January 26, 2001

The Honorable Michael K. Powell
Chairman, Federal Communications Commission
and Mr. Donald Abelson, Bureau Chief
International Bureau ("IB")
Federal Communications Commission ("FCC")
445 12th Street, S.W.
Washington, D.C. 20554

BY FIRST CLASS POST

Re: ***Request for Environmental Assessment and Enforcement Actions i.c.o. Sunny Isles, FL (25 55' 50" N.;80 07' 00" W.)***

Dear Chairman Powell and Bureau Chief Abelson:

Pursuant to Section 1.1307(c) of the Commission's rules, Public Employees for Environmental Responsibility ("PEER") hereby amends its October 6, 2000 letter of inquiry, elevating it to a Petition for environmental review. Based on material recently received from Florida PEER, reasonable cause indicates that officials of the Federal Communications Commission ("FCC" or "Commission") and/or executives of COM TECH International Cable Corporation, ("COM TECH"), may be in violation of:

(1) the Administrative Procedures Act of 1949 ("APA")(5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521;

(2) the Federal Advisory Committee Act of 1972 ("FACA")(5 U.S.C. App. II *et seq*.);

(3) the False Statement Act of 1934 (18 U.S.C. § 1001);

(4) the Endangered Species Act of 1973 (16 USC 1531 *et seq*.)

—and —

(5) the National Environmental Policy Act of 1969 ("NEPA")(42 U.S.C. § 4321 *et seq*.).

PEER asks the Chairman and Bureau Chief to investigate PEER's allegations and bring both the FCC and

COM TECH into compliance with the law.

PEER also replies to the International Bureau's response to PEER's letter of inquiry regarding environmental assessments and enforcement actions against COM TECH International Cable Corporation. *See* Letter, Donald Abelson, Bureau Chief, International Bureau to Daniel P. Meyer, General Counsel PEER (Dec. 8, 2000) ["Abelson Letter", Attached as Exhibit A]. During the State of Florida's review of the COM TECH project under Florida's public easement deliberations, environmental resources on the site were documented in a manner that may be inconsistent with COM TECH's submarine cable landing license application filed at the FCC.

As with other items of correspondence in this series, PEER requests that this filing be forwarded for docketing in RM-9913 concurrent to its review for action within the International Bureau.

SUMMARY OF FACTS

There is no dispute as to the following facts regarding the pending damage to environmental resources in and among the hardbottom and coral reef ecosystems off the coast of Sunny Isles, Florida:

? The cable now projected to make landfall at Sunny Isles, Florida is part of the ARCOS-1 System connecting Florida's telecommunications grid with the Bahamas, the Turks and Caicos Islands, the Dominican Republic, Puerto Rico, and the Americas south of Mexico.

? As it approaches environmentally-sensitive resources along the Florida coast, the cable will be installed using Horizontal Directional Drilling ("HDD"). HDD bores beneath the hardbottom and regains the ocean floor at a "punch out" in the softer sands and sediments. This is a "drill and leave" technology, which uses the boring pipe as conduit for the cable, itself.

? Divers then disturb the area around the exit point with hand held seawater hoses, increasing turbidity as they excavate a 15 -foot diameter hole, six (6) to nine (9) feet deep. Sand bags filled with an unidentified material are then placed into the hole to provide an anchor for the cable. The conduit pipe is severed three (3) to six (6) feet below the sea floor. It is not clear how the fiber optic cable is protected through the sand bag anchoring structure.

? COM TECH is proceeding with a project under the color of a major federal action by the

FCC, which may not have been subjected to the level of environmental review required by the Commission's rules. Through its August 14, 2000 *Comments on the PEER Petition* (RM-9913), the Personal Communications Industry Association ("PCIA") notified PEER of the existence of an "Environmental Compliance Group" ("ECG") organized within the Commission. PCIA stated, "[t]he ECG is active in reviewing EAs, assessing environmental effects and mediating and negotiating mitigation of effects of proposed and built towers and wireless facilities."[1] The role of the ECG in unknown, its proceedings are not public, and the scope of its work undocumented. Its position on submarine cable licensing matters remains an issue of contention between PEER and the Commission.

