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As the Bird Turns

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[Previously, on “As The Bird Turns”]: In 2002 a number of advocates for the avian asked the Commission to undertake a detailed environmental analysis of just about every new communications tower in the Gulf Coast Region. The chore would have included preparation of environmental assessments (EAs) of almost 6,000 towers that had already been constructed. The avian avengers also wanted the Commission to perform more detailed review (with opportunity for public comment) of new tower proposals *before* they get granted.

[In 2006 the Commission told the avian avengers that the FCC would not revisit the zillions of towers that had already been constructed. The birders took the Commission to court and, earlier this year, the court concluded that the FCC had not been appropriately respectful of the dictates of the Environmental Protection Act or the Endangered Species Act. The court shipped the whole matter back to the FCC for further action, specifically directing the FCC to craft some process to alert the public of pending applications so that the public may be meaningfully involved in the environmental evaluation of those applications.

[And now, the latest installment of “As The Bird Turns”.]

With more FCC proceedings looming and momentum clearly favoring the avian avengers, a number of groups representing various communications interests – including the NAB – have coalesced and, as “the Infrastructure Coalition” (IC), tried to get ahead of the curve by filing their own petition for rulemaking. Apparently conceding that, because of the court’s decision last February, the FCC will have to adopt some form of pre-approval public comment for new tower construction, the IC seems intent upon shaping that process.

The IC has proposed a public notice process for antenna structure registrations (ASRs) similar to the current assignment /transfer of control application process. Under the process, certain new ASR requests would be subject to petitions to deny. The new process would be limited to applications proposing to register new antenna structures, increase the overall height and/or change the lighting and marking on existing structures.

Under the IC's proposal, following public notice of an ASR application, petitions to deny would be due within 14 days, followed by a 10-day period for oppositions and another five-day period for replies. (The public notice would be available on-line at the FCC's website, but not necessarily published elsewhere, *e.g.*, in the Federal Register.) On Day 21 following the public notice, if no petition to deny has been filed, the Commission would either grant the application (or, if circumstances warrant, deny it). If a petition were filed (or if the Commission elected to do so on its own motion), the application would be "off-lined" for 30 days. At the end of that 30-day period, the Commission would be expected to act on the application – grant, deny, or require the applicant to submit an EA (if no EA had already been submitted). The Commission could, however, still give itself one final 30-day period. And at the end of that second 30-day period, again the FCC would be expected to grant or deny the application or require an EA.

Any submission of an EA along the way would re-set the clock back to zero, starting back up the public notice/petition to deny/ etc. process.

A number of other communications companies, including Sprint and AT&T, support the IC proposal, subject to various tweaks generally designed to expedite the process. (Of particular note: United States Cellular Corporation (USCC) suggests that the FCC should be required to act one way or the other on any application within six months – otherwise, the application would be automatically granted.)

As might have been expected, components of the avian avengers expressed concern that the proposed timelines would not be sufficient to allow for meaningful public involvement. While they claim to agree that the process should be expedited, they advocate a 60-day petition to deny period with public notice available both on the Commission website *and* in the Federal Register. They also reject the IC proposal that routine requirements for petitions to deny be deemed applicable. And in a twist on USCC's proposed tweak, the birders propose that, if the FCC fails to act on an application within six months, then the application should be deemed to have been denied. In addition to this, the avian avengers would cease all tower registrations and re-registrations until the FCC's EA is completed and the U.S. Fish and Wildlife Service has been consulted to prepare a programmatic environmental impact statement. According to their comments, the birders are planning to file their own formal rulemaking proposal shortly.

ASRs are technically the domain of the Wireless Bureau, and not the Media Bureau. Because of that, this particular battle may seem a bit arcane and irrelevant to many broadcasters. Think again. Broadcast applications involving new towers require environmental certifications, and no permit will in any event issue until the subject tower

has been issued an ASR. In the past the issuance of an ASR has not generally been a problem, largely because ASRs could ordinarily be obtained through the no-muss-no-fuss process (with no provision for pre-grant objection) which the court has now tossed. As a result of that development, if a new ASR is required, the potential for delay is now considerable. Obviously, the procedures and timetables that are ultimately imposed will determine how big that potential delay could be. Because of that, we suggest that all broadcasters pay attention to this proceeding as it progresses.