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Public Employees for Environmental Responsibility

2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER(7337) • fax: 202-265-4192  
e-mail: info@peer.org • website: http://www.peer.org

RECEIVED

SEP 18 2000

September 18, 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Secretary  
Federal Communications Commission  
Portals II  
445 12<sup>th</sup> Street, SW  
Suite TW-A325  
Washington, D.C. 20554

Re: Proceeding No. RM-9913, *FCC Accountability and Responsibility for Environmental Transgressions, and Petition for Rulemaking Regarding the NEPA, NHPA, and Part 1, Subpart I of the Commission's Rules*

Dear Ms. Salas,

Enclosed for filing in the above referenced docket are five (5) duplicates PEER's recent civil complaint letter to Chairman Kennard regarding alleged environmental violations at Mormon Peak, California. Please insert this documentation into the RM-9913 record as further empirical evidence justifying PEER's *Petition*. See Report No. 2426, Consumer Information Bureau, Reference Information Center, *Petition for Rulemaking - Filed* (RM No. 9913)(July 14, 2000).

As the enclosed civil complaint letter was one (1) of two (2) letters sent to the heads of federal agencies or departments, the original was mailed to the Chairman standing as a co-equal to the Secretary of the Interior. Should you have any questions, please contact the undersigned at (202) 265.7337.

Very respectfully,

Daniel P. Meyer, Esq.  
General Counsel and its Attorney

No. of Copies rec'd 074  
List A B C D E

Enclosure





Public Employees for Environmental Responsibility

2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER(7337) • fax: 202-265-4192  
e-mail: info@peer.org • website: http://www.peer.org

RECEIVED

SEP 18 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

September 13, 2000

DUPLICATE

The Honorable William E. Kennard  
Chairman, Federal Communications Commission  
and Mr. Thomas J. Sugrue, Bureau Chief  
Wireless Telecommunications Bureau (WTB)  
445 12<sup>th</sup> Street, S.W. — Eighth Floor  
Washington, D.C. 20554

BY FIRST CLASS POST

**Civil Complaint Letter:**     *Violation of the federal environmental law and regulations  
Mormon Peak, CA (36 01 32 N.; 117 02 38 W.)*

Dear Chairman Kennard and Bureau Chief Sugrue:

Public Employees for Environmental Responsibility (“PEER”) has reasonable cause to believe that officials of the Federal Communications Commission (“FCC” or “Commission”) and/or executives of the old Pacific Bell Telephone Company (“Pacific Bell”), now a subsidiary of SBC Communications, are 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 Wilderness Act of 1964 (16 U.S.C. § 1131 *et seq.*);
  - (4) the False Statement Act of 1934 (18 U.S.C. § 1001);
- and —
- (5) the National Environmental Policy Act of 1969 (“NEPA”)(42 U.S.C. § 4321 *et seq.*).

PEER asks the Chairman to investigate our allegations and ensure that the FCC and Pacific Bell conform to the law.

Page 1 of 12



## SUMMARY OF FACTS

There is no dispute as to the following facts regarding the continued siting and maintenance of a CF/Common Carrier, Fixed Point-to-Point Microwave communications tower and transmitters at Mormon Peak, California:

- 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” organized within the Commercial Wireless Division of the Wireless Telecommunications Bureau. PCIA states, “[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.”<sup>1</sup>
- 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 rules in which compliance is policed by staff members not confined to specific technology applications, but who work on environmental issues regardless of technology involved.
- PEER’s review of Commission’s decisions and Title 47 C.F.R. find no reference to PCIA’s cited “Environmental Compliance Group”, nor can PEER ascertain whether such a group handles technologies confined to the jurisdiction of the Commercial Wireless Division, or whether it operates across the board.

*To wit, this state of regulation may impact the following:*

- On August 8, 2000, Pacific Bell was granted permission to operate over federally-owned spectrum from Mormon Peak, CA (36 01 32 N.; 117 02 38 W.)(WHE225), near the Town of Ballarat, CA. See License No. L00000291; Call sign: WHE225. Radio Service: CF/Common carrier, Fixed Point-to-Point Microwave. See descriptive materials attached. [Exhibit I].

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<sup>1</sup> 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.

- PEER is unable to locate an Environmental Assessment (“EA”) or an Environmental Impact Statement (“EIS”) completed by Pacific Bell in preparation for the license grant made on August 8, 2000 for the Mormon Peak site. *See* 47 C.F.R. § 1.1308(a) (1999).
- The Mormon Peak tower and transmitters provide telecommunications for the environmentally-sensitive Death Valley region, including Death Valley National Park. Mormon Peak lies midway along the Grapevine to Government peak succession of microwave sites. Direct fixed point-to-point microwave links are maintained with sites at Pioneer Point, CA [Slate 1: (35 53 28 N.; 117 16 55 W.)(WLR558)] and Furnace Creek, CA [Furnace Creek Ranch: (36 28 02 N.; 116 51 45 W.)(WHE226)]. Four transmitters operate at various frequencies between 2115.200V and 2178.200V MHz.
- The transmitters radiating over WHE225 are located within “wilderness,” officially designated so by Congress (October 31, 1994) and depicted on Map #D-15 of the legislative maps cited in Section 601(a) of the California Desert Protection Act of 1994 (“CDPA”)(16 U.S.C. § 410 *et seq.*). On the same date, Congress transferred jurisdiction of these public lands to the National Park Service (“NPS”).
- The Mormon Peak tower is also situated on land leased from the federal government. The right-of-way was issued in 1982 by the Department of the Interior’s Bureau of Land Management (BLM) under Title 5 of the Federal Land Policy and Management Act (“FLPMA”)(43 U.S.C. § 1761 *et seq.*). It comprises 0.22 acres. *See* Bureau of Land Management, California Desert District, *Decision* (May 29, 1982) [Exhibit II].

### THE VIOLATION

When Pacific Bell filed its most recent Application for Commission radio service authorization, was it required to prepare an Environmental Assessment (“EA”) in accordance with Section 1.1307 of the Commission’s rules. 47 C.F.R. § 1.1307(a)(1)(1999). The site they are transmitting from was declared “wilderness” six years ago. The right-of-way they hold appears to be conditioned on the site *not* being wilderness. The Congressional act of declaring wilderness could have triggered heightened FCC regulatory standards for the registration of towers and the issuing of licenses serviced by the towers. Through its Application, Pacific Bell may have raised 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 PCIA’s citing to an “ECG”, PEER acknowledges that it possesses less than adequate level of information regarding the alleged Environmental Compliance Group (“ECG”) established within the Wireless Telecommunications Bureau to review sites such as Mormon Peak. 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 the manner described by PCIA—and in fact did so with respect to Mormon Peak—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 Commercial Wireless Division’s alleged “ECG” 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.

— ■ —

**(3) *The Wilderness Act of 1964 (codified at 16 U.S.C. § 1131 et seq.).*** *See*, Letter, Dan Meyer, General Counsel (PEER) to the Honorable Bruce Babbitt, Secretary of the Interior (September 8, 2000) at 3 [Exhibit III].

**Request:** PEER expects the bulk of the Wilderness Act review regarding the transmitter and towers on Mormon Peak to be conducted by the Department of the Interior. However, the Wilderness Act is implicitly mentioned in Section 1.1307 of the Commission’s rules. 47 C.F.R. § 1.1307(a)(1)(1999). The presence of the “wilderness” exclusion in the Commission rules tends to undermine the FCC’s statement that, “[t]he Commission has reviewed representative actions and has found no common pattern which would enable it to specify actions that will thus automatically require EISs.” 47 C.F.R. § 1.1305 (1999). The network of CF/Common Carrier Fixed Point-to-Point Microwave towers and transmitters is an organized, systemic pattern of networked

infrastructure. Where this common pattern of buildout intersects the network of wilderness-designated properties of the federal Government, the Commission has a programmatic problem. The confluence of these networks, one environmental and one technological, requires rigorous systemic environmental review, the type unavailable under the Commission's present environmental rules.

Accordingly, PEER requests the Commission's regulation of the Mormon Peak site be reviewed for Pacific Bell compliance with the Wilderness Act as it is presently provided for in the Commission's rules. Notably, PEER reminds the Chairman that the provisions for "lead" and "consulting" agency do not permit the Commission to assume Interior 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 (5<sup>th</sup> Cir. 1980).



