



VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

April 9th, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Notice of Violations Under the Endangered Species Act and Notice of Intent to File A Citizen Suit

Dear Secretary Dortch:

Pursuant to 16 U.S.C. §1540(g) Forest Conservation Council and American Bird Conservancy hereby provide notice of our intent to file a citizen suit against the Federal Communications Commission (“FCC”) for violations of Section 7 of the Endangered Species Act (“ESA”) in connection with the registration and continued operation of the following antenna structures on the Hawaiian Islands:

<u>Tower Owner</u>	<u>FCC File Number</u>	<u>Initial Registration</u>
AT&T Wireless	A0147567	August 1996
Lesea Broadcasting	A0008704	November 1996
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Pinnacle Towers, Inc.	A0151154	July 1997
Cox Radio, Inc.	A0169986	October 1997
Visionary Related Equipment, Inc.	A0133478	May 1998
American Islands Broadcasting	A0063556	July 1998
American Towers, Inc.	A0303694	February 1997
City of Honolulu	A0130920	July 2000
KM Communications, Inc.	A0198974	July 2001
Island Airwaves, Inc.	A0352920	November 1996
James A. Fakus	A0011913	December 1996
Island Airwaves, Inc.	A0352919	April 2000

These antenna structures, as presently configured, are likely to adversely affect the Newell's (Townsend's) Shearwater (*Puffinus auricularis newelli*) and the Hawaiian (Dark-rumped) Petrel (*Pterodroma phaeopygia sandwichensis*). Despite this fact, the FCC has registered the subject structures and authorizes continued operation of these structures without consulting with the U.S. Fish and Wildlife Service ("USFWS") as required by Section 7 of the ESA (16 U.S.C. § 1536). This letter advises the FCC that Forest Conservation Council ("Council") and the American Bird Conservancy ("ABC") intend to file litigation to enforce these requirements should the FCC continue to authorize operation of the subject structures in an unlawful manner.

The subject structures are likely to adversely affect the Newell's (Townsend's) Shearwater and Hawaiian (Dark-rumped) Petrel.

It is well established that large communication towers, especially those that are lit and supported with guy wires present a threat to seabirds on the Hawaiian Islands. The two endemic species of birds which are most likely to be affected by the lighted and guyed towers on the Islands are Newell's (Townsend's) Shearwater and the Hawaiian (Dark-rumped) Petrel. The Hawaiian (Dark-rumped) Petrel is listed as endangered by federal law, and the Newell's (Townsend's) Shearwater is listed as threatened. These two species are of particular concern with respect to communication towers due to the fact that they carry out the substantial part of their daily lives on the coast and spend the night in their nests in mountains. They travel between the coast and the mountains mostly during the night. Newell's (Townsend's) Shearwaters have had proven mortality associated with both power wires and with street lights. The young of both species travel from nest to sea on a fledgling flight. Like sea turtles, because they are genetically "hard-wired" to go toward the moonlight reflecting on the water, they are distracted and taken off course by lights such as those used atop communication towers.

The USFWS has already determined that communication towers and their guy wires, lights, and ground facilities may adversely affect both the Newell's (Townsend's) Shearwater and Hawaiian (Dark-rumped) Petrel. In the context of both formal and informal consultations with respect to smaller communication towers on the Islands, the USFWS has found that "direct death or physical injury" to the Newell's (Townsend's) Shearwater from collisions with antennas, guy wires, or associated structures is likely over the lifespan of large communication towers and that both species are at risk when towers are taller than surrounding trees and not hidden by vegetation.¹ Indeed, the effects of the structures identified in this notice are "likely to adversely affect" these two species since they all exceed the height of surrounding vegetation, are located in critical areas, and are

¹ See, e.g. USFWS, Pacific Islands Fish and Wildlife Office (2002). Reply to Mr. Calvert Chun, Nextel Communications regarding impacts of the proposed telecommunications antenna cell site at the Waimea Church, Waimea, Kauai; USFWS, Pacific Islands Fish and Wildlife Office (2000). Section 7 Consultation on U.S. Coast Guard Differential Global Positioning System (DGPS), Hawaii Island, Hawaii. Biological Opinion Log Number 1-2-00-F-01.

predominately guyed and lit with the kinds of lighting that attract these species during their nocturnal travels to and from nest sites.

