Before the Federal Communications Commission

Washington, D.C. 20554

In Re the Telecommunications Industry's)

Environmental Civil Violations in U.S. Territorial)

Waters (South Florida and the Virgin Islands))

and along the Coastal Wetlands of Maine:) Dkt. No. RM-9913

)

FCC Accountability and Responsibility for)

Environmental Transgressions, and Petition for)

for Rulemaking Regarding the NEPA, NHPA, and)

Part 1, Subpart I of the Commission's Rules)

To the Secretary, Federal Communications Commission:

Petition for Rulemaking

Public Employees for Environmental Responsibility (PEER)

Daniel P. Meyer

Public Employees for Environmental Responsibility (PEER) 2001 S Street, N.W. -- Suite 570

Washington, D.C. 20009

Tele: (202) 265.7337

Its General Counsel and Attorney

District of Columbia Bar No. 455369

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SUMMARY

Following the deregulation of American Telephone & Telegraph and the passage of the Telecommunications Act of 1996 ("Telecom Act"), an "urban" myth has perpetuated

itself, a myth created to justify loose environmental regulation of those companies advancing the "pro-competitive" policies of the Telecom Act. This myth posits that telecommunications technologies are in some manner "cleaner" and "greener" than their pre-Information Revolution "smokestack" predecessors. *See, contra,* Wait, Patience, *Company fined $20,000 for pollution*, Gazette Community News, (Brunswick, Md. Edition)(May 11, 2000) at A-4, A-8 (reporting the illegal dumping of barium-laden sludge into the water supply of the City of Frederick, Md., by the manufacturer of wireless communications tower antennas)[Attached as Exhibit 1]. Petitioner PEER comes now to rebut that argument, and asks the Federal Communications Commission reassert its role as a protector of the environment under the National Environmental Policy Act of 1969 ("NEPA") and the National Historic Preservation Act of 1966 ("NHPA").

Federal agencies are under a mandate to harmonize NHPA and the NEPA with their own Rules enabling these statutes. 36 C.F.R. § 800.8 (1999). And yet, NHPA/NEPA statutory regimes are distinct and differ from one another. The NHPA, for instance, directs federal agencies--which includes the FCC--to take responsibility for considering specific historic resources when undertaking a federal action. 16 U.S.C. § 470(w)(7), 470-1(1999); 36 C.F.R. § 800.2(o)(1999).[(1)] As such, a Commission rewrite of the environmental rules must fully articulate the varying levels of environmental protection required by the general pattern of federal environmental law.

NEPA and NHPA are co-joined in this Petition as the effective statutes governing this issue because the NEPA specifically included the subject of the NHPA in its list of environmentally sensitive resources. As such, the two statutes create--along with other provisions of the United States Code--a cohesive pattern of statutory action by the United States Congress. And while the subset of affected sites which are the concern of the NHPA will be a smaller subset of those resources which are the concern of the NEPA, they are some of the most irreplaceable environmental resources. This woven quality of the NEPA and the NHPA is explicitly reflected in the Commission's rules. *See* 47 C.F.R. § 1.1307(a)(4)(1999). As such, Petitioner's argument will work both statutes, in tandem, to provide a justification to grant this Petition.

By this request, based on the facts supplied *infra* by concerned members of PEER's field office in the State of Florida ("Florida PEER"), and believing that the public interest lies in the enforcement of the environmental laws against all transgressors, public and private, petitioner Public Employees for Environmental Responsibility ("PEER")[(2)]:

respectfully requests the Federal Communications Commission ("FCC" or "Commission") conduct a joint-rulemaking with the Environmental Protection Agency ("EPA") and the Advisory Commission on Historical Preservation (ACHP) to ascertain whether the Commission's environmental rules are being lawfully applied in the case of (a) submarine cable laying within the territorial waters of the United States; (b)

submarine cable landing licenses for the locations under Commission jurisdiction; (c) extensions of fiber optic cables within the United States and (d) licenses for the use of all public spectrum requiring the use of communications towers.

further requests the Commission implement an immediate, expedited rulemaking to ascertain whether the FCC is in need of an "Office of Environmental Compliance" to prevent further violations of the environmental laws by the FCC.

respectfully requests the Commission require the beneficiaries of the Commission's federal actions -- (1) all Section 214 certificate holders and applicants, (2) all spectrum license holders and applicants, (3) all submarine cable operators conducting operations within the territorial waters of the United States, and (4) all cable landing licensees and applicant--to amend their applications, licenses and certificates and thereby allow the FCC to comply with the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). Thorough administration of the law requires acting under blanket Section 214 Authority be subject to such safeguards, as well.