**(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 maintenance of a tower and transmitters on Mormon Peak requires landing and take-off by rotary aircraft (helicopters), a consequence of federal action, which may have an environmental impact on wilderness areas. *See Meyer/Babbit Letter* at 3 [Exhibit 2]. If Pacific Bell failed to perform due diligence in meeting this, and/or other, environmental requirements prior to signing its Application, 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.

**Request.** PEER asks the Chairman to review the grant of License No. L0000029 (WHE225) to insure that Pacific Bell has made no violation, willfully or otherwise, of Title 18, Section 1001 when it communicated with the Commission regarding the erection and maintenance of the tower and transmitters on Mormon Peak. 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 at 42 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 Interior 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 (5<sup>th</sup> 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 change in the legislative status of the Mormon Peak site, due to Congressional action. The concurrent expiration of the BLM/Pacific Bell right-of-way is a tertiary concern with respect to the Commission's responsibilities in this matter. But the change in legislative status may demand greater scrutiny under the environmental laws.

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). The Commission's rules state that “[f]acilities that are to be located in an officially designated wilderness area”. 47 C.F.R. § 1.1307(a)(1)(1999)[*Emphasis supplied.*] The plain meaning of this rule encompasses both the planned siting of towers in existing wilderness areas, and the planned designation of wilderness around existing towers. The future tense is not written in the conditional. As such, the critical question for the FCC is to determine at what point Pacific Bell had constructive notice that Mormon Peak was to be wilderness area.

Of particular interest are the attached internal communications of the NPS. Prior to designation as a wilderness, there seem to have been substantive discussions of alternatives and the need to conform site usage to the environmental laws. If these predecisional communications between NPS and Pacific Bell informed a planned effort to deny, de jure, wilderness status through an arbitrary and capricious reading of the right-of-way, one agency and its Applicant (NPS and Pacific Bell) may have established a de facto exclusion contrary to law. These parties may have not adequately informed another agency and its Applicant (Pacific Bell and FCC) of a fact germane to the execution of the law: wilderness status. *See* miscellaneous communications attached [Exhibit IV].

Pacific Bell is the common party in this transfer of information leading to NEPA (non)compliance. Did the Applicant withhold information of wilderness status or past controversy to avoid NEPA? *See*, for instance, 47 C.F.R. §§ 1.1311(a)(3), (4), (6)(b). Specifically, did Pacific Bell brief the Commission on the Interior Department's policies regarding helicopter operations in

wilderness areas? *See* 47 C.F.R. § 1.1311(a)(6)(b)(1999). If the FCC has failed to engage in the necessary NEPA analysis of the communications tower site and frequency use, the Commission may have thereby denied the itself, and the public it serves, the ability to assess not only the environmental effects of Pacific Bell Telephone Company's use of federal property and spectrum, but also the full range of alternatives anticipated by 42 U.S.C. § 4332 (c) (iii).

## CONCLUSION

Mr. Chairman, PEER seeks not to be rhetorical in its request. There is, however, a growing mistrust of many federal Agencies in the ranks of the American environmental movement. As institutions so central to the environmental compliance process as the United States Corps of Army Engineers are revealed to be corrupted, confidence in all agencies continues to decline. *See* Michael Grunwald, *Working to Please Hill Commanders*, WASH. POST (Sept. 11, 2000) at A1, A13; *A Race to the Bottom*, Wash. Post (Sept. 12, 2000) at A1, A15; *Reluctant Regulator on Alaska's North Slope*, Wash. Post (Sept. 13, 2000) at A1, A23. Mr. Grunewald's on-going series ("Engineers of Power: Inside the Army Corps") undermines public faith in provisions regulations such as Section 1.1311(e) of the Commission's rules. If Corps environmental studies at Prudhoe Bay, Yellowstone National Park, the Snake River, the Chesapeake Bay evidence gundecking in order to avoid implementing the law, why should the public respect the FCC's deference to similar such documentation?

Lawyers have a metaphor for this type of regulatory maneuver. It is called "turning a blind eye", a reference to Lord Nelson's response to a superior's flag hoist during the Battle of Copenhagen.

One on the hunt for reality must see that subjective conditions — preconceptions as well as preferences and prejudices — do not blind his inward or "third" eye. If, "like Lord Nelson at Copenhagen he claps his telescope to a blind eye," he will not see things as they are. This caution here is not a mere pleasantry. It has real relevancy to the work in hand.

*Louisville & N.R. Co. v. Western Union Telegraph Co.*, 1914 U.S. Dist. LEXIS 1378 at 11-12 (E.D. Kentucky).

If he could not see the command, he could not execute it. Never mind that his flag lieutenant informed him that the command was there, on the flagship's halyard. And while Nelson was the victor at Copenhagen, his example is a poor one for a Republic ruled by laws, not men (and women).

The “blind eye” allows an agency to avoid its responsibilities. The FCC’s environmental rules have become just that, its “blind eye” to the very real environmental impact of its actions.

The Commission’s understanding of “public trust” is now seen as narrowly-defined around the maximization of network penetration, a Major federal action perhaps detrimental to “the human environment” and contrary to the law of the land. *See* 42 U.S.C. §4332(2). Title 47 is exactly that, the 47<sup>th</sup> title in a codification of laws that includes a full fifty (50) titles. The FCC and its Applicants are required to comply with all titles of the United States Code.

PEER invites both of you to clarify the FCC’s environmental compliance policy and correct any malfeasance connected with the Mormon Peak CF/Common Carrier Fixed Point-to-Point Microwave communications tower and associated transmitters.

Cordially,

A handwritten signature in black ink, appearing to read "Daniel P. Meyer", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning.

Daniel P. Meyer, General Counsel  
Public Employees for Environmental Responsibility  
("PEER")  
2001 S Street, N.W. — Suite 570  
Washington, D.C. 20009  
Tele: (202) 265.7337  
Facs: (202) 265.4192  
E/ml: [dmeyer@peer.org](mailto:dmeyer@peer.org)

District of Columbia Bar No. 455369

CC: The Honorable Bruce Babbitt, Secretary  
Department of the Interior

John D. Leshy, Esq.  
Office of the Solicitor (OS/DoI).

Earl E. Devaney  
Office of the Inspector General (OS/DoI)

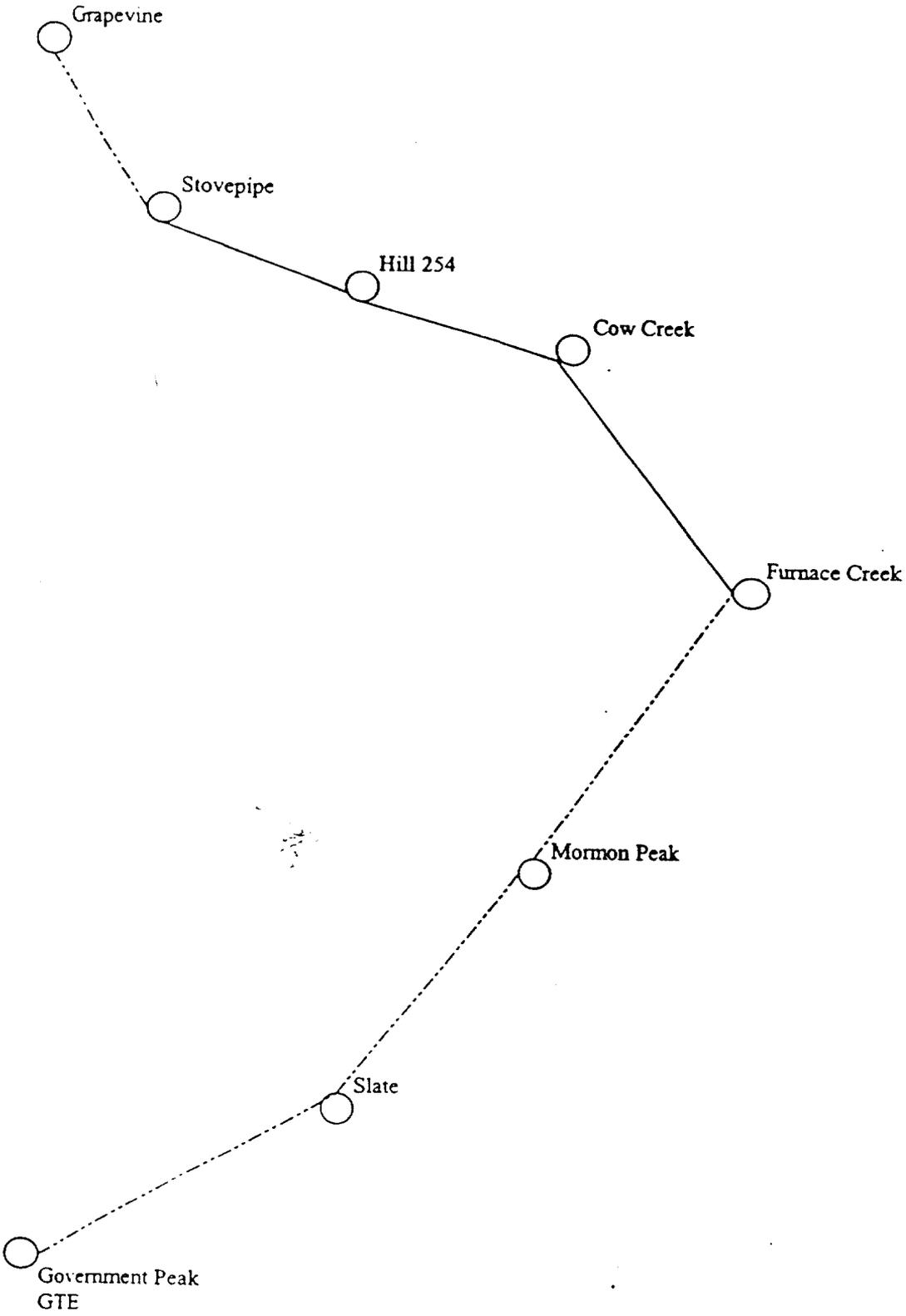
Magalie Roman Salas, Secretary (FCC)  
(for filing in FCC Dkt. RM-9913).

