

Avian Mortality at Communications Towers

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Presentation Number 16

Research and policy overview: a critique and needs analysis

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Al Manville's introduction of the sixteenth speaker, Kathleen Rogers.

Our final speaker this afternoon – before we convene our panel discussion – is currently the Director of Land Use Policy for the Piedmont Environmental Council in Warrenton, Virginia. I've also known her in the past in a capacity as Wildlife Counsel with the National Audubon Society. She was an Associate with the law firm of Beveridge & Diamond, and worked on a number of environmental issues with them. She's been a law clerk with a United States District Court Judge in Washington, DC. She served on the United Nations Conference on Women Council, she worked on the Lake Placid Olympic Organizing Committee, and she worked for the British Broadcasting Corporation before that. Kathleen Rogers is going to give us a research and policy overview, critique and needs analysis. Kathleen.

Kathleen Rogers

This section of course is a public policy section, but I think it has a lot of implications for research. I think very quickly, we have to think about the three different types of towers we're talking about here. The first is existing radio and broadcast towers, most of which have been described as monsters, big ones. The second are the PCS cell towers. They're currently being built and there are many, many, many of them. And to go back and talk about Sheldon – and it's not Sheldon's fault – but one of the comments he made about wireless service providers not knowing about the bird implications. I think it's probably incumbent on the industry – and they could probably do it in a few days through their website and other places – to let their providers know that there is this issue. The third, of course, is digital TV towers which are the big, big, big ones that are coming down the pike and those towers are the ones, I think, that will be particularly the issue for both the research and the public policy concerns.

Let me just tell you that the Telecommunications Act [1996] does prohibit, it prohibits localities from prohibiting service completely and it prohibits them from discriminating against providers, but that's about all it prohibits. What it does allow localities – meaning local governments in all of your counties, you each live in a county and each of those counties will have tower applications before them, they have them now, they've had them in the past, they'll have them in the future – it allows those counties to prohibit, for example the building of the cheapest tower. Providers are not allowed or given permission under the law to build the absolute cheapest tower. That provider may have to build multiple towers below a tree-line and that is permissible under the Telecommunications Act. In which case it would eliminate, in most, except for the rarest of circumstances, at least PCS towers over 200 feet. So all of a sudden we're looking at a smaller group of towers if we really do follow what localities have been able to do in many jurisdictions. Except again, in the rarest of circumstances, you're not going to see PCS towers over 200 feet if localities have anything to do with it.

The next is that it allows counties to prohibit builders from building anywhere they want. It allows them to require builders to find very unobtrusive places like Mike Allred of Southwestern Bell just talked about and they've been terrific in terms of avoiding a lot of problem situations in many counties in which they work. There is an exception to this which I think is an issue and I think it was raised by one of the speakers today which is that in state department of transportation right-of-ways. State departments of transportation are allowed, are allowing, and have permission to allow cell towers to be built in the right-of-ways and those towers that they build escape local jurisdiction. Fairfax County challenged that because Virginia is notoriously bad at environmental protection and they have allowed, I think over 100 towers to be built – many in the right-of-ways and they are a problem. That's been challenged; they lost at the local level, but they're appealing it so that's something to watch and it was raised by someone here as towers built in right-of-ways because there is no local power to do much about it or so it's been said.

I think case law, just so everyone knows, has been pretty supportive of everything I've said. Occasionally a locality will lose. They may not have the money to appeal, but generally speaking a lot of the case law supports the fact that counties can basically tell cell tower providers where they want them to ride and require them to co-locate and things like that. So I guess my view is, except in the rarest of circumstances, we shouldn't have to be dealing with towers over 200 feet if we're talking about cell towers. I work in an area of the country that is about the size of New Jersey with 12 counties and in our counties we have sometimes at any given time 12 to 15 applications for sites in each county. It's a lot of towers to fight, it's a lot of towers to deal with, but there is one of the things that you can all do. Those applications are generally on the web and if people can focus, you can send comments in either through the web to the county and let them know you either don't like the placement of the tower, or it's along a migratory bird route and they will be able to consider that as part of their environmental review. I can talk about that a little bit more at the end.

So I think the question is what really is FCC's role in this, what is the local county's role, and what is our role, both with respect to research and with respect to what I'll call "activism" for lack of a better word. I don't want to hit Holly when she's down – she's a darling, but she's sitting back there with a sprained ankle – but since she's down, I'll go ahead. I think the FCC's interpretation of NEPA is simply awful and incorrect as a matter of law. The Council for Environmental Quality (CEQ) – the mother of NEPA regulations – allows you to consider things beyond what the FCC is considering in their list of 8 things that were put up on the screen [Mike Allred's presentation]. They've always provided for looking at general environmental harm and I think that if it is pursued to the detriment of migratory birds then it is ripe for challenge. I think also it is important to look at both CEQ and EPA's recent guidance on NEPA. I'll just quickly read to you, EPA's for example says, "An EPA reviewer can identify geographic area and extend the area when necessary to include the same or other resources affected by the impacts of the project." In other words, EPA and CEQ are taking an ecosystem view of a proposed project so in this case, in the case of a cell tower, I think it's perfectly reasonable to include cumulative impacts along the migratory route. It could be very, very long, but as long as we have the evidence and the impact, particularly if it's a migratory stop-over, etc., I think all of that is something that the FCC can take into account. In fact, because they have taken it into account, and it has been raised with them, I think it's incumbent on them to do that in every circumstance when you have any evidence at all and certainly they know it's an issue.

