). The petitioners, however, seek to compel agency action on their Petition for Environmental Compliance, a pleading that asked the Commission, *inter alia*, to require initial or supplemental EAs on about 6,000 communications towers that already have been

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<sup>53</sup> See, e.g., 47 U.S.C. § 160(c) (one year deadline to rule on petitions for forbearance); 47 U.S.C. § 204(a)(2)(A) (five month deadline to conclude tariff investigations); 47 U.S.C. § 208(b)(1) (five month deadline for resolution of certain complaints); 47 U.S.C. § 157(b) (twelve month deadline to determine whether any new technology or service proposed in a petition or application is in the public interest).

<sup>54</sup> The petitioners claim that a writ of mandamus is necessary to prevent “frustrat[ion] [of] the congressional mandate that federal agencies act expeditiously to protect the environment and wildlife under the ESA, NEPA, and the MBTA.” Mandamus Petition at 22. However, if Congress intended to require expedition, it would have made its intention known by incorporating specific deadlines into those statutes. Moreover, in the absence of such deadlines, Congress in section 4(j) of the Communications Act, 47 U.S.C. § 154(j), accorded the Commission broad discretion in managing its own docket. See FCC v. Schreiber, 381 U.S. 279 (1965) (in enacting in section 4(j), “Congress has left largely to [the Commission’s] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate the proper dispatch of its business and the ends of justice”).

registered and constructed.<sup>55</sup> It would be impossible for the Commission, in ruling on that petition, to go back in time and grant relief as to those towers within the “implicit deadlines” the petitioners read into NEPA and the ESA.

4. Petitioners’ Allegations of Harm Are Speculative. Finally, petitioners’ allegations of harm do not outweigh the agency’s need to proceed to resolve their claims in an orderly fashion. Petitioners allege that bird populations are adversely affected by tower collisions; but that assumption is highly disputed in the various scientific studies in the pending tower inquiry, and the Commission has not yet resolved the question. Petitioners cannot make out their claim of unreasonable agency delay on the basis of alleged harms that remain vigorously contested.

The petitioners’ allegations of harm to human welfare are entirely speculative. Their claims of injury to human welfare are based upon assertions that bird mortality due to the agency’s inaction on the Petition for Environmental Compliance will interfere with the ability of members of the petitioner American Bird Conservancy to observe and research birds. Mandamus Petition at 25-26. The petitioners pointedly do not assert, however, that as a result of agency inaction any of their members have been unable to view or study birds or actually have encountered any increased difficulty in observing or researching birds.

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<sup>55</sup> The petitioners also vaguely complain that “the Commission has delayed resolving [their] informal requests for nearly five years,” Mandamus Petition at 19, but they do not identify these alleged “informal requests,” or seek a judicial order directing the agency to respond formally to them.

## **II. Petitioners' Claims That The Commission Is In Violation Of Environmental Statutes Are Not Properly Before The Court.**

The petitioners' repeated claims that Commission's environmental rules and procedures violate various environmental statutes are not properly before the Court. Invoking the Court's jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), the petitioners ask the Court "to order the FCC to take final action" on a specific pleading -- the Petition for Environmental Compliance -- that is currently pending before the agency. Petition for Environmental Compliance at 1, 27. The petitioners do not ask the Court to direct the agency to rule in their favor or itself to decide the merits of the petition. The Court can resolve -- and should resolve -- the petitioners' claim of egregious agency delay without addressing the merits of the petitioners' environmental claims.<sup>56</sup>

The petitioners' merits arguments presuppose the validity of the comments and studies, including the Longcore study, finding that communications towers are a significant cause of bird mortality and have an impact on birds that are on the endangered species list. As the petitioners acknowledge, however, these comments and studies have been sharply disputed by the comments and scientific studies of other commenters in the pending NOI proceeding. Mandamus Petition at 25. Because the Commission has not reached any determinations on these issues, we express no view on the merits of the petitioners' claims regarding the impact of communications towers on bird mortality. The Court, however, should not grant mandamus relief on the basis of factual assertions

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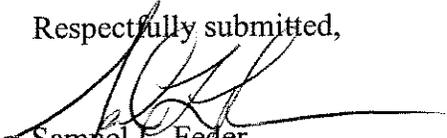
<sup>56</sup> The petitioners have made a number of assertions concerning the environmental statutes and the Commission's implementation of those statutes. Because the Commission has not ruled on those assertions, we will not address those statements here. As noted above, the Court's role in this mandamus proceeding is to determine whether the agency has engaged in egregious delay, not whether the agency has complied with the environmental statutes and implementing regulations.

that are in dispute in a pending agency proceeding. Relying on these disputed factual assertions, the petitioners cannot show that their "right to issuance of the writ is clear and indisputable." Kerr v. United States, 426 U.S. at 403 (internal citations and quotations omitted). See In re Cheney, 406 F.3d at 729.

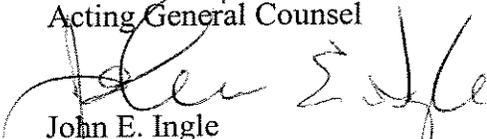
### CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of mandamus.

Respectfully submitted,



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August 4, 2005

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re:

American Bird Conservancy, et al., Petitioner.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing "Opposition Of The Federal Communications Commission To Petition For Writ Of Mandamus" was served this 4th day of August, 2005, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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