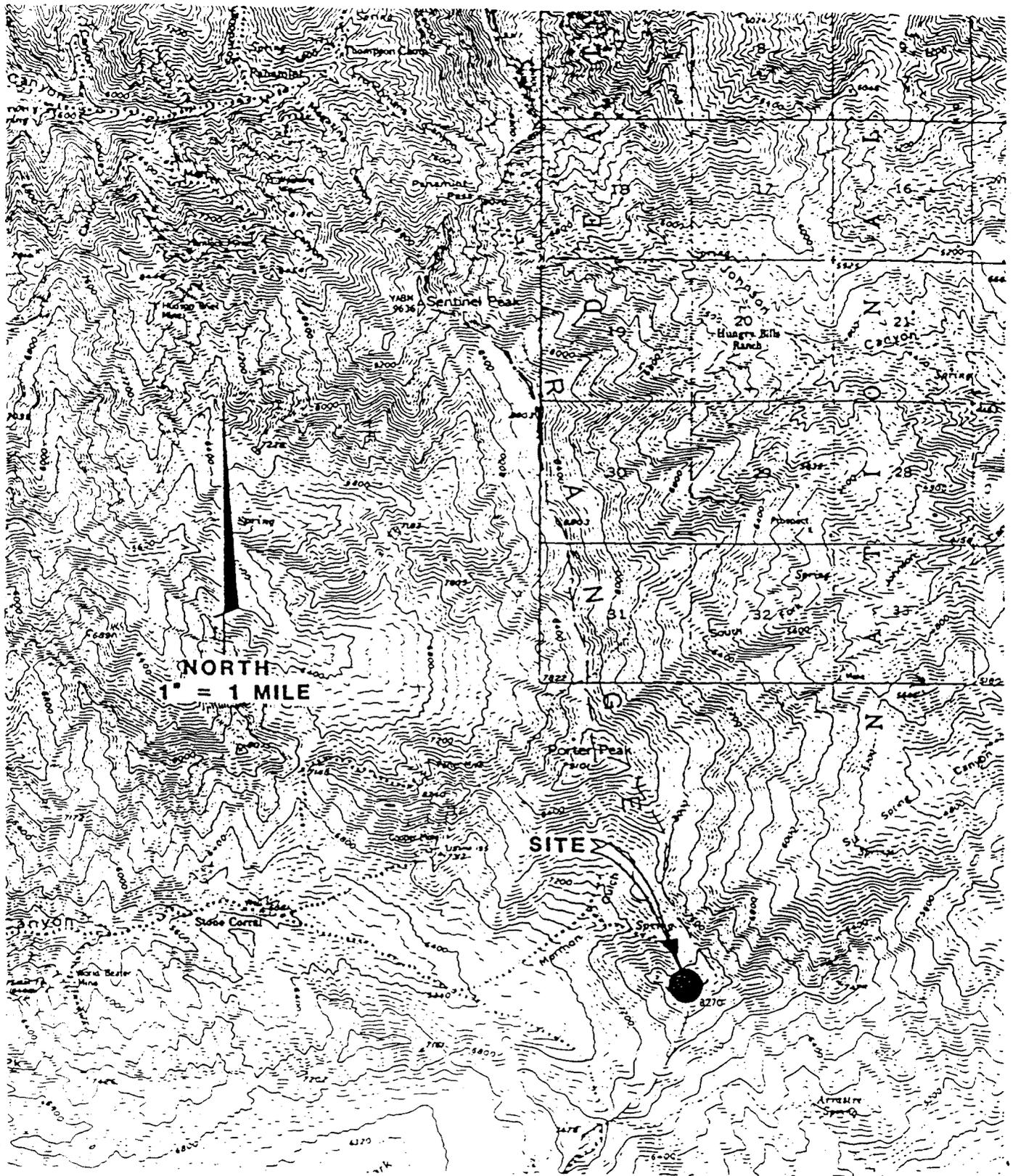
John F. Clark, Esq.  
Perkins Coie LLP (Counsel of Record, PCIA)

Bruce E. Beard, Esq.  
SBC Wireless, Inc.

