BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

AND THE

Council for Environmental Quality

WASHINGTON, D.C.

In the Matter of Public Employees for Environmental Responsibility	)	
Request for Amendment of the Commission's Environmental Rules	)	RM-9913
Regarding NEPA and NHPA	)	

To the Secretary, Federal Communications Commission:

Petition for Reconsideration

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INTRODUCTION

Pursuant to Section 1.106 of the Commission's rules and Section 1507.3 of the Council's rules, Public Employees for Environmental Responsibility ("PEER") hereby petitions for reconsideration of the Commission's PEER Order, released December 5, 2001. In the Matter of Public Employees for Environmental Responsibility ("PEER"), Request for Amendment of the Commission's Environmental Rules Regarding NEPA and NHPA, Order (FCC Dkt. No. RM-9913)(Dec. 5, 2001). Compare 47 C.F.R. § 1.106 with 40 C.F.R. § 1507.3.

This Petition seeks a revision of the Commission's environmental rules to:

(1) Revised Rule 1.1307 to ensure that subjective, essential government functions in ensuring compliance with the Endangered Species Act of 1973 are not unlawfully delegated to non-government entities such as telecommunications carriers and fiber-optic cable laying companies, 47 C.F.R. § 1.1307(a)(3);

(2) Revise Rule 1.1307 to ensure that subjective, essential government functions in ensuring compliance with the National Historic Preservation Act of 1966 are not unlawfully delegated to non-government entities such as telecommunications carriers and fiber-optic cable laying companies, 47 C.F.R. § 1.1307(a)(4);

(3) Revise all Rules to remove the categorical exemption now granted for the federal action known as "wireless and broadcast spectrum auctions", and to subject the same to environmental review;

(4) Revise all Rules to remove the categorical exemption now granted for the federal action known as "Communications Antennae Registration", and to subject the same to environmental review;

(5) Revise all Rules to remove the categorical exemption now granted for the federal action known as “Section 214 Authority”, and to subject the same to environmental review;

(6) Revise all Orders to remove the categorical exemption now granted for the federal action known as “cable laying”, and to subject the same to environmental review;

Statement of Facts

Prior to, and following, the filing of the PEER Petition, the following actions or undertakings by the Federal Communications Commission caused and adverse impact which went unreviewed under the Commission’s environmental rules:

(1) Coral Reef breaching, U.S. Virgin Islands. See PEER Petition, and attached documentation (May 17, 2001).

(2) Coral Reef breaching, State of Florida

(3) Vernal pond dredging, State of Maine. See PEER Petition, and attached documentation (May 17, 2001).

(4) Endangered species habitat dredging, State of Pennsylvania. See Charleston Daily Mail, Columbia Energy may sell off fiber optic venture, Parent company has been shedding peripheral assets (April 11, 2001) at P2C (“Construction of the subsidiary's northeast corridor route was halted for a while last year when it was learned that the route included a wetland near Allentown, Pa., which is a habitat of the bog turtle. In a filing with the Securities and Exchange Commission, Columbia said that under a voluntary settlement agreement with the Philadelphia District of the U.S. Army Corps of Engineers, it contributed $ 1.2 million to the Pennsylvania chapter of the Nature Conservancy. The company said the Corps subsequently lifted its directives halting work and construction resumed.”)

(5) Native American archaeological site desecration, State of California. See Supplement to PEER Petition (April 16, 2001), and associated documents filed in Docket No. Rm-9913).

(6) National Historic Park site mismanagement, State of New Mexico. See Supplement to PEER Petition (April 16, 2001), and associated documents filed in Docket No. Rm-9913).

(7) National Historic Park site mismanagement, State of Virginia. See Petition for Order Mandating Preparation of an EA or EIS (Dec. 5, 2001)(joint filing by PEER, Forest Conservation Council, Piedmont Environmental Council, and Friends of the Earth; filed in Docket No. RM-9913).

(8) National Park, State of Wyoming. See Letter, Dan Meyer, General Counsel, PEER to Karen Wade, Director, Intermountain Region NPS, Re: John D. Rockefeller Memorial Parkway, State of Wyoming (June 14, 2001)(filed in Docket No. RM-9913).

In each instance, the FCC was required to review the impact of its actions before hand, and to proceed only after the environmental degradation of its actions and/or undertaking had been adequately reviewed. Such review required consultation with peer agencies. In none of the cases, supra, did the Commission perform its legal obligation under the National Environmental Policy Act of 1969 or the National Historic Preservation Act of 1966.