Need for Immediate Action. Immediate action by the Commission and the EPA is necessary because FCC licenses, certificates, and blanket authority may have been issued in a manner which transgresses the NEPA and the NHPA. Each of these federal actions--a license, a certificate, or a blanket authority--may have a current, adverse impact on the Nation's environmental resources. It is highly likely that significant and irreversible damage is being committed to the environment through the FCC's failure to abide by these laws. Damage has already been incurred due to the Commission's actions in the Territory of the Virgin Islands and in the State of Maine.[(3)] And significant damage is predicted due to the Commission's recent actions in the State of Florida.[(4)]

At a minimum, some corporate Applicants and Holders may be acting in a manner--at specific environmentally-sensitive sites--which offends the NEPA and the NHPA. At the extremes, the FCC's entire system of environmental rules may be crafted in a manner--using the corporate Applicant's self-regulation and certification--which fails to ensure that the FCC is in compliance with NEPA. If non-compliance is systemic, then no current federal action conducted by the FCC may be lawful under the NEPA. As a license, certificate or blanket authority issued through an unlawful act or condition precedent can not be a lawful license, a cloud now hangs over all FCC licenses. In fact and law, all FCC licenses may all be invalid and without affect. This, of course, would mean than any business enterprise established around such a license is prone to regulatory and fiscal insecurity.

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To the Secretary, Federal Communications Commission:

Petition for Rulemaking

Public Employees for Environmental Responsibility ("PEER"), pursuant to Section 1.401 of the Commission's Rules, 47 C.F.R. § 1.401 (1999), hereby petitions the Federal Communications Commission ("FCC" or "Commission") to reform, through a rulemaking, the Commission's environmental rules in a manner which will restore public confidence in the Commission's commitment to the enforcement of the National Environmental Policy Act of 1969 ("NEPA") and the National Historic Preservation Act of 1966 ("NHPA").

Standing to File. PEER is an I.R.S. 501(c)(3) non-profit organization incorporated under the laws of the District of Columbia. PEER serves the professional needs of the local, State and federal employees--the scientists, hydrologists, marine biologists, etcetera--charged with the protection of America's environmental resources, and, specifically, the very same public employees charged with interpreting and enforcing the laws now being violated by the Commission. As such, PEER is an "interested person"and "Party" as that term is defined for the purposes of Sections 1.21 and 1.401(a) of the Commission's Rules. *See* 47 C.F.R. §§ 1.21 & 1.401(a)(1999).

BACKGROUND.

Under the National Environmental Policy Act of 1969, federal agencies--including the Federal Communications Commission--are under a legal obligation to take no action to the detriment environment without conducting a review of the Application to see if mitigation strategies are mandated to lessen the environmental impact. 42 U.S.C. § 4321 *et seq*. The FCC has issued enabling environmental rules to ensure that the corporate beneficiaries of federal actions by the FCC do not lead the FCC to violate NEPA. 47 C.F.R. §§ 1.1301 *et seq*. (1999). However, the actual application process for handling FCC licenses, certificates and blanket authorities has created an environment where industry is essentially self-regulated. As such, if a corporate Applicant does not affirmatively acknowledge that a contemplated buildout adversely affects the environment, the Commission will not know that it--the FCC--has violated federal law.

Accordingly, the Telecommunications Act of 1996 has turned America's allegedly "green" information economy into an apparition of another environmentally-challenged carrier, the 19th century railroad. Instead of clear-cut forests and the pits of arsenic, sulfur, lead and heavy metals presided over by the former Interstate Commerce Commission (ICC), we now have injured and dying conchs, choking manta rays, displaced manatees, and endangered sea turtles. Back-haulers are soiling New England's pristine wetlands while laying fiber optic cable. Wetlands and reefs are the new sacrificial lambs. "Brown fiber"--not dark fiber--is the information Superhighway's to keep up with the industrial

revolution's "Brown fields".