Exhibit I

# Government Peak to Grapevine Microwave Radio Route

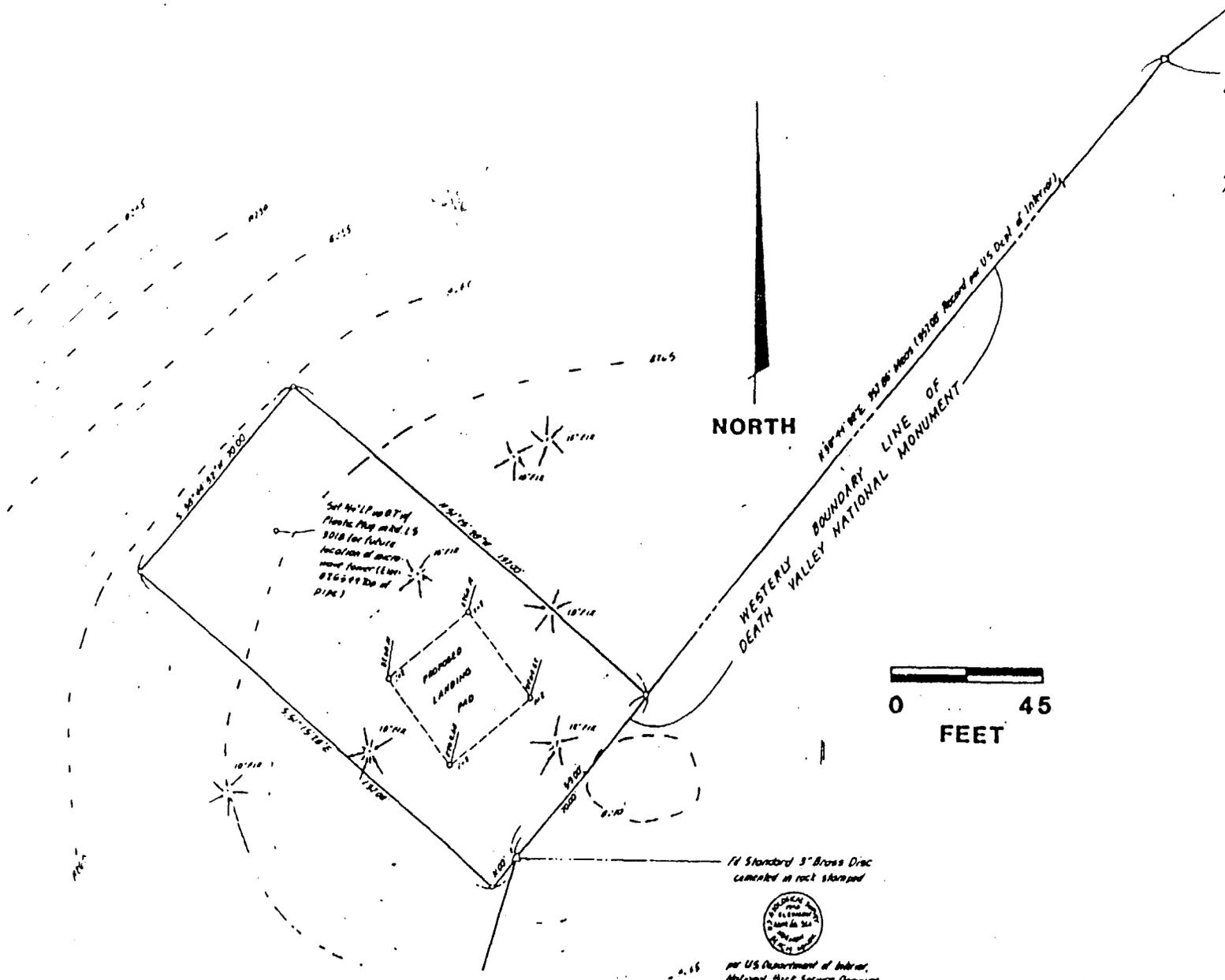




SOURCE: USGS QUAD MAP "TELESCOPE PEAK"

LOCATION OF MORMON PEAK RIGHT-OF-WAY

FIGURE



1/4 Standard 3" Brass Disc  
centered in rock stamped



per US Department of Interior,  
National Monument Survey Drawing  
No. 149/41052

NORTH



1/4 Standard 3" Brass Disc  
centered in rock stamped



per US Department of Interior,  
National Monument Survey Drawing

LOCATION OF EXISTING FACILITIES WITHIN THE MORMON PEAK RIGHT-OF-WAY **FIGURE**

# Mormon Peak

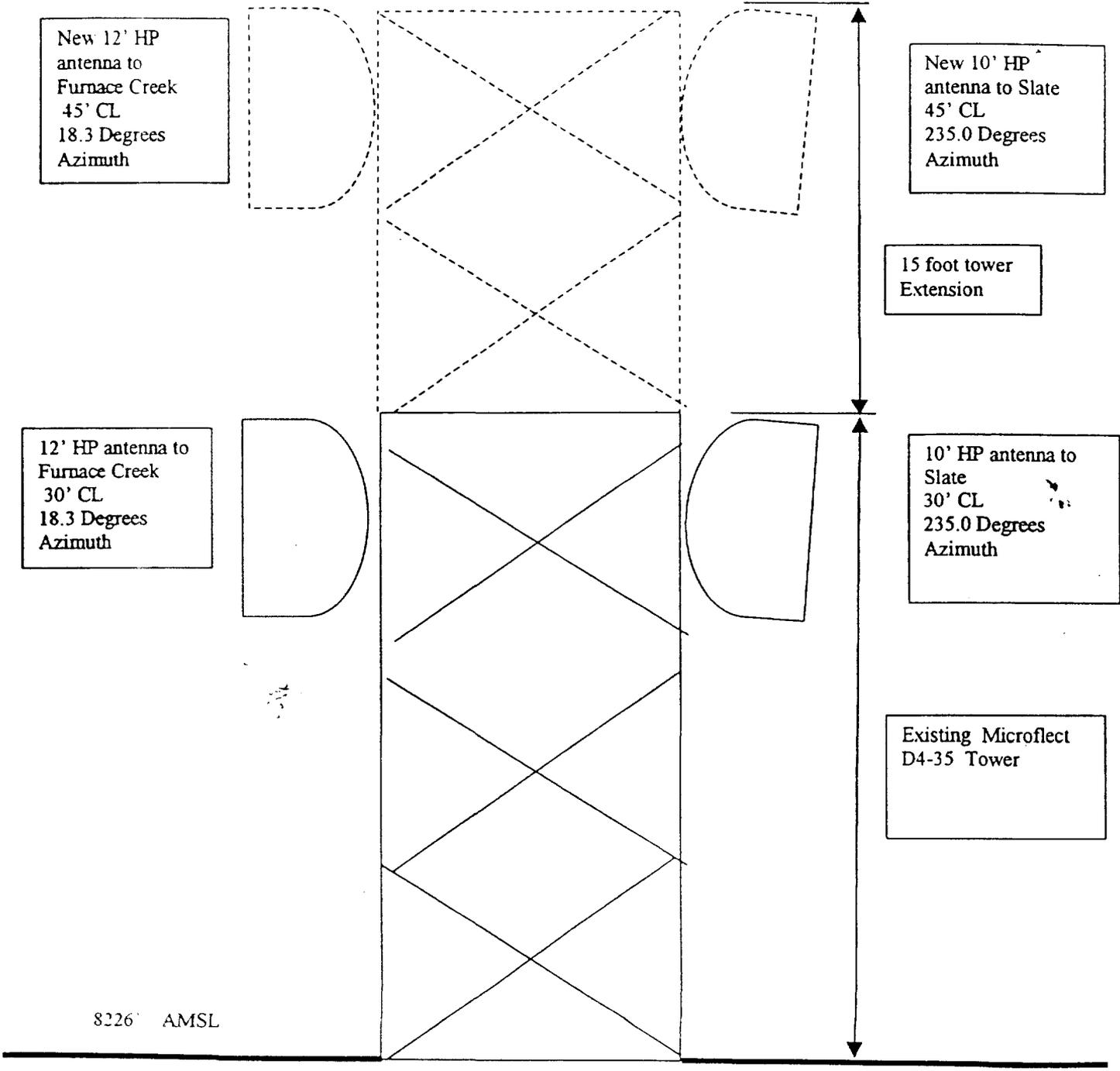


Exhibit II



BUREAU OF LAND MANAGEMENT  
 California Desert District  
 1695 Spruce Street  
 Riverside, California 92507

DECISION

RIGHT-OF-WAY GRANTED

MAY 29 1982

Details of Grant

Serial Number: CA-3961

Holder: Pacific Telephone and Telegraph  
 525 "B" Street, Room 1311  
 P. O. Box 524  
 San Diego, California 92112

Project Description: Solar Powered Microwave Repeater  
 Map entitled, Mormon Peak JFD File No. 81-7381

Date Filed: February 5, 1981

Land Description: T. 22 S., R. 46 E., MD Mer (Unsurvived)  
 Section 17, NW 1/4 NW 1/4

Permitted Use by Holder: Construction, use and maintenance of a solar  
 powered microwave communication site

Authority for Grant: Title V of the Act of October 21, 1976 (90 Stat.  
 2776:43 USC 1761)

Regulations Applicable: Title 43 Code of Federal Regulations, Sections  
 2801 through 2806.2

Effective Date of Grant: Effective the date of this grant

Termination Date of Grant: Temporary, the permitted use may continue as long  
 as it meets the non-impairment criteria contained  
 in Section 503 of the Federal Land Policy and  
 Management Act of 1976. This right-of-way is  
 granted on a temporary basis subject to a deter-  
 mination by Congress of whether or not the lands  
 upon which the subject grant is located is a  
 wilderness or non-wilderness area. If Congress  
 designates the area as non-wilderness, the grant  
 will be issued for thirty years with the right to  
 renew.

Rental: \$500 estimated rental for the first year, subject  
 to adjustment by formal appraisal

12-17-82  
 MTP O&G LSBL  
 MIN LOC OTHER  
 4/16/82

TERMS AND CONDITIONS OF GRANT

Pursuant to the authority vested in the undersigned by Order Number 701 of the  
 Director, Bureau of Land Management, as amended February 19, 1982, (47 F.R.  
 7505), a right-of-way, the details of which are shown above, is hereby granted,  
 subject to the following numbered terms and conditions:

\_\_\_\_\_

All valid rights existing on the date of this grant.

There is hereby reserved to the Secretary of the Interior, or his lawful delegate, the right to grant additional rights-of-way or permits for compatible uses on, over, under or adjacent to the land involved in this grant.