ARGUMENT

The failure of the Commission's environmental rules is systemic, and not the product of any one industry actor's malfeasance or disregard for the law. The FCC has created a system of "self-certification" which is effectively unenforceable given the lack of budgetary resources allocated by the Commissioners to ensure environmental compliance. See PEER Order at 3 n.22 citing 47 C.F.R. §§ 1.1307(a)-(b), 1.1308, 1.1311.

The PEER Order states that Petitioner has failed to meet the "substantial evidence" standard of proof necessary to conduct non-discretionary rulemaking. PEER has demonstrated seven (7) instances where the Commissions actions significantly affected the environment, each requiring an EA or and EIS which was never performed or was performed in under the "self-certification" regime which places subjective, essential governmental decisions in the hands of the regulated industry least interested in NEPA compliance. 40 C.F.R. §§ 1501.4(a)-(b); 1507.3(b)(2)(i)-(iii).

The FCC's PEER Order as it is now written is arbitrary, capricious, an abuse of discretion and otherwise unlawful. 5 U.S.C. § 706(2)(A)(1994). In its attempt to craft a satisfactory explanation for its action, the FCC has failed to make a rationale connection between the existence of environmental damage in the U.S. Virgin Island, the State of Maine, the State of California, the State of Pennsylvania, and the State of New Mexico and the FCC's environmental review of the actions that precipitated the environmental damage. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). Contrary to law, the FCC has not given reasoned consideration to all of the relevant facts and issues docketed under RM-9913. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970). The events documented through the PEER Petition and subsequent filings were an actual "injury in fact" "fairly traceable" to the administrative actions of the FCC. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); Committee for Effective Cellular Rules v. Federal Communications Commission, 53 F.3d 1309, 1315-16 (D.C. Cir. 1995).

The PEER Petition presents the Commission with a matter resolved by Congress through the National Environmental Policy Act of 1969, and therefore subject to the hard look prong of analysis under Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In its PEER Order, the Commission errs in its analysis by adopting the 'soft look' reasoning appropriate for Commission-related subject matter within the "symmetrical and coherent regulatory scheme" established by Title 47 of the United States Code. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

This is not communications law the Commission is determining its adherence to, it is environmental law -- a field in which the Commission lacks expertise. Congress has mandated that environmental review will take place in the form of an Environmental Assessment (EA) or an Environmental Impact Statement ("EIS"). The Commission's self-certification scheme has bypassed this legislative mandate by creating a 'regulatory fiction' positing that review has taken place. Accordingly, the Commission is in violation of federal law. Cf. Global Crossing Telecommunications, Inc. v. Federal Communications Commission, 259 F.3d 740, 744 (D.C. Cir. 2001).

The Commission faces a higher evidentiary standard in the area of environmental regulation, a field in which it has little or no expertise. As it is the Commission's responsibility and duty to abide by the environmental laws which regulate the Commission's actions, the PEER Petition does not fall within that category of cases in which the Commission is given wide berth by federal Courts. See Telocator Network of Am. v. FCC, 691 F.2d 525, 538 (D.C. Cir.

1982)(finding that when it is fostering innovative methods of exploiting spectrum, the FCC "functions as a policymaker and, inevitably, a seer - roles in which it will be accorded the greatest deference by a reviewing court").

Indeed, in the FCC's review of the evidence offered by the PEER Petition, the Commission has departed from the policies of numerous State agencies to which it -- the Commission -- is required to consult with prior to taking federal action affecting those State agencies' policies. As such, the FCC is moving against well settled case law. Cf. Hall v. McLaughlin, 864 F.2d 868, 872 (D.C. Cir. 1989)(holding that where an agency is following established policy, the need for a comprehensive statement of the rationale is less pressing). Accordingly, the FCC's PEER Order must state the evidentiary standard it is applying, and address each filing in Docket No. RM-9913, item-by-item, as it articulates and applies the appropriate standard of review. This the FCC has not done. PEER requests such a review occur through an answer to this Petition for Reconsideration.

In its answer, PEER requests the Commission specifically cite the environmental damage addressed in each of the cases offered by PEER, and then articulate the "rationale connection made between those facts and the choice made by the Commission." Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996). Specifically, PEER petitions for an answer to the question of why the FCC is departing from the policies of the governments of the U.S. Virgin Islands, Maine, New Mexico, California and the U.S. Army Corps of Engineers. Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 57 (1983)("an agency changing its course

must supply reasoned analysis"); ANR Pipeline Co. v. FERC, 71 F.3d 897, 901 (D.C. Cir. 1995)(holding that an unreasoned departure from established precedent is arbitrary and capricious); see also AT&T v. FCC, 974 F.2d 1351, 1355 (D.C. Cir. 1992).

