

Mr. Earl E. Devaney
Inspector General
Department of Interior
1849 C Street, NW
Washington, DC 20240

May 3, 2006

Dear Mr. Devaney:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that your office conduct an investigation into actions by Yellowstone National Park (YNP) that appear to violate the Federal Advisory Committee Act (Public Law 92-463, 5 U.S.C., App). We are requesting that your office confirm whether this violation occurred and which official(s) was responsible.

On March 31, 2005, YNP convened a meeting with representatives of Sprint, Verizon Wireless, Western Wireless, Qwest, Union Telephone, Western Wireless (now called Alltel) and others to advise it on developing a "Wireless Communication Plan." The subject of the meeting was to develop both the process and the substance for developing a proposal governing cell tower placement, wireless internet access, two-way radio signals and other topics relating to commercial interaction between the invited companies and YNP. Attached are the minutes for this meeting, which PEER obtained from YNP under the Freedom of Information Act (FOIA).

Our FOIA request yielded no records indicating any public notice of this meeting, let alone posting of its agenda. Nor was there any opportunity afforded for public input into this closed-door session.

Section 10(a)(1) of the Federal Advisory Committee Act (FACA) provides:

"Each advisory committee meeting shall be open to the public." 5 U.S.C. App. I § 10(a)(1).

In addition, no Department of Interior advisory committee shall be established without following the requirements of Section 9(a) of FACA. 5 U.S.C. §9 (a) (2006) No advisory committee shall meet or take any action until an advisory committee charter has been filed as required by section 9 (c). 5 U.S.C. § 9 (c) (2006) Moreover, Section 9 (a) of the FACA statute provides that no advisory committee shall be established unless such establishment is (1) specifically authorized by statute or by the President or (2) determined as a matter of formal record by the head of the agency involved after consultation with the Administrator [of GSA], with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law. Also, section 9 (c) provides that no advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency

to whom any advisory committee reports and with the standing committees of the Senate and House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information (A)-(J).

In the papers we received pursuant to our FOIA request we found no evidence that the Secretary of the Interior or Interior's Solicitor's office ever reviewed the question whether the group that met at Yellowstone National Park was an advisory committee.

The Supreme Court has stated that the purpose of FACA is to ensure that the creation, operation, and duration of advisory committees be subject to uniform standards and procedures and that Congress and the public remain apprised of their existence, activities, and cost of and that their work be exclusively advisory in nature. (Public Citizen v. United States Department of Justice Et. Al., 491 US 440, 446)

The FACA statute defines the term "advisory committee" as "...any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as 'committee'), which is--

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration." (5 USCS Appx § 3).

The General Services Administration (GSA), the agency responsible for administering FACA, has developed a list of meetings that are not considered "advisory committee" for FACA purposes. Significantly, the Wireless Telecommunications Plan, Internal Scoping Meeting does not appear to fall under any of the definitions of activities excluded from the definition of advisory committee by GSA:

- (1) It was not a group created by the National Academy of Sciences (Under 41 CFR § 102-3.40(a));
- (2) It was not an advisory committee of the Central Intelligence Committee (Under 41 CFR § 102-3.40(b));
- (3) It was not a committee exempted by statute (Under 41 CFR § 102-4.40(c));
- (4) It was not outside the management or control of an executive agency, in this case the National Park Service (Under 41 CFR § 102-4.30(d));
- (5) It was not a group assembled to provide individual advice (Under 41 CFR § 102-3.40(e)). Specifically, the meeting was a group of entities brought together, according to the meeting minutes, to address "a need to develop consistent policy" (page 2), adding that "Working together as a group is the easiest way to develop an effective plan (page 5);
- (6) It was not a group assembled to exchange facts (Under 41 CFR § 102-3.40(f));
- (7) It was not a meeting solely between or among federal employees (Under 41 CFR § 102-3.40(g) and (h)). It was a meeting between a federal agency and private entities;

- (8) It was not a meeting of a local civic group (Under 41 CFR § 102-3.40(i));
- (9) It was not a meeting to advise state and/or local officials (Under 41 CFR § 102-3.40(j));
and
- (10) It was not an operational committee meeting (Under 41 CFR § 102-3.40 (k)) to discuss non-discretionary actions required under law or presidential directive.

In addition, GSA regulations also provide “additional guidance” on the point of what is and is not an advisory committee providing an exception in this type of case for committee meetings between agency officials and their contractors, licensees, or other “private sector program partners.” The regulations add that “Agencies often meet with contractors and licensees, individually and [as] a group, to discuss specific matters involving contract’s solicitation, issuance, and implementation, or an agency’s efforts to ensure compliance with its regulations. Such interactions are not subject to the Act because these groups are not ‘established’ or ‘utilized’ for the purpose of obtaining advice or recommendations.” (41 CFR § 102-3.40, Appendix A)

This further exception also does not apply in this case, as the purpose of the meeting was to solicit advice on how to develop standards for future license and/or permits.

The Supreme Court has found that one of the main purposes of FACA is to stop bias from occurring in the development of federal policy. (See, Public Citizen v. United States Department of Justice Et. Al., 491 US 440, 451-455, stating that the purpose of FACA, as manifested by its legislative history and as recited in 2 of FACA, is to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals)

By excluding the public from this scoping meeting, YNP was providing telecommunication companies, which had possible direct potential benefits at stake, a favored seat at the table in order to help shape the development of the policy that would determine how and to what extent the participants would benefit. By excluding the public from this meeting, YNP was allowing these interested parties to shape the proposal that would, presumably, be available for public comment only after the proposed policy was already developed.

The actions of YNP appear to be precisely the type of actions forbidden by the Federal Advisory Committee Act.

Should your office require additional information about this request, or additional materials relating to YNP’s actions, please do not hesitate to contact me.

Cordially,

Jeff Ruch
Executive Director