The holder shall comply with the applicable Federal and State laws and regulations concerning the use of pesticides (i.e., insecticides, herbicides, fungicides, rodenticides, and other similar substances) in all activities and operations under this grant. The holder shall obtain from the Authorized Officer approval of a written plan prior to the use of such substances. The plan must provide the type and quantity of material to be used; the pest, insect, fungus, etc. to be controlled; the method of application; the location for storage and disposal of containers; and other information that the Authorized Officer may require. The plan should be submitted no later than December 1 of any calendar year that covers the proposed activities for the next fiscal year (i.e., December 1, 1982 deadline for a fiscal year 1983 action). Emergency use of pesticides may occur. The use of substances on or near the right-of-way shall be in accordance with the approved plan. A pesticide shall not be used if the Secretary of the Interior has prohibited its use. A pesticide shall be used only in accordance with its registered uses and within other limitations if the Secretary has imposed limitations. Pesticides shall not be permanently stored on public lands authorized for use under this grant.

The holder agrees not to exclude any person from participating in employment or procurement activity connected with this grant on the grounds of race, creed, color, national origin, or sex. To ensure against such exclusions, the holder further agrees to develop and submit to the proper reviewing official specific goals and timetables with respect to minority and female participation in employment and procurement activity connected with this grant. The holder also agrees to post in conspicuous places on its premises which are available to contractors, purchasers, and labor unions or representatives of workers with whom it has collective bargaining agreements, of the holder's equal opportunity obligations.

The right-of-way herein granted is subject to the express covenant that it will be modified, adapted, or discontinued if found by the Secretary of the Interior to be necessary, without liability or expense to the United States, so as not to conflict with the use and occupancy of the land for any authorized works which may be hereafter constructed thereon under the authority of the United States.

By accepting this grant, the grantee acknowledges that the lands contained in this grant are being inventoried or evaluated for their wilderness potential by the Bureau of Land Management (BLM) under section 603 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (43 USC Sec. 1782), and that activities which are not in conformity with section 603 may never be permitted.

Activities will be permitted under the grant so long as BLM determines they will not impair wilderness suitability. This will be the case either until the BLM wilderness inventory process has resulted in a final wilderness inventory decision that an area lacks wilderness characteristics, or in the case of a wilderness study area until Congress has decided not to designate the lands included within this grant as wilderness. Activities will be considered non-impairing if the BLM determines that they meet each of the following three criteria:

(a) It is temporary. This means that the use or activity may continue until the time when it must be terminated in order to meet the reclamation requirement of paragraphs (b) and (c) below. A temporary use that creates no new surface disturbance may continue unless Congress designates the areas as wilderness, so long as it can easily and immediately be terminated at that time, if necessary to management of the areas as wilderness.

(b) Any temporary impacts caused by the activity must, at a minimum, be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole by the time the Secretary of the Interior is scheduled to send his recommendations on that area to the President, and the holder will be required to reclaim the impacts to that standard by that date. If the wilderness study is postponed, the reclamation deadline will be extended accordingly. If the wilderness study is accelerated, the reclamation deadline will not be changed. A full schedule of wilderness studies will be developed by the Department upon completion of the intensive wilderness inventory. In the meantime, in areas not yet scheduled for wilderness study, the reclamation will be scheduled for completion within 4 years after approval of the activity. (Obviously, if and when the Interim Management Policy ceases to apply to an inventory unit dropped from wilderness review following a final wilderness inventory decision of the BLM State Director, the reclamation deadline previously specified will cease to apply.) The Secretary's schedule for transmitting his recommendations to the President will not be changed as a result of any unexpected inability to complete the reclamation by the specified date, and such inability will not constrain the Secretary's recommendation with respect to the area's suitability or unsuitability for preservation as wilderness.

The reclamation will, to the extent practicable, be done while the activity is in progress. Reclamation will include the complete recontouring of all cuts and fills to blend with the natural topography, the replacement of topsoil, and the restoration of plant cover at least to the point where natural succession is occurring. Plant cover will be restored by means of reseeded or replanting, using species previously occurring in the area. If necessary, irrigation will be required. The reclamation schedule will be based on conservative assumptions with regard to growing conditions, so as to ensure that the reclamation will be complete, and the impacts will be substantially unnoticeable in the areas as a whole, by the time the Secretary is scheduled to send his recommendations to the President. ("Substantially unnoticeable" is defined in Appendix F of the Interim Management Policy and Guidelines for Lands under Wilderness Review.)

(c) When the grant is terminated, and after any needed reclamation is complete, the area's wilderness values must not have been degraded so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability or unsuitability for preservation as wilderness. The wilderness values to be considered are those mentioned in section 2(c) of the Wilderness Act, including naturalness, outstanding opportunities for solitude or for primitive and unconfined recreation, and ecological, geological or other features of scientific, educational, scenic, or historical value. If all or any part of the area included within the grant is formally designated by Congress as wilderness, activities taking place or to take place on that part of the grant will remain subject to the requirements of this stipulation, except as modified by the Act of Congress designating the land as wilderness. If Congress does not specify in such act how existing leases like this one will be managed, then the provisions of the Wilderness Act of 1974 will apply, as implemented by rules and regulations promulgated by the Department of the Interior.

The holder agrees to the stipulations contained in Appendix A, attached hereto and made a part hereof.

Acceptance hereof, the holder agrees that the right-of-way is subject to the applicable regulations contained in 43 CFR 2800 and to the terms and conditions of this grant.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

J. M. Basler  
(Holder)  
Vice President

Bruce Ottobelf ACTING  
Gerald E. Hillier,  
District Manager

MAY 26 1982.

STATE OF CALIFORNIA }  
COUNTY OF San Francisco } ss.

P-2638-M (6-75)  
(TPT & TCO AS CORPORATION)

May 7, 1982 before me, the undersigned, a Notary Public in and for  
State, personally appeared J. M. Basler

known to me to be the Vice President  
of the Pacific Telephone and Telegraph Company, the corporation that executed the within  
instrument, and to be the person who executed the within instrument on behalf of the corporation  
therein named, and acknowledged to me that such corporation executed the same,  
pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.  
Signature Merry M. Hazlak



U  
F  
E  
R  
T

Exhibit III



Public Employees for Environmental Responsibility

2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER(7337) • fax: 202-265-4192  
e-mail: info@peer.org • website: http://www.peer.org

September 8, 2000

The Honorable Bruce Babbitt  
Secretary of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

BY FIRST CLASS MAIL

Re: *Violation of environmental law, Mormon Peak*

Dear Secretary Babbitt:

Public Employees for Environmental Responsibility ("PEER") has reasonable cause to believe that officials of the National Park Service ("NPS") at Death Valley National Park and executives of the Pacific Bell Telephone Company ("Pacific Bell") are in violation of the Wilderness Act of 1964 (16 U.S.C. § 1131 *et seq.*) and the National Environmental Policy Act of 1969 ("NEPA")(42 U.S.C. § 4321 *et seq.*). We hereby petition the Department of the Interior to investigate our allegation and ensure that the NPS, and the corporations with which it does business, conform to the law.

#### SUMMARY OF FACTS

There is no dispute as to the following facts regarding the continued siting and maintenance of a communications tower at Mormon Peak:

- On July 24, 2000, Mr. Richard Martin, Superintendent of Death Valley National Park granted permission to Pacific Bell to conduct work on their 35-foot microwave tower located within a purported communication site right-of-way and assured Pacific Bell that NPS would issue a new right-of-way instrument.
- The right-of-way is located in Township 22S., Range 46E., Section 17 at a place known as "Mormon Peak".
- The location is within wilderness officially designated by Congress on October 31, 1994 and depicted on Map #D-15 of the legislative maps cited in section 601(a) of the California Desert Protection Act of 1994 ("CDPA")(16 U.S.C. § 410 *et seq.*).

Page 1 of 6



- On October 31, 1994, Congress transferred jurisdiction of the public lands in question to the administration of the NPS.
- The right-of-way was issued in 1982 by the Bureau of Land Management (BLM) under Title 5 of the Federal Land Policy and Management Act (“FLPMA”)(43 U.S.C. § 1761 *et seq.*). It comprises 0.22 acres.

### THE NATURE OF THE RIGHT-OF-WAY

Normally, the designation of Federal lands as “wilderness” is subject to valid existing rights. Wilderness designation does not usually extinguish such rights. And although Section 601(a) of the CDPA designating wilderness in Death Valley is silent on valid existing rights, PEER believes that any valid existing rights are protected by Section 305 of the same Act. But the circumstances of the right-of-way in question can be distinguished from those instances involving private rights in a compelling way.