The Commission is required to do more than "simply posit the existence of the disease sought to be cured" and it must review the PEER Petition's entire docket to "draw reasonable inferences based on substantial evidence." Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 664, 666 (1994). As in Time Warner Entertainment Co. v. Federal Communications Commission, 240 F.3d 1126, 1133 (D.C. Cir. 2001), the FCC has put forth no evidence at all separating itself from the environmental damage conducted under the colour of its authority.

With respect to the question of the cumulative impact of the FCC's federal actions and undertakings, PEER has provided substantial evidence of a trend to degradation. See PEER Petition, and associated documents relating to the Virgin Islands, Pecos N.H.P., and Mormon Peak, CA. Each of these systems, fiber optic and wireless, cumulatively degrades National Parks, wilderness areas and sensitive coral reef systems in a manner which makes Cable Landing Licenses, Wireless and Broadcast Spectrum Licensing, Antennae Registration, and Section 214 Authority (and its abeyance) ill-suited for categorical exclusions. PEER is required to present sufficient evidence of environmental degradation. Is not the issuance of a fine by the government of the U.S. Virgin Islands for environmental damage a prima facie case of reef degradation by fiber optic cabling? See PEER Petition,

and associated documents relating to the Virgin Islands. And PEER also cited to the pending rulemaking in the State of Florida on the impact of cables across reefs, and the empirical evidence presented in that proceeding? See PEER Petition, and associated documents relating to the ARCOS-1 Project.

It is not PEER's place to conduct an environmental review under the guise of a evidentiary standard test. The impacts documented are not prospective; they have already occurred. In the case of Columbia Transcom's 1.4 million dollar fine from the U.S. Corps of Army Engineers for transgressions acting under the Commission's Section 214 Authority (or abeyance of the same), the Nature Conservancy is now spending that money to repair the damages. See Charleston Daily Mail, Columbia Energy may sell off fiber optic venture, Parent company has been shedding peripheral assets (April 11, 2001) at P2C. How much evidence does the Commission need?

A search of the Commission's orders finds little or no evidence of enforcement action by the Commission for the failure of industry to self-certify in a manner which allows the Commission to comply with NEPA. But see PEER Order at 8 (alleging this to be an effective means of administering the self-certification process). Likewise, the booting of this problem to independent petitions by "interested persons" is a red herring. Merely setting up a process for notice and hearing is not the same as ensuring that it, the FCC , is in compliance with the NEPA. PEER Order at 8. Unable to goad industry into doing its job, the FCC falls back on the assumption that citizens will do the Commission's job of environmental review. What the Commission has not answered is

the question: why is it not ensuring its own environmental compliance?

And as for the PEER Order's statement that "the Commission's rules contemplate consultation with appropriate State Historic Preservation Officers . . . ." this is more regulatory fiction than fact. See PEER Order at 8. Compare 36 C.F.R. § 800.2(c)(1) with 47 C.F.R. § 1.1307(a)(4). What the Commission approval of the Pecos, New Mexico communications tower erection proved was that this is aspirational, giving the Commission the ability to tell industry to get the State Historic Preservation Officer's approval if that is of political importance to the FCC, or, even worse, as a mere spine stiffening regulation to provide necessary cover when a SHPO requests to see evidence of FCC compliance. What does not exist in the Commission's rules is text which understands 'consultation' to be something the Commission reaches out to do when it has an action or undertaking which affects a peer agency's mission.

The tower at Pecos, New Mexico was erected and up two (2) years before the National Park Service request that it be subjected to environmental review was taken seriously. The Commission is now reviewing its transgression only because former Commissioner Gloria Tristani, a resident of New Mexico, is interested in the case. Likewise, the Park Service Superintendent who requested review was subjected to a "midnight reassignment" to get him off the issue. Through all of this, New Mexico State Historic Preservation Officer ("NMSHPO") Elmo Baca was never consulted by the FCC until he, as a New Mexico State official, exerted his jurisdictional prerogative and requested evidence of environmental review –

and it did not exist, two years after a telecommunications provider self certified to the FCC that no environmental impact was created by the action. The tower was erected in proximity to Native American remains, impacted significantly Native American archaeological sites, and was planted in the middle of the most important Civil War battlefield in the Western theater of that war.