Commission Recognizes the Problem. Twice during the past year, the foregoing issue has waited, reef-like, submerged below the spray of Commission inquiry. *See* Public Notice, *Comments Sought on AT&T Communications Construction of Fiber Optic Signal Regeneration Facility Near Burkittsville, MD - Re-Compliance with Section 214 and Environmental and Historic Preservation Requirements Under NEPA and NHPA* (DA-99-3025)(Dec. 30, 1999); In the Matter of AT&T Corp., et al., *Joint Application for a license to Land and Operate a Submarine Cable Network Between the United States and Japan* (File No. SCL-LIC-1998-1117-00025 (July 9. 1999) at ¶ 43. During the period between the present Petition and the releases cited *supra*, the International, Common Carrier and Wireless Bureaus have continued to issue licenses, certificates and blanket authorities that may be in violation of the law. PEER does believe that the Commission's conduct of unlawful acts--if committed--have been done without malice. But indifference to the law is no excuse for a lack of federal agency compliance.

By *Public Notice*, the Network Services Division of the Common Carrier Bureau broached this issue publicly in the context of blanket Section 214 Authority for the laying of fiber optic cable. *See* Public Notice, *Fiber Optic Signal Regeneration Facility Near Burkittsville* (Dec. 30, 1999), *supra.* In that proceeding, AT&T Communications of Maryland sought to expanded its fiber optic network into an area of heightened environmental sensitivity, namely, a region of Maryland--known as "the lee of South Mountain"--noted for its role in the Antietam (1862), the Gettysburg (1863), and the defense of Washington (1864) campaigns of the American Civil War. It was not the cognizant federal agency, but rather a special committee of local[(5)] municipal regulators, who identified the adverse impact the Commission's action would have on an environmentally sensitive area. Faced with an administrative case of first impression and a potential precedent-setting decision on this issue, AT&T retreated from the field at Burkittsville before the Commission could reach a decision on the merits.

The thoughtful effort of the Network Services Division has not gone unnoticed in the environmental community. However, during the year preceding the action regarding the preservation of battlefields around Burkittsville, Maryland, AT&T Corporation continued a previous pattern of environmental offense that went unchecked precisely because the Commission has abandoned its duty under the NEPA. *See* note 2, *supra*. Now, the "Mother of All Fiber Optic Landings" is about to occur off the coast of Florida,[(6)] and the FCC is once again without an effective process to ensure that corporate Applicants, acting under the Commission's own federal actions, are not placing the Commission itself in violation of federal law.

Argument in Support of Petition

I. Currently, an Applicant for FCC Federal Action

in the form of a license or certificate merely "stipulates" that

no adverse impact will occur to the environment through the FCC's action

in furtherance of that Applicant's business plan

In illustrating the weakness in the Commission's rules, Petitioner draws upon the relevant authority for any of various types of "federal action": the license, the certificate, or the blanket authority. The question of environmental compliance is not specific to any one technology. In a manner similar to the Cable Landing Licenses issued in accordance with 47 C.F.R. § 1.767 (1999), Commission rules written to enable Section 214(a) of the Communications Act of 1934 regulate new line construction by domestic common carriers subject to Commission jurisdiction. Under the *Code of Federal Regulations*, domestic common carriers are given blanket authority to extend their existing network provided the carrier complies with the Commission's regulations regarding compliance with the NHPA and the NEPA. 47 C.F.R § 63.01 (1999).

Commission rules under the blanket authority are quite permissive. "Any party . . . is authorized to . . . construct, acquire, or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies". 47 C.F.R § 63.01(a) (1999). Section 214 Authority plays lip service to the environmental laws; the Cable Landing License process does not even mention the obligation to follow those laws. As such, a corporate Applicant must stumble upon the environmental rules under Part 1, Subpart I, in order to aid the FCC in complying with the law.

This self-certification by the FCC's corporate Applicants--and the inability of the FCC to verify the integrity of that self-certification--may have led to an state of governance where one cannot be sure that environmental assessments have been "submitted by the licensee or applicant and ruled on by the Commission, and environmental processing . . . [has been] completed prior to the construction of the facility." 47 C.F.R. § 1.1312(b)(1999). If the FCC's decision to "invoke" environmental processing is merely predicated on an unverifiable statement filed by a corporate Applicant which states that no environmental impact is made, then the FCC's process is crafted to produce arbitrary and capricious decisions. Absent the scientific rigor required to produce an Environmental Assessment (EA) or an Environmental Impact State (EIS), any federal action based on that corporate Applicant's certification is a "guess" as to whether the environment is endangered, and whether the FCC is in thereby in violation of the NEPA and NHPA. In short summary, the FCC has delegated, to the party most interested in

hasty action, the FCC's own responsibility to comply with the environmental laws.