? Section 1.1304 of the Commission's rules merely contemplates a loosely-defined subset of Commission staff members handling "general information and assistance" (Office of the General Counsel) and "specific information" (Bureau-by-Bureau) regarding environmental compliance. 47 C.F.R. § 1.1304 (1999). In fact, PEER discussions with FCC Staff indicate a state of environmental regulation in which compliance is policed by staff members on an ad hoc, inter-Bureau basis.

? PEER's review of Commission's decisions and Title 47 C.F.R. find no reference to PCIA's cited "ECG". PEER cannot ascertain whether such a group handles technologies normally confined to the delegated powers of each Bureau, or whether it operates across the board.

The procedural summary on page two of the Abelson Letter is accurate. It articulates a process which provides for a logical ordering of Commission affairs. It does not, however, define the role of the "ECG" in Commission affairs. Nor does it guarantee that the FCC is in compliance with the law. Accordingly, PEER requests the evidence and observations presented *infra* be weighed before the Commission decides whether to require an Environmental Assessment on the Sunny Isles project.

To wit, this state of regulation may impact the following at Sunny Isle:

? 6,000 linear feet of low, medium and high relief hardbottom and coral reef ecosystems will

[1] *See*, In the Matter of the Petition for Rulemaking filed by Public Employees for Environmental Responsibility ("PEER"), *PCIA's Comments on the Petition* (August 14, 2000) at 3-4.

be impacted by the project. *See* State of Florida Department of Environmental Protection, *Recommended Consolidated Intent* (01-SED-005)(Jan. 23, 2001) at Staff Remarks, ¶ 4. ["Consolidated Intent", Attached as Exhibit B, unpaginated].

? The impact of the COMTECH project is significant enough to require mitigation with 1,620 square feet of artificial reef, and yet, no assessment of the damage requiring such mitigation has been completed. At what point is the appropriateness of the NOAA Habitat Equivalency Analysis employed to determine the appropriateness of artificial reefing subject to review by the Commission?

? The chart compiled by Environmental Development Consultants Corporation and included in the *Recommended Consolidated Intent* clearly identified the sewage outfall, along which the fracture identified by PEER in its October 6th letter of inquiry. The cable is labeled ARCOS-1 North and ARCOS-1 South. While it appears North was shifted to avoid the fracture, no notation has been made to confirm that fact.

? Even more important, the chart clearly identifies an existing breech in the hardbottom and coral reef barrier to the south of the proposed site. Landfall can be made here without damaging these environmental resources. No assessment of this site's feasibility appears in the documents compiled by the State of Florida.

? The attached *Recommended Consolidated Intent* does not cite the applicable federal laws, laws which with the FCC is required to comply. Environmental resources will be impacted and the review conducted at the State level does not meet the requirements of the Commission's rules. 47 C.F.R. § 1.1305 (2000).

? The mitigation techniques proposed by COM TECH are themselves a concession of environmental impact. These mitigations have not been subjected to review under the standards of the Environmental Policy Act of 1969. NEPA binds not the States, but the federal government. *See also See* Melissa L. Meeker, Director of District Management (Southeast District), *Consolidated Environmental Resource Permit* and Intent to Grant Sovereign Submerged Lands Authorization (Permit No. 13-0171515-001) at 6.

["Consolidated Environmental Resource Permit", Attached as Exhibit B, undated

? COM TEC concedes that there is a danger that drilling apparatus will "frac-out" and damage the seafloor while boring beneath 4,000 linear feet of hardbottom or coral reef. *Consolidated Environmental Resources Permit at 7.*

? The State of Florida has identified potential reef abrasion damage from the cable-laying platform. *Consolidated Environmental Resource Permit* at 7.

? The State of Florida has identified "turbidity" as an environmental concern on this project. *Consolidated Environmental Resource Permit* at 6.