For all the Commission's confidence in its system of rules, it offers no explanation for the central question of this Petition: how does it know when industry officials are misleading the FCC, intentionally or unintentionally, as they self-certify that the requested Commission action they are soliciting will not adversely impact the environment? Given that the independent contractors hired by industry executives to conduct the self-certification are paid for by the industry itself, there is no guarantee of independence in the conduct of the self-certification. The science can be cooked to meet the needs of industry, notably, the avoidance of environmental compliance.

The entire PEER Petition, and the subsequent PEER Order, come down to a simply question of whether the FCC's delegation of NEPA compliance though self-certification is permissible under the Council's environmental rules. 40 C.F.R. § 1506.5, 36 C.F.R. § 800.2 with Letter, John M. Fowler, Executive Director, Advisory Council on Historic Preservation to Federal Communications Commission, State Historic Preservation Officers and Tribal Historic Preservation Officers (Sept. 21, 2000). See http://www.fcc.gov/wtb/siting/nepa106.pdf. Whether the agency is complying with ACHP or CEQ regulations is immaterial; the FCC's self-certification process does not

provide the necessary information required for the FCC to meets its obligations. It is the process of delegating compliance to industry which creates this vacuum.

Not once in its history has the Federal Communications Commission prosecuted an applicant under the Federal False Statements Act of 1934, the means it has at its disposal to enforce its rules. See PEER Order at ¶ 13; see also 47 C.F.R. §§ 1.1311 (b), 1.17, 1.65. If, over the period of sixteen(16) months, PEER was able to document seven (7) of what may be many adverse impacts on the environment due to FCC actions and undertakings, where is the record of the FCC's review of the certification trail in these seven (7) cases, and in the three hundred (300) or so cases the FCC has not reviewed and processed over the past thirty (30) years? Indeed, PEER only acted on those cases brought to its attention by PEER members. The number of FCC violations may be in the thousands. One senior staffer at the Advisory Council for Historic Preservation estimated Commission non-compliance exists in roughly 90,000 communications tower cases.

The most inflammatory allegation by the Commission in the PEER Order is the statement in footnote forty-six (46):

> With respect to these examples, we agree with commenters [sic] that the incidents do not demonstrate insufficient processing or review at the application stages, but rather show failure to comply with state regulatory requirements . . .

See PEER Order at 7, n.46. The Commission offers no evidence that State agencies in the U.S. Virgin Islands or the State of Maine were or are operating under partnership agreements with the FCC, delegating all or portions of FCC NEPA and NHPA

compliance to the States. Nor does the FCC indicated that such compliance is being administered due to a federal block grant. The FCC's NEPA and NHPA requirements are independent of any State environmental programs, and the FCC may not -- absent a written delegation -- assume that the governments of Maine or the Virgin Islands are doing its, the FCC's, job.

The Commission is required, by the CEQ, to use cumulative impact analysis for certain types of activities. 40 C.F.R. § 1508.7. The activities falling under Nos. 3, 4, 5, and 6 in paragraph 2, supra, all meet this criteria. As for proof of these activities impact, see PEER Petition, and associated documents regarding Virgin Island, the ARCOS-1 Project, the communications towers along the Rappahannock, the treatment of vernal ponds and wetlands in Maine and Pennsylvania, and the siting of towers on federal park and management lands in California, New Mexico, and Wyoming. Compare Implementation of the National Environmental Policy Act of 1969, Report and Order, 49 FCC 2d 1313 (1974); 1998 Biennial Regulatory Review - Review of International Common Carrier Regulations, Report and Order, 14 FCC Rcd 4909 (1999)(Commission orders establishing categorical exception for an activity known to cause adverse impact to coral reefs).

PEER sympathizes with the Commissioner's concerns over their lack of resources, but also notes that their failure to dedicate resources to environmental compliance can hardly be an excuse for non-compliance with a federal law such as the NEPA. Various means of having industry finance its own use of Commission staff for the purpose of meeting can be devised, as, indeed, municipalities have done through their

communications tower ordinances across the country. What is lacking is the will to comply with the law.

CONCLUSION

One is not permitted to chose between compliance with the Telecommunications Act of 1996 and the National Environmental Policy Act of 1969. The salutary effects of "competition" are understood but they need not be advanced to the detriment of the environmental policy goals of the United States Government. PEER believes that timely action by all parties hereby petitioned can bring the FCC and the telecommunications industry into compliance with the law. In order to aid in this correction, PEER is more than willing to meet with FCC, CEQ, ACHP officials and staff to provide whatever expertise we have to the benefit of the United States Government.

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