The FCC's use of "self-certification" by corporate Applicants seems to have created a "regulatory fiction": a convenient device by which a rather rigorous public inquiry is avoided though a mutual agreement between the regulator and the regulatee. In reviewing a cross section of cable landing license applications, Section 214 Authority documentation, and electromagnetic spectrum license applications, PEER has been unable to determine what environmental evidence and analysis is used by the FCC to determine whether it--the FCC--has met its obligations under the NEPA and the NHPA prior to undertaking the federal action required in each of these instances. During extensive conversations with FCC and regional EPA staff on May 10, 2000, PEER's General Counsel sought clarity on the environmental prerequisites to the issuance of FCC licenses and certificates to corporate Applicants. The uniform answer throughout the EPA and the FCC was that the corporate Applicant merely stipulates "no adverse impact on the environment". The license is then drafted that no adverse impact exists. One federal official was candid enough to concede, "[t]he FCC has no Office of Environmental Compliance". Indeed, all that stands between the FCC and a violation of federal law is either the environmental competence or honesty of the corporate Applicant to the undertaking.

Absent a factual, as opposed to stipulated, determination that there is no adverse impact on the environment, it would appear that the FCC is in violation of its obligations under NEPA and NHPA. Given the general collapse of the Florida public's confidence in the FCC's environmental rules, all actions in redress of these grievances must not only seek to not only correct unlawful actions in the future, but must also seek to determine whether federal actions have been used by corporate Applicants to shield environmental offenses in the past.

II. The Commission Should Dispel the Public (Mis)perception That the FCC Does Not Support, and Is Not Adhering To, the Environmental Laws of the United States

Having identified the problem with Commission adherence to the NEPA and the NHPA, Petitioner PEER proposes a solution. Traditionally, the Commission has not had to delve into the definition of "Utility" in most of its proceeding. The common carrier classification process has substituted for the traditional "Utility" question, which is now almost the exclusive province of State legislatures and their Public Service Commissions. With deregulation of the telecommunications market, however, there is now a regulatory need to craft a rubric for deciding when a company providing *services* traditionally

organized under carrier law, public and private, *is also a public utility.* PEER now advances a new regulatory paradigm to assist the Commission in deciding when a company needs to file an EA, and when a company needs to file an EIS. Instead of "eye-balling" the environmental impact of the FCC's federal action, the Commission should treat all actions as potentially damaging to the environment, and grant the lesser regulatory burden--an EA--to those facility elements which remain "public" utilities, and require the higher regulatory burden--an EIS--to those facility elements which are, post-regulation, facility elements of a "private" utility.

Although the Commission Rules such as those codified under Part 63, often do not require the rigorous technical classification of companies providing those services normally defined as "Utilities", local decision-makers attempting to balance the preservation of an environmentally-sensitive area *with* the need to provide "public" utilities have already struggled with the classification question. The outlines of that discussion are presented here in the hope that they will inform the general rulemaking process. In deciding whether to damage the environment of a sensitive area, an adequate categorization of the benefit contemplated is absolutely essential. When assessing development's impact in a sensitive area, the distinction between a "facilities-based" and a "services-based" definition of utilities--public and private--follows logically from the deregulation that occurred with the Telecommunications Act of 1996. Some local regulators have adopted a post-deregulation, working definition of "Utilities", positing that:

All Utilities are either (A) Private or (B) Public.

Private Utilities are generally those facility elements of a networked system which are required (A1) to store, supply or generate the commodity moved over the network and those facility elements used (A2) to transmit such commodities over long distances.

Public utilities are generally those facility elements essential (B1) to the distribution of the commodity to the individual consumer--the "last mile" in industry chat.[(7)]

The facilities-based regulatory paradigm articulated *supra* allows for a rule-based process for which decides what level of regulatory burden should be placed on a corporate Applicant requesting federal action and federal largesse to implement its business plan. For example, in the Virgin Islands, the laying of fiber optic would be defined as an "A2" element under the aforementioned definition of a Utility and could have been subjected to an EIS filed at the Commission, the review of which could have preceded the federal action of issuing a Cable Landing License. The definition *supra* would have guided the FCC to a forward looking review of the project, one that would have spared the Government of the Virgin Islands the costs of fixing the FCC's failure after the bentonite mud damaged the coral reefs. Such an approach is not a novel inquiry.