Both these birds fly to and from their nesting areas primarily at night, and may collide with man-made structures in their path, such as towers and lines, because they do not see them. These birds also are attracted to artificial lights, particularly young birds leaving the nest for the first time. They may circle around lights until they strike on object, such as a tower, guy line, or utility line, or until they become disoriented or exhausted and fall to the ground, where they may be killed by vehicles or predators. Tall towers that are lit and supported by guy lines may be particularly harmful to these birds because they may attract birds and subsequently result in their deaths.

Any wires or slender/webbed structures (antennas) erected above tree tops in the vicinity of nesting areas or in the flight paths of these birds will cause mortality as they move, at night, to/from the ocean and nesting areas. These species are very sensitive to this, and the phenomenon is very well documented. In fact, the high incidence of collisions with wires and structures is a major reason why these species were listed under the Endangered Species Act.

The Newell's (Townsend's) Shearwater suffers so much from collisions that a volunteer organization has emerged in Hawaii to deal with this and other problems related to the species. Called Save Our Shearwaters, or SOS, the group works to rescue fledgling Newell's (Townsend's) Shearwaters that have become attracted to lights and end up on the roads, caught in power lines, etc. Over a 17 year period from 1978 to 1994, the group rescued more than 24,000 birds, averaging more than 1400 a year.² Although shielding street and building lights has begun in recent years, there is still significant mortality in the Newell's (Townsend's) Shearwater population.

Section 7 of the ESA requires the FCC to consult with the U.S. Fish and Wildlife Service

Section 7 of the ESA requires the FCC, as a federal entity, to initiate formal consultation with the USFWS over the impacts of the subject structures on Newell's (Townsend's) Shearwater, and the Hawaiian (Dark-rumped) Petrel. In pertinent part, Section 7 requires:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary, 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 which is determined by the Secretary, after consultation as appropriate

² Ainley, et al. (2001). The status and population trends of the Newell's Shearwater on Kauai: Insights from modeling. Pp 108-123 In Scott, J.M., S. Conant, and C. Van Riper eds. *Evolution, Ecology, Conservation, and Management of Hawaiian Birds*. Studies in Avian Biology, number 22. Cooper Ornithological Society.

with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available” (16 U.S.C. §1536).

Regulations implementing the ESA establish that any action which “may affect” a listed species is subject to these consultation requirements (50 C.F.R. § 402.14(a)). Because there is no doubt that the subject structures “may affect” the Newell’s (Townsend’s) Shearwater and Hawaiian (Dark-rumped) Petrel and because the FCC authorized these structures through its registration program and maintains ongoing authority over the towers’ operation, consultation must occur.³

The USFWS has promulgated regulations establishing how the consultation process is implemented (50 C.F.R. § 402.14-402.15). To comply, the FCC must make a written request to initiate consultation and provide the USFWS with the best scientific and commercial data available concerning the past and potential impacts of the subject structures on listed species, including Newell’s (Townsend’s) Shearwater and Hawaiian (Dark-rumped) Petrel. The USFWS must then prepare a biological opinion which sets forth reasonable and prudent alternatives for continued operation of the subject structures which minimizes the possibility of harm to Newell’s (Townsend’s) Shearwater and Hawaiian (Dark-rumped) Petrel. Upon receiving the biological opinion, the FCC has a duty to comply with its recommendations or seek an exemption pursuant to 16 U.S.C. §1536(h).

It is our understanding that the FCC has not initiated consultation with the USFWS as required by Section 7. To obviate the need for litigation, the FCC must take immediate steps to comply with Sections 7 of the ESA regarding the impacts of the subject structures on the Newell’s (Townsend’s) Shearwater and Hawaiian (Dark-rumped) Petrel. If you wish to discuss our concerns in more detail, please contact either one of us at the phone numbers provided below. Thank you for your prompt attention to this matter.

Very truly yours,

³ At any point in time, the Commission has the authority to modify terms of its licenses and authorizations if new information surfaces indicating that the existing terms no longer serve the public interest. For example, the Commission has broad latitude to revoke equipment authorizations if it discovers that previously authorized equipment no longer conforms with pertinent technical requirements or if new conditions coming to the attention of the Commission would have warranted the Commission in refusing to grant the original application. 47 C.F.R. § 2.939. In this case, new information that is now before the Commission is the significant risk its antenna structure authorizations in the Islands pose to the Newell’s (Townsend’s) Shearwater and Hawaiian (Dark-rumped) Petrel and the fact that it can reduce the problem by modifying existing structures and prohibiting the authorization of new structures that do not comply with U.S Fish and Wildlife Service (“USFWS”) guidelines for the protection of wild birds from tower mortality.



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