The District Manager of the California Desert District of BLM signed the right-of-way instrument on May 26, 1982. The right-of-way states the nature of the right granted in the following words:

Termination Date of Grant: Temporary, the permitted use may continue as long as it meets the non-impairment criteria contained in Section 603 of the Federal Land Policy and Management Act of 1976. This right-of-way is granted on a temporary basis subject to a determination by Congress of whether or not the lands upon which the subject grant is located is a wilderness or non-wilderness area. If Congress designates the area as non-wilderness, the grant will be issued for thirty years with the right to renew.

[Emphasis supplied.]

The right-of-way instrument, by its own terms, made the continuation of the grant explicitly contingent upon the potential designation of wilderness by Congress.

In other words, if Congress did not designate the lands as wilderness, then the right-of-way would continue for a thirty-year term, until 2012 (with a right to renew). No one disputes that the right-of-way would extend to its normal thirty-year (30) term if Congress did not designate the lands as wilderness. Obversely, if Congress designated the lands as wilderness, the right-of-way would NOT extend to its full thirty-year term. Any other interpretation would mean that the right-of-way extends to 2012, regardless of what designation Congress conferred on the lands. Such a conclusion cannot be made to fit within the plain language of the right-of-way's termination clause.

Granted, the terms of this right-of-way are unusual. The language is not typical of the words that BLM customarily uses when issuing rights-of-way. Nevertheless, it is the language of this particular grant, and the language governs the interpretation of the law. Consequently, the right-of-way is no longer a valid existing right under Section 305 of the CDPA. 16 U.S.C. § 410(a)(4).

## THE VIOLATIONS

(1) *The Wilderness Act of 1964.* “Subject to existing private rights,” Section 4(c) of the Wilderness Act (16 U.S.C. 1133(c)) prohibits, among other things “commercial enterprise” and structures in designated wilderness. The Pacific Bell facility constitutes both. It is a structure and it is part of a commercial enterprise, responsible for \$100,000 of gross revenues per year, according to the NPS. Pacific Bell's right-of-way was a conditional right; a right that expired by the operation of its own terms when Congress designated the area as wilderness. Thus, Pacific Bell does not possess an existing private right that would have otherwise exempted it from the prohibitions at section 4(c). The NPS, by authorizing Pacific Bell's request to conduct work on the tower, and by assurances, given in writing, that the NPS will issue a new right-of-way instrument, is in blatant and willful violation of the Wilderness Act.

Even if we assume, for argument's sake, that the right-of-way issued in 1982 remains valid, as the NPS believes, we must challenge the assurance that Mr. Martin gave to Pacific Bell that the NPS would issue a right-of-way under NPS regulations at 36 CFR Part 14. If the 1982 right is valid, the NPS cannot reissue, renew or replace it with another NPS-issued right-of-way without altering the fundamental nature of the right. The 1982 right was issued under authority of FLPMA. If the NPS issues a new instrument to Pacific Bell, it would be issued under an entirely different authority, an act of 1911, amended in 1952 and codified at 16 U.S.C. § 5. It would be a new right-of-way authorized under a different law. If the NPS actually believes that the 1982 right continues to exist, then why is the NPS promising to issue a new right-of-way? While the new NPS-issued right would endure until the same date as the so-called “current” right, the NPS-issued right will be a new and different right in wilderness. In addition to violating the Wilderness Act, such an action is contrary to the *NPS Wilderness Management Reference Manual No. 41*. See No. 41 at 6.4.7.

(2) *The National Environmental Policy Act of 1969.* 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 an agency, “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).

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 may also play a role in both the decision-making process and the implementation of that decision.” *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 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, which 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 effect 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:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) 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).

PEER’s concern with respect to NEPA focuses on the change in the nature of the site, due to both Congressional action and the concurrent expiration of the right-of-way. Such changes may demand greater scrutiny under the environmental laws. By failing to engage in the necessary NEPA analysis of the communications tower site, the National Park Service has denied the Department, and the public it serves, the ability to assess not only the environmental effects of Pacific Bell Telephone Company’s project, but also the full range of alternatives noted by 42 U.S.C. § 4332 (c) (iii).

## THE HISTORY

In fairness to the NPS, the assumption of jurisdiction over the vast areas of public lands added to Death Valley on October 31, 1994 was a formidable task. The NPS did not receive the BLM case file for this right-of-way (CA-8961) until some time in August 1995. Before transferring the case file, the BLM wrote to Pacific Bell on July 20, 1995 and notified the company of the transfer of jurisdiction and that the right-of-way continued to be a valid existing right “expressly recognized” and presumably protected by the CDPA. BLM provided this notice without informing or consulting with the NPS, and apparently without reading the right-of-way document.

Beginning around October 1999, Pacific Bell initiated discussions with the NPS at Death Valley to seek approval for work to add 15 feet to the tower height. On May 16, 2000, Pacific Bell submitted a formal application to modify the “existing” right-of-way and enable the work. During the last week of June, troubled NPS officials began contacts with BLM staffers to seek guidance on the language of the Pacific Bell right-of-way. Within a few days (on July 6, 2000), the NPS Superintendent hastily decided that the right-of-way remained valid. His conclusion was not based on any guidance provided by BLM or any advice from the Department of the Interior field solicitor's office.

The NPS then prepared a document to categorically exclude the tower work from review and public comment under NEPA. Mr. Martin signed the categorical exclusion on July 11, 2000. The exclusion cited was from the 516 *Departmental Manual* (DM 6)(Appendix 7.4(a)): “Reissuance/renewal of permits, rights-of-way or easements not involving new environmental impacts.” Mr. Martin stated in a memo to the files accompanying the categorical exclusion that Pacific Bell possesses a right-of-way dating from 1982. The categorical exclusion is itself inapplicable since by the NPS's own belief, the right-of-way continues to exist and does not require renewal or reissuance until 2012.

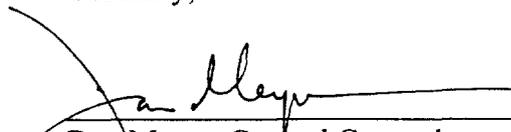
More significantly, the NPS failed to analyze and seek public comment on the impacts resulting from the presence of the tower in the wilderness and the authorization given Pacific Bell to land helicopters in the wilderness to accomplish its work. True, an “existing private right” is excepted from the prohibition on commercial enterprises, structures and the landing of aircraft in the wilderness. However, even if this right-of-way exists, it is a right directly subject to NPS control. NPS consent is required for Pacific Bell to land aircraft in wilderness and the *Departmental Manual* provides no categorical exclusion for such an NPS authorization. When a federal agency takes an action in wilderness, it is never wise to exclude public comment and shortcut the NEPA process. This decision was apparently made in too much haste and with insufficient analysis.

## CONCLUSION

The last sentence of the 1982 right-of-way termination section states that "If Congress designates the area as non-wilderness, the grant will be issued for thirty years (i.e. until 2012) with the right to renew." The NPS has acted as if this sentence describes the current status of the lands at Mormon Peak; indeed, as if Congress has not designated the lands as wilderness. In fact, the opposite is true. Congress designated the lands as wilderness. To act as if the right-of-way endures until 2012 and may be renewed even though Congress designated the lands as wilderness is plainly in error, contrary to the terms of the right-of-way and thus in violation of law.

We request that you instruct the Director of the NPS to revoke the approval granted by the park superintendent on July 24, 2000. We request that the NPS must address the very serious questions we have raised about the existence of this right-of-way. Please instruct the Director to withdraw a commitment made by the park superintendent to Pacific Bell that the NPS would soon issue an NPS right-of-way expiring on May 29, 2012 with a possible right of renewal thereafter. Lastly, the NPS must inform Pacific Bell to remove the tower and reclaim the site within a reasonable period.

Cordially,



Dan Meyer, General Counsel  
Public Employees for Environmental Responsibility  
("PEER")

2001 S Street, N.W. — Suite 570

Washington, D.C. 20009

Tele: (202) 265.7337

Facs: (202) 265.4192

E/ml: [dmeyer@peer.org](mailto:dmeyer@peer.org)

District of Columbia Bar No. 455369

CC: William E. Kennard, Chairman  
Federal Communications Commission

John D. Leshy, Esq.  
Office of the Solicitor (OS/DoI).