The Supreme Court of Pennsylvania has recently utilized such a process to organize its approach to communications towers. While not making the complete transition to a facilities-based definition, the Court did underscore the importance of "the last mile" in determining the difference between "public" and "private" utilities. In *Crown Communications v. Zoning Hearing Board of the Bureau of Glenfield*, 705 A.2d 427, 431-33 (1997), the Court first noted the rather vacuous definition of "public utility" offered by *Black's Law Dictionary*:

To constitute a true "public utility," the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, *has the legal right to demand that service shall be conducted*, so long as it is continued, with reasonable efficiency under reasonable charges.[(8)]

But even this legal standard noted the importance of "the last mile" in determining the "public" nature of a utility. The emphasized text in the definition, *supra*, accurately reflects the distinction between "public" and "private" articulated by the Town of Burkittsville under the *Public Notice* issued by the Network Services Division in December, 1999. *See* page 7, *supra*. In *Commonwealth of Pennsylvania v. WVCH Communications, Inc.*, 351 A.2d 328, 330 (1976), the Pennsylvania lower courts stated:

The distinctions between a public utility and a business entity which is not a public utility are well known. For example, a public utility holds itself out to the public generally and may not refuse any legitimate demand for service, while a private business independently determines whom it will serve.

Again, "the last mile" is the gravamen between "public" and "private". Based on this jurisprudence, the "Pennsylvania rule" was handed down in *Crown Communications* almost three (3) years ago. The court defined "public utility corporation":

In order to qualify as a public utility corporation, WVCH would have to prove that it is required by law to: 1) serve all members of the public upon reasonable request; 2) charge just and reasonable rates subject to review by a regulatory body; 3) file tariffs specifying all of its charges; and 4) modify or discontinue its service only with the approval of the regulatory agency.

Crown Communications v. Zoning Hearing Board of the Bureau of Glenfield, 705 A.2d 427, 431-33 (1997). Here, all four (4) elements define those obligations of companies employing the technology carrying information services over "the last mile". By working through this same form of analysis in a rulemaking proceeding, the Commission can organize its efforts to comply with the NEPA and the NHPA in a manner which adheres

to the law.

III. The Commission Should Rewrite the Environmental Rules to Require Private Utility Applicants to Submit an EA in All Cases, and an EIS in Those Instances Where Significant Damage to the Environment Will Occur

The Commission's rules have been drafted to meet the needs of NEPA. It is the implementation of the rules that has fallen fallow. For instance, Part 63 requires a domestic common carrier to comply with the Commission's environmental rules prior to any line construction that may have significant effect on the environment. *Compare* 47 C.F.R § 63.01(b)(1999) *with* 47 C.F.R. §§ 1.1307, 1.1312 (1999). So prior to construction, common carriers and cable laying companies must comply with the Part 63 and Part 1 review procedures. But this is a "self-certifying" regulatory regime. Under a perfunctory issue of a Cable Landing License or Blanket Section 214 Authority, dozens of domestic common carriers may be currently engaged in line construction that may or may not have complied with the Commission's environmental rules regarding Section 106 Review.

Look the problem from a wireless context. With respect to the licensing of electromagnetic spectrum, PEER finds the "self-certifying" aspect of the Commission's NEPA and NHPA compliance regulations somewhat problematic. For instance, if NHPA is triggered by the presence of a protected resource adjacent to a proposed communications tower site, Section 106 of that Act requires federal Agency compliance to occur "prior to . . . the issue of any license as the case may be." 16 U.S.C. § 470(f). Here, the Commission's use of "self-certification" by the corporate Applicant has created an open-ended license--or rather "certification"--to be granted under whatever federal action is required to implement the corporate Applicant's business plan. Perhaps Section 106 Reviews, and similar reviews under the NEPA, should be conducted prior to seeking zoning approval for such towers, or as the first step in that process. If the Commission required such approval as a precondition to the issuing of a license, certificate or blanket authority, it would be confident that the environmental laws are being enforced. Absent such a process how would the Commission know what carriers are expanding their networks and impacting historic or environmental resources on, or eligible for, the National Historic Register? *See* 36 C.F.R. §800.4(a)(2), (b)(1999).