? The State of Florida has identified potential dangers to endangered sea turtles. *Consolidated Environmental Resource Permit* at 8. *See also*, Exhibit I, Appendix of the *Consolidated Environmental Resource Permit* (unpaginated)("Assessment" prepared by COMTECH.). The State of Florida's Department of Environmental Protection has identified a threat to endangered marine turtles, a threat that appear not to be identified by COM TECH in its filings to the FCC. As such, the Environmental Assessment must review the project under the standards of the Endangered Species Act of 1972, as well.

See State of Florida Department of Environmental Protection, *Recommended Consolidated Intent* (01-SED-005)(Jan. 23, 2001) at Staff Remarks, ¶ 6.

THE VIOLATION

The Commission's approach to its own environmental laws has produced a rather odd anomaly. Generally, applicants now (1) come to the Commission to obtain a submarine landing license which is issued based on market, and not environmental analysis; (2) applicants then go to the applicable State authority to obtain local environmental, approval which may, or may not, be predicated on a programmatic assessment supervised by the U.S. Army Corps of Engineers. Corps assessments tend to be limited in their scope, and

focused on Clean Water Act, 33 U.S.C. § 1341, requirements; (3) the applicant then returns to the Commission for approval of its specific landing points. Abelson Letter at 2.

In bifurcating its review, the Commission has created a situation where the Applicant is required to undergo report any environmental issues raised at the State level before the Commission approves the specific landing points. *Id.* But given its preference for self-certification, the Commission has also established a de facto regime of environmental non-compliance. At what point will the Commission review, under NEPA, the same concerns addressed by the State of Florida under its laws? *See* 4 F.S. 373 (2000); 62 F.A.C. (2000). Through its Submarine Cable License Application, COM TECH raises the prospect that it, and/or the Commission, are presently in violation of, among others, the following statutes:

? ? ?

(1) The Administrative Procedures Act of 1949 (codified at 5 U.S.C. §§ 551-559, 701-706, 305, 3105, 3344, 5372, 7521). FCC outreach activities are governed by the Administrative Procedures Act. In the context of Commission rulemaking, agencies are typically at will to collect information about regulatory alternatives from sources deemed appropriate. This is a freedom the FCC commonly exercises by communicating with outside parties. *Cf. Sierra Club v. Costle*, 657 F.2d 298, 400-10 (D.C. Cir. 1981) (holding that ex parte communications are not prohibited). Section 553 of the APA requires only that agencies provide notice of proposed rules, allow interested parties an opportunity to comment on proposed rules, and respond to such comments with a "concise, general statement" upon promulgation of final rules. *See, e.g., American Medical Ass'n v. United States*, 887 F.2d 760, 767-69 (7th Cir. 1989) (explaining principles relevant in determining whether notice was sufficient); *Portland Cement Ass'n. v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (holding that information on which agency bases final rule cannot be known only to agency), *cert. denied*, 417 U.S. 921 (1974).

Request: Regarding the appearance that COM TECH has been granted the benefit of a sub rosa environmental review, PEER requests the project protested by this Petition be reviewed in light of PCIA's cite to an "Environmental Compliance Group" ("ECG") last summer. PEER acknowledges that it possesses less than adequate level of information regarding the alleged ECG established somewhere within the FCC to review projects such as Sunny Isles. Nonetheless, PEER asks the Chairman to verify that the APA's procedural requirements were satisfied if/when the Commission created the "ECG" referenced by PCIA. *See*, In the Matter of the Petition for Rulemaking filed by Public Employees for Environmental Responsibility ("PEER"), *Comments on the Petition (PCIA)* (August 14, 2000) at 3-4. If this entity regularly rules in both secret and the manner described by PCIA? and in fact did so with respect to Sunny Isles? such deliberations should be opened to the public.

? ? ?