Earl E. Devaney  
Office of the Inspector General (OS/DoI)

Exhibit IV

Author: DEVA Chief Ranger at NP-DEVA

Date: 04/26/2000 8:11 AM

Normal

TO: Richard L Anderson at NP-DEVA-CCRK

TO: Ed Greene at NP-CACA

TO: DEVA Administration (Marian O'Dea)

TO: Jay Wells at NP-WRO

TO: Tim Stone at NP-DEVA-CCRK

TO: Jed Davis at NP-DEVA-CCRK

TO: DEVA Superintendent

Subject: Request to Modify Existing Right-of-Way

----- Forwarded w/Changes

Author: "COLEMAN; RON (PB)" <RACOLE1@msg.pacbell.com> at np--internet 04/24/2000 11:21 AM

TO: DEVA Chief Ranger (Bill Blake) at NP-DEVA

CC: "URADA; RON (PB)" <RMURADA@msg.pacbell.com> at NP--INTERNET

CC: "RANKIN; LINDA S (SBCSI)" <LSRANK1@msg.pacbell.com> at NP--INTERNET

CC: "WHITE; JERRY J (PB)" <JJWHIT2@msg.pacbell.com> at NP--INTERNET

CC: "COLEMAN; RON (PB)" <RACOLE1@msg.pacbell.com> at NP--INTERNET

Request to Modify Existing Right-of-Way

----- Message Contents

This is the heads up copy of the request to modify the existing ROW that Pac Bell has on Mormon Pk.

The "official" copy is in the mail.

The clock will start ticking when we receive the official copy.

txs

Forward Header

Subject: Request to Modify Existing Right-of-Way

Author: "COLEMAN; RON (PB)" <RACOLE1@msg.pacbell.com> at np--internet

Date: 04/24/2000 11:21 AM

Bill,

Here is an advanced copy of our request for the Mormor Peak Site. The hard copy and the \$210.00 application fee check will be sent registered mail.

<<Request to Modify Existing Right of Way.doc>>

If you have any questions or if you would like me to be available during the meeting that you are having this Wednesday just call.

Ron Coleman

\* racole1@pacbell.com

\* 626-576-6121

Author: DEVA Chief Ranger at NP-DEVA  
Date: 01/28/2000 4:04 PM  
Normal  
TO: Dick S. Young at NP COLO  
CC: Richard L Anderson at NP-DEVA-CCFL  
CC: Jay Wells at NP-WRO  
Subject: Re[3]: Pac Bell ROW

----- Message Contents

dick Young

txs for your help

this info does help

however, i doubt we will be able to say "yes" or "no" w/i the 100 limit.

this is a complex issue occurring in wilderness.

also - - can we charge them for the time and effort it takes to do the compliance process? Can that process/work be contracted out?

also - - what are "time outs"

txs

bill BLAKE

Reply Separator

Subject: Re[2]: Pac Bell ROW  
Author: Dick S. Young at NP-COLO  
Date: 1/27/00 9:24 AM

Doesn't work that way. I'm attaching the latest version of telecomm policy/procedure about to be published in RM-53. The 120 business days includes the first ten day initial decision period, but has 'time-outs' what does this mean? while the basic material is being gathered. This includes nepa and 106 stuff. On day 100, if it actually takes that long, it's either yes or no, no maybe involved. By day 120, you're supposed to have a signed permit in hand.

Call me if this is clear as mud.

D

Reply Separator

Subject: Re: Pac Bell ROW  
Author: DEVA Chief Ranger at NP-DEVA  
Date: 1/26/2000 7:01 PM

DICK

TXS - - WHAT ABOUT THE 120 DAY ISSUE.

IF WE SAY "MAYBE" AND AT THE END OF 120 DAYS WE STILL ARE SAYING  
"MAYBE", WHAT HAPPENS?

DID YOU GET SNOW"

78 HERE TODAY

Reply Separator

---

Subject: Pac Bell ROW  
Author: Dick S. Young at NP-COLO  
Date: 1/24/00 10:38 AM

Bill

I was on travel last week but back in my office now.  
Sorry to be so long getting back to you, just back  
from travel and leave. Very interested to know what  
you guys decided about this in you 1/18 meeting.

By the way, I have to emphasize that that first 10 day  
decision is only an 'initial' decision, not the final  
one. It's meant ONLY to handle those situations that  
are OBVIOUSLY yes or no, and to get some sort of  
answer back to the company in a short time. It is  
expected that 95% or more of the initial decisions  
will be MAYBE.

D

Author: DEVA Chief Ranger at NP-DEVA

Date: 10/16/1999 12:34 PM

Normal

TO: Richard L Anderson at NP-DEVA-CCRK

CC: Ed Forner at NP-DEVA

CC: Jodi Rods at NP-DEVA

CC: DEVA Superintendent at NP-DEVA

Subject: remial// Pac Bell Microwave

----- Message Contents

dick A

sarah would be great - - ed is also going to be there alone with jodi and i.

did you get a copy of the existing ROW??

they are tying this meeting into some on site (mormon pk) wk.

we will get the info you have ask for and more.

i will have to ck the law/nps policy on how long we have to give them an answer - - but for some reason 100 days is in my head.

Reply Separator

Subject: Pac Bell Microwave Site meeting 10/27

Author: Richard L Anderson at NP-DEVA-CCRK

Date: 10/15/99 8:10 AM

Bill Blake,

I have asked Sarah Koenig if she could go to the 10/27 meeting. If she can, she would be really good, but no other RM staff are available that day since it's the Eureka Dunes trip day with the DEVA Advisory Commission.

Could the meeting be re-scheduled, or a second meeting held later?

Issues so far:

- what is the purpose and need for the project?
- are the proposed changes improvements to NPS DEVA phone service, or general improvements (to equipment or for other customers) which do not affect DEVA's phone service?
- What is our time line requirement under the new telecommunications site law?
- Since NPS policy says not to renew expired ROWs in wilderness, what are the details to allow us to get around that, if we decide that the facility is essential to DEVA phone system?
- what are the alternatives?
- what would be the impact on no action?

Dick Anderson

Author: DEVA Chief Ranger at NP-DEVA

Date: 01/14/2000 2:02 PM

Normal

TO: Linda Greene at NP-DEVA-CCRK

TO: Richard L Anderson at NP-DEVA-CCRK

CC: Jay Wells at NP-WRO

CC: Ed Forner

CC: Chief DEVA Interp (Corky Hays)

CC: DEVA Administration (Marian O'Dea)

CC: Jodi Rods

CC: Jed Davis at NP-DEVA-CCRK

CC: Dick S. Young at NP-COLO

CC: Dick Martin at NP--WR

CC: DEVA Assistant Chief Ranger at NP-DEVA-CCRK

CC: Eric Inman

CC: Charlie Callagan

Subject: ROW

----- Message Contents

Linda

Dick

I met with Pac Bell this AM to review the options for a location for their microwave tower (currently on wilderness on Mormon's pk).

This facility now feeds DEVA all of its phone services. It is now at 100% capacity. Recently DEVA requested more services (which would equal a 1/16 increase in capacity)

They will soon be filing with us an official application.

Based on their review of options, they will be requesting to use and modify the existing site and facilities.

Once we get their application, we have but 10 days to say "yes" or "no" or "maybe". We then have 120 days to back up our decision.

These time frames are established by law and regulation. Pac Bell is fully aware of them. And, the NPS (so I am told) is under great scrutiny/pressure to make the deadlines.

As such, I would think it best for us to review this issue at our 1/18 staff meeting (Superintendent Staff Meeting)

Some background info:

+ This facility now feeds DEVA all of its phone services. It is now at 100% capacity.

+ Recently DEVA requested more services (which would equal a 1/16 increase in capacity).

+ It is located on lands mgt by BLM until 1994.

+ It is now on NPS lands

+ For what ever reason, it is not excluded from wilderness

+ It is now operating under a PCW issued by BLM.

+ It was constructed in 1969

+ No roads service or connect to it. Most maint is done by folks who walk in.

+ It is so remote and "hidden", most of our staff did not know of it until Pac Bell ask if they could increase capacity (that we ask for).

+ Pac Bell generates \$100,000.00/yr in revenue from phone traffic going thru this site (gross revenue). As such, any options have a bottom line figure to do a C/B review.

+ The only non-wilderness Mt top they could relocate to is Roger's Pk. From this location, they would need a tower 200-225 feet (with its flashing red light on top) to "see" the relay point. Due to icing and wind loads, this tower would be "massive".

for those of you who do not know, this is a very visible site from all points in Death Valley proper and much of the Park in general. A major viewshed.