The Commission's normally will direct a corporate Applicant under any particular Part of its rules to the environmental rules, themselves. Part 63, for example, directs all domestic

common carriers to Part 1. Under the subtitle "Procedures Implementing the National Environmental Policy Act of 1969", it is required that,

Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (see 16 U.S.C. 470w(5); 36 C.F.R. 60 and 800). 47 C.F.R. § 1.1307 (a)(4)

--are the--

. . .types of facilities [which] may significantly affect the environment and thus require the preparation of EAs by the applicant (see Secs. 1.1308 and 1.1311) and may require further Commission environmental processing (see Secs. 1.1314, 1.1315 and 1.1317).

47 C.F.R. § 1.1307(a)(1999).

But whether any such facilities are in the general location of the corporate Applicant's project site is a question left to the answer of the corporate Applicant, who may have no technical competence in making such a determination. The same general "self-certification" rubric exists for those corporate Applicants required to meet NEPA standards. Returning to the NHPA example, the enabling regulations--47 C.F.R. § 1.1307 *et. seq.*--require an Environmental Assessment ("EA") when the proposed extension may have a significant environmental impact, but it is not clear that a FCC "EA" is the same as a Section 106 Review under the NHPA. The relevant federal agency with the expertise to determine whether the two are identical--in this case the ACHP--would need to be included in a rulemaking design to clarify the Commission's environmental rules. The exact same relationship needs to exist with the EPA and compliance with the NEPA. *See, for example,* 36 C.F.R. § 800.14 (1999). *Compare* 47 C.F.R § 1.1307(1999) *with* 36 C.F.R. § 800.15(1999).[(9)]

For environmental resources covered by the NHPA, a domestic common carrier *prudent enough* to route an EA through the State Historic Preservation Officer ("SHPO"), and careful enough to modify that document's traditional engineering orientation to meet Section 106 Review requirements, would be able to hand the appropriate FCC Bureau a "Section 106 Review in EA clothing". The FCC would then be able to review the document, decide whether further studies--a Draft Environmental Impact Statement (DEIS) or a Final Environmental Impact Statement (FEIS)--are required. The FCC could then certify to the ACHP that Section 106 Review has been completed. But this has not been the history of this domestic common carrier's actions. "Self-certification" has become a mere paper chase designed to circumvent environmental review.

The National Environmental Policy Act of 1969 (NEPA) created a national policy of environmental protection. *See Preservation Coalition, Inc. v. Pierce,* 667 F.2d 851 (9th Cir. 1982), which combined the first scrapes of the historic preservation legislation of the mid-1960s with the budding environmental movement. Although both NHPA and NEPA require federal agencies to take environmental considerations into account throughout their decision-making, it is the NHPA which raises the higher barrier by requiring review when any federal undertaking affects a historic resource NEPA only requires review for *major* federal actions. As NHPA presents the de minimis requirements governing *any* federal action, it is NHPA that must always be compiled with when a historic resource is endangered.

The only manner in which the Commission may wash its hands of this Petition is if it decides that its actions are not federal actions, and successfully defends this assertion in the federal courts. But short of defending its abuse of the environment and given the process by which the Commission's environmental rules are enforced, how can the Commission determine whether it is engaged in a major federal action? With no Office of Environmental Compliance, no systematic review of FCC federal actions can be undertaken. Is not the construction of the information Superhighway a major federal action? An effort of the magnitude of the national rail system, cutting into the ecosystem every minute of every day, is a major federal action. Unfortunately, the Commission's rules do not direct--at this point--the domestic common carrier to either the EPA or the ACHP's regulations regarding EIS's or Section 106 Review. *See, for example,* 36 C.F.R. § 800.1 *et. seq.* (1999).

And for all environmental resources--ecologically-defined or historically-defined--the Commission requests information regarding local or federal site approval by other bodies, and yet the Rules says nothing about the State Historic Preservation Officer or the EPA Regional Director, both of whom could give the relevant FCC Bureau Chief specific information about the sites involved. *See* 47 C.F.R. § 1.13111(c)(1999).[(10)]

The statutory pattern created by the NEPA and NHPA argues for greater precision in the Commission's Rules. Depending on whether one considers the construction of the information Superhighway and its wireless extensions a major federal action, the Commission may require corporate Applicants to file the NEPA-patterned EIS. The higher regulatory hurdle imposed by the NHPA offers no discretion, a distinction not included in the Commission's environmental rules. Corporate Applicants *must file* a NHPA Section 106 Review for the Commission to be in compliance with the law. 36 C.F.R. § 800.2(a)(1999). Indeed, under the current Rules an EIS may only discuss

historic resources and not review the effect upon them. In such an instance, the corporation would not meet NHPA requirements. *Preservation Coalition v. Pierce,* 667 F.2d 851 (9th Cir. 1982); *National Indian Youth Council v. Andrus,* 501 F. Supp. 649 (D.N.M. 1980), aff'd, 664 F. 2d 220 (10th Cir. 1981).