I think the other thing is that CEQ's regulations also allow you to take into consideration, when you are doing this analysis – in fact they require it where it is reasonably foreseeable – that it is indeed reasonably foreseeable that there will be thousands of towers built. Therefore, cumulative impacts analysis under NEPA requires us to take into consideration that thousands of towers are reasonably foreseeable to be built and therefore we should consider them in toto. Even if they're not yet built.

And I think everyone would agree, if you looked at the law on this, that it's pretty clear that you can take the future construction of these towers into account when you're analyzing it. That's exactly what we all want to be able to consider. Sit down, put the towers on a map and look at where they are going to be. Industry knows where they are building.

They've been in my office many times, for example SPRINT and other people 6 to 8 months ago and said, "within four years, we want x number of towers." And they'll show you a county map and where the towers are going to be placed. That's just one provider in the county. There are multiple providers in every county. You can do what's called an "all-call." Again, Fairfax County did it, where all the cell tower providers are required to put their plans down on paper so that the county can force them to be where they want them to be. That's something that is perfectly viable and acceptable under the FCC rules.

Just quickly, what can you do? I think there is a great need to work with other groups on this and possibly a subcommittee of us could focus on this. I'll give you an example, the Appalachian Trail Conference, a great group that manages a couple thousand miles of the Appalachian Trail. They're about to announce an agreement with the industry which they've negotiated hard and long on, that they're very proud of, that gives them the right to be consulted with any towers placed in front of a scenic trail. Scenic America is doing the same thing. That's great, but that doesn't really help us and the same thing is true of a lot of other groups. They're negotiating agreements with the industry, but we should all be working together.

We should lobby as quickly as we can and as hard as we can, both the Administration and Congress, for money for Holly to do two things. One is for her agency [FCC] to conduct the research or to require that research be done by the industry. And that's not unheard of – it happens in a lot of other contexts. And secondly, let's lobby for Holly for money for other employees to help her. She doesn't have a single environmental reviewer among her staff and that responsibility is not hers, but the FCC has "passed to the fox the hen house review," and so you have the providers doing the environmental research and then you have nobody at the FCC that's competent to review it. This seems to me to be close to insane, but anyway. And I think the FCC would appreciate it. They're a small agency, as Holly said, and they don't have a lot of money, so I think it is something we can help them with.

I think the FCC could quickly create a scientific advisory board. They can do that right now under regular agency law. We should sit on it, we should review permits, all that sort of thing, that we should be able to go ahead and do in working with industry – put the committee together. As I said most of the action is at the county level, you can work with the birding groups, the Sierra Club, National Audubon has chapters all over the place, get on the web. Let the [Audubon] Chapters and all these places pay attention to what's coming up in their counties. Every tower will have county review, even if it's in a right-of-way. Those counties can get information to you. Most counties are on the web so you can respond and say, "yes, that's a problem"; "yes, it's a migratory bird corridor"; and, "yes, it's an important bird area", whatever it is, you can get it very easily if we just get organized.

Work with industry, a lot of them are really great and they're trying to help out. I just spoke to a person who has invested a lot of time in camouflaging towers and putting them in out-of-the-way places. There are people in the industry that we can work with.

Let's petition for a rule-making to help the FCC out if they say they can't do more. Let's do it.

I don't want to pick on Sheldon, but there's another thing he said which is, "it's not been conclusively demonstrated that there's a problem and no administrative or policy measure for limiting fatal interactions should be considered until conclusive evidence is provided." That's not as matter of law. In the legal standard, you don't have to have conclusive evidence before you take action. I'd recommend a petition on the rule making and I think Fish and Wildlife Service – based on their presentation – would probably agree. Find the right site to challenge. If we had a site that's particularly bad, where we know there are a lot of bird kills, let's challenge the continued operation of the site. I think that is perfectly acceptable.

Modification of towers and re-licensing of towers give people the opportunity to step in. If modification or re-licensing are carried out, you have an opportunity to request, in certain circumstances, modification of what the tower looks like.

And finally, I look at a lot of model contracts that landowners sign. Often, particularly in rural areas – that is where a lot of these things are going to be – you have landowners who need money. They’ll sign these contracts if it looks lucrative to them and at the end of the contract it says, “all improvements on your property belong to you.” Well, not a lot of them think that means the tower, but it does. And so when the service is no longer needed, and it will become obsolete fairly quickly – you know, 5, 10, 15 years it will become obsolete – the landowner is then stuck with taking the tower down. A lot of counties are now requiring bonding so that there is money available to take them down. So I think that’s also really something we could petition either Congress or the FCC to require because I think it’s all within their power. Thank you very much.

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