+ The cost of bring in a hard line (50+ miles) is approx \$14,000,000.00 (yes, million).

Options other than their preferred options, Pac Bell will address in their application:

1) Hard line connection

2) Moving to Roger,s Pk

3) No Action (no increase in capacity)

**Notes from PAC Bell Morman Peak facility meeting  
10/27/99 Sara Koenig**

Need for expansion: Microwave relay is from facility in Slate Range to Morman Peak to Furnace Creek to Cow Creek to Hill 254(?) to Stovepipe to Grapevine. Demand for services exceeding the capacity of the equipment, mostly due to high speed modems and internet. The proposed expansion would include ability to upgrade to ~600% of current capacity. Changes needed would include 15 ft increase in height of tower at Morman Peak and possible need to relocate Furnace Creek tower. The radio frequencies would be changed requiring a change in antennae type.

Morman Peak facility currently has a 35 ft tower with two microwave "drums", a small solar array on top and a "double portapotty" sized fiberglass building inside the bottom of the tower. All power needs are met with solar power. We viewed a video of the site. The area vegetation is mature pinyon-juniper woodland with sparse ground cover. Bare ground is a reddish tan.

We discussed wilderness law and policy and the specific language in the 1981 temporary right of way. The temporary right of way specifically mentions that if the area becomes wilderness the permanent right of way may not be granted.

We discussed possible site mitigation ideas. The covers for the microwave drums can be a color such as tan or green to help them blend in. The tower could be painted a neutral color if not against FAA regulations. The tower should not require a night warning light.

The principle alternative to the Morman Peak site seems to be Rogers Peak. We provided information and maps to aid Pac Bell in evaluating moving to Rogers.

We visited the Furnace Creek site and discussed possible changes at that site.

# CASE FILE COPY

CA-8961

8500  
CDCA-136  
(CA-065-43)

KKW

Ridgecrest Resource Area  
112 East Dolphin Avenue  
Ridgecrest, California 93555

CERTIFIED - RETURN RECEIPT REQUESTED  
Certification No. P921 204 442

JAN 9 1989  
10??

Pacific Telephone and Telegraph  
525 "B" Street, Room 1311  
San Diego, CA 92112

Dear Sir:

This letter is to inform you of the current status of your telephone repeater station on the Panamint Range crest. The boundary of the Surprise Canyon Wilderness Study area was revised several years ago and no longer includes the area of your solar powered microwave repeater located in the NW1/4NW1/4 of Section 17 Township 22S, Range 46E, Mount Diablo Meridian, on Mormon Peak. This boundary adjustment was made based on the existence of a road to the north of your repeater site. That road is now the southern boundary for the WSA. We have enclosed a map indicating the new boundary line.

Since the area of your repeater is now outside of the Surprise Canyon WSA, you are no longer required to remove the repeater before June 30, 1989 as previously stated in our letter dated October 26, 1988. Should you have any questions regarding this matter, please contact Katie Wash, Wilderness Specialist at (619) 375-7125 of this office.

Sincerely,

(S) GREG THOMSEN

Gregory S. Thomsen  
Area Manager

Enclosure: Map

cc: Death Valley National Monument



KWash:12/30/88:wp5usel36.ltr

Ridgecrest Resource Area  
112 East Dolphin Avenue.  
Ridgecrest, California 93555

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OCT. 30, 1988

CERTIFIED MAIL-RETURN RECEIPT REQUESTED OCT, 30, 1988  
Certification No. P 459 904 311

Pacific Telephone and Telegraph  
525 "B" Street, Room 1311  
Post Office Box 524  
San Diego, California 92112

Dear Sir:

This letter is to indicate the current status of your activity in Wilderness Study Area CDCA-136 Surprise Canyon, and to advise you of the schedule of actions needed to reclaim the site by June 30, 1989.

Pursuant to Section 603(c) of the Federal Land Policy and Management Act of 1976, and the Bureau of Land Management's Wilderness Interim Management Policy and Guidelines for Lands Under Wilderness Review, activities are allowed in a wilderness study area only to the extent that they do not impair the suitability of the area for wilderness, and that any impacts resulting from those activities are reclaimed prior to a decision on the area's suitability by Congress.

Your solar powered microwave repeater located in the NW<sub>1</sub> of Section 17, Township 22 South, Range 46 East, Mount Diablo Meridian, on Mormon Peak, was approved by the Bureau of Land Management under the authority of Title 43 Code of Federal Regulations, Sections 2801 through 2806.2 on May 26, 1982. Reclamation was required as a condition to the approval of your solar powered microwave repeater. On December 18, 1986 we reviewed your file and conducted a compliance inspection of the site.

Results of the compliance inspection are as follows:

1. Project Activity Observed:

- No evidence of past or present activity.
- Project currently inactive, but evidence of past activity observed.
- Project currently active.
- Project complete.

2. Extent of Reclamation Observed:

- No evidence that reclamation has been initiated.
- Reclamation initiated but not complete.
- Reclamation completed.

## 3. Needed Action:

- (X) Reclamation required; specific requirements/schedule listed below.
- ( ) No reclamation required at this time; new requirements may be imposed if activity commences; plan amendment may be required.
- ( ) Project completed and file closed; you ARE NOT AUTHORIZED to undertake further activity on the site.

The reclamation shall be completed by removing the communication equipment which consists of a tower with receiving and sending discs on top of the tower. The tower can be unbolted and disassembled on site. A portable building is located under the tower and houses equipment for communications. The building can be lifted by a helicopter and removed from the location. All concrete pads and mooring blocks shall be removed. Two aircraft air socks shall be removed along with the concrete bases. Four concrete aircraft tie-downs shall be removed. All material removed from the communication site shall be removed from the public lands.

After all communication structures and related concrete mooring blocks have been removed to an area which is not public land, the following reclamation shall be completed:

1. All concrete mooring blocks and associated concrete material shall be removed from public lands.
2. All holes created by concrete mooring blocks shall be reclaimed by filling the holes with native soil material and rocks to a level even with the existing topography. The soil material shall be brought in from areas outside of the Wilderness Study Area, because the area directly around the communication site has returned to a substantially unnoticeable condition within the wilderness area as a whole.
3. The reclaimed areas will require a few pieces of native rock placed on top of it to mimic the natural environment around the reclaimed area. The native rock shall be obtained from the immediate area around the communication facility.
4. Due to the sparse vegetative cover within the area of the communication site no seeding or transplanting of vegetation will be required within the disturbed area.
5. Reclamation shall be completed by May 1, 1989.

## Equipment required for reclamation:

The equipment needed for removal of the communication equipment will be a large helicopter which can handle a payload of 1000 pounds in a sling load. Approximately 5 workers and a supervisor will also be needed to complete the operation. Transportation for the workers and equipment will consist of a four wheel drive vehicle to transport the workers to within two miles of the site. Shovels and pry bars will also be needed to remove the concrete pilings and concrete supports for the buildings and to fill in the holes made by the removal of the concrete footings.

We would like to review your temporary Right-of-Way and go over the reclamation schedule with you at the Ridgecrest Resource Area Office during December 1987. Please contact our Realty Specialist Greg Thomsen by the end of November 1987 to set up a date and time for the meeting.

Within 30 days of receipt of this notice, you may request review of the reclamation schedule stated above. We have included a copy of our reclamation procedures (IM-No. CA-87-272) for your information. Your request must be made in writing to the Area Manager, 112 East Dolphin Avenue, Ridgecrest, California 93555, and must clearly specify the parts of the reclamation schedule you disagree with or do not understand. The purpose of the review will be to clarify the reclamation schedule or to discuss any additional information you may wish to provide to ensure that reclamation is complete by June 30, 1989.

If you do not respond to this notice, you will be expected to complete the actions as specified in the reclamation schedule above. This is an interlocutory decision from which no appeal may be taken. If a new decision is required, for example, because the issued right-of-way is no longer adequate to protect the wilderness values, a final decision will be issued following the 30-day period for review of the reclamation schedule that may be appealed to the Interior Board of Land Appeals (IBLA).

Should you have any questions regarding this matter, please contact Greg Thomsen, 619-375-7125, at this office.

Sincerely,

(S) RICHARD S. SMITH

**ACTING FOR** Patricia E. McLean  
Area Manager

Enclosure

1-Copy of IM No. CA-87-272

cc: Death Valley National Monument

PHappel:ch 10/29/87 MagCard II