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, EPA, ACHP officials and staff to provide whatever expertise we have to the benefit of the United States Government. A rulemaking is required to save the reefs, and PEER petitions so.

//s// Daniel P. Meyer

Daniel P. Meyer

Public Employees for Environmental Responsibility (PEER)

2001 S Street, N.W. -- Suite 570

Washington, D.C. 20009

Tele: (202) 265.7337

Its General Counsel and Attorney

District of Columbia Bar No. 455369

March 17, 2000

1. On the definition of "Federal agency", *see generally,* Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 435 (5th Cir. 1989), *cert. denied,* 493 U.S. 1020 (1990); Ely v. Velde (Ely I), 451 F.2d 971 (4th Cir. 1971).

2. PEER is therefore an "interested" person under the Rules of the Federal Communications Commission. 47 C.F.R. § 1.1307(iii)(c)(1999).

3. *See* Government of the Virgin Islands of the United States, Department of Planning and Natural Resources, *Notice of Violation; Order for Remedial Action; and Notice of Opportunity for Hearing* (Dec. 30, 1998)(regulatory action against common carrier for bentonite contamination of the coral reefs while acting under a Cable Landing License from the FCC)[Attached with Exhibit 2]; State of Maine, Department of Environmental Protection, *Administrative Consent Agreement In the Matter of AT&T Communications of New England, Inc. et al.*, (July 22, 1997) (regulatory action against common carrier for the destruction adjoining a 100-mile long fiber optic project laid pursuant to Section 214 Authority issued by the FCC)[Attached with Exhibit 3].

4. *See* State of Florida, Department of Environmental Protection (Southeast District), *Map of Permitted and Proposed Fiber Optic Cables within the DEP Southeast District* (Mar. 8, 2000)[Attached with Exhibit 4].

5. Namely, the Brunswick Region Planning Committee ("BPRC"), which represents communities in southwestern Frederick, County, Md., in proceedings before local, State and federal agencies. The BPRC has become one of the westernmost proponents of Governor Parris Glendening's "SmartGrowth" policies.

6. The technology contemplated for use off the Florida coast is identical to the technology used in committing the civil offense in the United States Virgin Islands. *Compare* State of Florida, Department of Environmental Protection, *Fiber Optic Cable White Paper 3* (Draft, March 23, 2000)[Attached with Exhibit 4] *with* Jones, Will, *More Bentonite Mud Found at Butler Bay*, St. Croix Avis (May 16, 2000) at 4 (The toxic bentonite mud utilized in the Virgin Islands was a lubricant for drills used on the coral reefs. This is the very type of environmentally harmful practice the FCC's environmental rules should critique prior to the issuance of a Cable Landing License.)[Attached with Exhibit 2].

7. *See,* In Re the Matter of AT&T Communications' Construction of Fiber Optic Signal Regeneration Facility Near Burkittsville, Md., *Comments of the Town of Burkittsville*(NSD-L-99-103)(Jan. 28, 2000) at 6.

8. Black's Law Dictionary 835 (4th Ed. 1958)[Emphasis supplied].

9. Certain actions are exempted from the requirement to prepare and Environmental Assessment ("EA"). 47 C.F.R. §§ 1.1306, 1.1307 and 1.1312.

10. Would, for instance, compliance with the above cited rule ensure the EA contained a determination of the area of potential effects? *See* 36 C.F.R. § 800.2(c) (1999). Would it include an analysis of the criteria which make all historic or ecological environmental resources in question eligible for protection? *See*, for instance, 36 C.F.R. §§ 63, 800.9(b)(1999). And how would AT&T Communication's EA address the changes to site location, setting, feeling and association? 36 C.F.R. § 800.9(b)(1999). The FCC needs to bridge this lacuna in the Rules. *See* 36 C.F.R. §§ 800.8(a)(3), (b) & (c)(1)(1999).