(2) The Federal Advisory Committee Act of 1972 (codified at 5 U.S.C. App. II et seq.). When agency conduct triggers the FACA, that agency is obliged under Section 10 of the Act to follow certain procedures and safeguards. Passed in 1972, the FACA seeks to promote openness, accountability, and balanced discourse. These goals reflect previous concerns that advisory committees had become a hidden vehicle for secret clubs and special-interest access to agency decision-makers. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 453 (1989)(explaining that "biased proposals" was one of the main "specific ills" that FACA was designed to cure); *see also id*. at 455-56 (summarizing legislative history). At the same time, the FACA seeks to promote conflicting goals associated with administrative efficiency and cost-reduction. These aims reflect a separate set of previous concerns about the number, costs, and usefulness of advisory committees and specifically about whether the federal government was getting its money out of advisory committees, especially long-lived ones. *See, e.g.*, H.R. Rep. No. 91-1731, 91st Cong., 2d Sess. (1970).

In the interests of openness, accountability, and balance, the FACA requires the Commission: (a) to provide public notice that it is establishing an advisory committee; (b) to promote diversity of viewpoints on established advisory committees; (c) to provide notice of all advisory-committee meetings; (d) to keep minutes of those meetings; (d) to make available for public inspection all documents prepared for or by advisory committees; (e) to provide opportunity for participation during advisory-committee meetings by non-members; and to make available at cost transcripts of any advisory committee meeting. 5 U.S.C. App. II §§ 9(a)(2), 5(b)(2), 10(a)(2), 10(c), 10(b). These requirements are subject to restrictions in the Freedom of Information Act and the Government in the Sunshine Act. *Compare* 5 U.S.C. App. II 10(b),(d) *with* 5 U.S.C. §§ 552 (FOIA), 552(b)(Sunshine).

These openness requirements facilitate public monitoring of advisory committees and thereby reduce the likelihood that advisory committees can serve as secretive channels for special-interest access to the Commission. In the interest of administrative efficiency, the FACA requires the Commission to charter advisory committees with the GSA and both houses of Congress. Agencies may terminate or recharter all advisory committees within two years from the date of their creation. 5 U.S.C. App. II §§ 9(c), 14. These review mechanisms ensure that advisory committees do not outlive their usefulness. All of these various requirements impose on agencies several layers of procedural responsibilities above and beyond those required by the APA.

Request: PEER requests the Chairman review the mandate, charter and actions of the "ECG" identified by PCIA to determine whether it is a federal advisory committee as that entity is defined under the FACA. If it is a federal advisory committee, PEER requests its procedures be reviewed for compliance with the FACA.

? ? ?

(4) False Statement Act of 1934 (codified as 18 U.S.C. § 1001). Applications for major Federal actions by the Commission typically require the Applicant to verify whether a "significant environmental effect" will occur due to the contemplated federal action. The landing of fiber optical cables and the maintenance required of them are the consequence of federal action, which may have an environmental impact on wilderness areas. If COM TECH failed to perform due diligence in meeting this, and/or other, environmental requirements prior to signing its Sunny Isles Application or any successive amendments thereto, it may have violated Title 18 of the U.S. Code. From the environmental movement's perspective, the Commission's dispersed environmental compliance organization—and the lack of a centralized file facility/dbase for environmental filings—make the public policing of these violations all the more problematic.

First enacted in 1863 as part of the prohibition against filing fraudulent war claims against the federal Government, the "false statement statute" was directed at the gundecking of Applications to the federal Government, filings similar to present-day industry's Applications to the Commission. *Compare* FCC Application for Wireless Telecommunications Bureau Radio Service Authorization (FCC Form 601) *with* Act of March 2, 1863, ch. 67, 12 Stat. 696, 697. After yet another war in which corporations engaged in fraud against the federal Government, Congress broadened the prohibition in 1918 to cover other false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." Act of October 23, 1918, ch. 194, §35, 40 Stat. 1015, 1016. But even through the Great Depression, the U.S. Supreme Court read the false statement statute narrowly and limited it to "cheating the Government out of property or money." *United States* v. *Cohn*, 270 U.S. 339, 346 (1926).

