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Increased Environmental Scrutiny Of Proposed Tower Construction Ordered

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The U.S. Court of Appeals for the D.C. Circuit dealt potential tower constructors a potential setback in a decision issued on February 19. The FCC had been petitioned by bird lovers to adopt rules providing for the protection of migratory birds in the tower permitting process. The bird people insisted that the National Environmental Protection Act requires the FCC to take the impact on birds into account in its licensing decisions by the preparation of an environmental impact statement (EIS). The FCC gathered extensive comments on this petition but ultimately concluded that the evidence was conflicting about whether migratory birds are or are not significantly affected by communications towers. (The bird people estimated that 4 to 50 million birds are killed each year by collisions with towers or associated wires, while industry groups said hardly any are killed.) The FCC decided that because the evidence was conflicting, it would continue to investigate the matter but not adopt the rules requested by the petitioners.

Not so fast, the Court ruled. Because the evidence was conflicting about whether there will be an impact on protected species, the FCC was required to at least consider an environmental assessment to try to determine whether there would be an adverse impact. This assessment is less burdensome than the full EIS demanded by the birders but considerably more than what the FCC does now. In addition, the Court required the FCC to get input from the folks at the federal Department of Fish and Wildlife who presumably know more about birds than the FCC. The Court also required the FCC to permit more meaningful pre-grant participation by members of the public who want to evaluate proposed construction for bird impact. All of this promises to be good for birds but less good for people want to construct towers along the migratory paths. One solution might be to re-name such towers “bird motels” where tired avians can rest and perch on their way south.