The narrow, *Cohn* reading of the 1918 Act was problematic after reforms of the Roosevelt Administration survived judicial opposition. These reforms included passage of the FCC's organic law, the Communications Act of 1934. *See generally, United States* v. *Yermian*, 468 U.S. 63, 80 (1984) (Rehnquist, J., dissenting). New regulatory agencies, such as the Federal Communications Commission, relied heavily on self-reporting to assure industry compliance. If regulated entities such as Pacific Bell could

file false reports with impunity, significant Government interests (such as the industrial laws of the 1930s and the socio-environmental laws of the 1960s) could be subverted. Laws designed to prevent the Government proprietary loss would not prevent such fraud. *See generally, United States* v. *Gilliland,* 312 U.S. 86, 93-95 (1941). The Secretary of Interior, in particular, expressed concern that "there were at present no statutes outlawing, for example, the presentation of false documents and statements to the Department of the Interior in connection with the shipment of 'hot oil,' or to the Public Works Administration in connection with the transaction of business with that agency." *United States* v. *Yermian*, 468 U.S., at 80 (Rehnquist, J., dissenting).

In response to the Interior's request, Congress amended the statute in 1934 to include the language that formed the basis for prosecuting falsification of all agency Applications, regardless of whether they involved "property or money". *See Hubbard* v. *United States,* 514 U.S. 695, 707 (1995). Since 1934, the false statements statute has prohibited the making of "any false or fraudulent statements or representations … in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder." Act of June 18, 1934, ch. 587, §35, 48 Stat. 996.

The Commission's bifurcation of submarine cable licensing environmental review begs the question as to whether COMTECH should be prosecuted for criminal activity under the False Statements Act of 1934. It is under a positive, pro-active requirement to notify the Commission if it has knowledge of potential environmental damage. 47 C.F.R. § 1.52 (2000). COMTECH has presumably read the documentation supporting its own permit to enter Florida's Sovereign Submerged Lands. Exhibit I, Appendix A of that document is entitled, "Assessment, Repair , Monitoring, Reporting of Stony Coral Impacts Along Telecommunication Cables in Miami-Dade County, Florida". *See* Exhibit B, attached ("Appendix A").

Appendix A is Florida's equivalent of an "Environmental Assessment". If COM TECH's project is subject to environmental assessment under Florida's environmental laws, why is it not subject to environmental assessment under the NEPA? And when was that determination made? Has COM TECH reported the environmental risk to the FCC, and if it did, when was that risk assessed by Commission staff and placed on public notice for comment from the professional scientific community? If COM TECH has not reported the risk evidenced by Appendix A, when does the Commission intend to refer the matter to the Federal District Attorney for the District of Columbia, for prosecution under the False Statements Act of 1934?

Request. PEER asks the Chairman to review the grant of the COM TECH submarine landing license issued to permit the landing of the ARCOS-1 cable, and to insure that COM TECH has made no violation, willfully or otherwise, of Title 18, Section 1001 when it communicated with the Commission regarding the proposed laying of fiber optic cable off Sunny Isles, Florida. If Title 18 was violated, PEER expects a prompt referral of the matter to federal District Attorney's Office in Washington, D.C.

? ? ?

(5) The National Environmental Policy Act of 1969 (codified at42 U.S.C. § 4321 et seq). In 1969, Congress passed the National Environmental Policy Act ("NEPA") to ensure that all federal agencies consider the environmental impacts of major federal actions that affect the "quality of the human environment." 42 U.S.C. § 4332(2)(C). One of the statute's primary purposes is to make certain that the FCC, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, (1989); *see also City of Grapevine, Texas v. Department of Trans*., 17 F.3d 1502, 1503-04 (D.C. Cir. 1994) (discussing the agency's mandate to take a "hard look" at the environmental consequences of its decision to proceed with a project).

Notably, PEER reminds the Chairman that the provisions for "lead" and "consulting" agency do not permit the Commission to assume that the United States Army Corps of Engineers will conduct the Title 16 and Title 42 analysis. The essence of NEPA is that each agency engages in independent review to satisfy its own requirements under the environmental laws. Provisions adopted at Section 1.1311(6)(3) of the Commission's rules appear to be at variance with judicially-approved interpretations of the NEPA. *Compare* 47 C.F.R. § 1.1311(e) *with Save the Bay, Inc. v. United States Army Corps of Engineers,* 610 F.2d 322, 325 (5th Cir. 1980).

In addition to providing crucial information to the agency, NEPA also "guarantees that the relevant information will be made available to the larger audience that also plays a role in both the decision-making process and the implementation of the resulting." *Robertson*, 490 U.S. at 349. This larger audience includes the President, who is responsible for the agency's policy; Congress, which has authorized the agency's actions; and the public, which receives the "assurance that the agency 'has indeed considered environmental concerns in its decision-making process,'" *Sierra Club v. Watkins,* 808 F. Supp. 852, 858 (D.D.C. 1991) (quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc*., 462 U.S. 87, 97 (1983)), as well as the product of the opportunity to comment.

NEPA has twin goals:

(1) to ensure that the agency takes a "hard look" at the environmental consequences of its proposed action;

—and—

(2) to make information on the environmental consequences available to the public.

The public may then offer its insight to assist the agency's decision-making through the comment process. *DuBois v. United States Dept. of Agric.*, 102 F.3d 1273, 1285 (1st Cir. 1996). NEPA sets forth procedural safeguards to execute this "hard look" and ensure proper consideration of environmental concerns . . .. *See City of Carmel-by-the-Sea v. United States Dept. of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997). The cornerstone of NEPA's procedural protections is the Environmental Impact Statement ("EIS"), a detailed statement that discusses:

(1) the environmental impact of the proposed action,

(2) any adverse environmental effects that cannot be avoided should the proposal be implemented,

(3) alternatives to the proposed action,

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,

—and—

(5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332 (C).

Request. PEER's concern with respect to NEPA focuses on the lack of the required Environmental Assessment ("EA") at the point where COM TECH received the benefit of a Major federal action. The Commission's rules state that new applications and minor/major modifications of existing or authorized facilities are subject to EA/EIS review. *Cf*. 47 C.F.R. §§ 1.1305, 1306(b) (1999). Given the

fact that an EA has been prepared by the State of Florida to meet its environmental laws, why has the federal government not prepared an EA in compliance with NEPA?

CONCLUSION

PEER concedes that as a rule, the FCC does not require an environmental assessment to be filed with submarine cable landing license applications. 47 C.F.R. § 1.1306.1 (2000). This rule is predicated on a finding that submarine cable landings are not inherently invasive, meaning that they do not, in and of themselves, degrade environmental resources. However, the landing of cables off, say, the Jesery coast does not have the same impact as the landing of cables along the southern coast of Florida. Coral reefs are a sensitive environmental resource. This was not understood in the mid-1970s when the current regulatory regime was established. And while the Commission reserves its prerogatives with respect to requesting environmental assessments, it seems to have based the exercise of that government function on objections during the public comment period. *Compare* Joint Applicant for a License to Land and Operate a Submarine Cable Network Between the United States and Japan, Cable Landing License, File No. SCL-LIC-19981117-00025, 14 FCC Rcd 13066, 13083 (1999) at para. 45(70 *with* Abelson Letter at 1.

PEER reminds the Commission that its obligation— under federal law — is to ensure that no federal action degrades the environment without an environmental assessment of that degradation and an analysis of the regulatory merits of proceeding in the face of the degradation. 47 C.F.R. § 1.1305 (2000). While it is convenient for regulator and regulatee alike to have an alert public available to underscore corporate actions which may degrade the environment, the National Environmental Policy Act of 1969 does not require public comment to trip its provisions. The FCC is required to comply with the law regardless of whether public comment is available.

PEER requests the Commission issue an immediate administrative injunction on the COM TECH project. An injunction is necessary to prevent environmental damage to the hard bottom and coral reefs off

Sunny Isles, damage left unassessed by COM TECH's failure to report the environmental risks presented by the project.

Cordially,

Dan Meyer

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