



Public Employees for Environmental Responsibility

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Office of the General Counsel
Washington, D.C.

August 17, 2001

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Michael K. Powell, Chairman
Federal Communications Commission (FCC)
445 12th Street, S.W.
Washington, D.C. 20554

and Commissioner Gloria Tristani
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin

BY FIRST CLASS MAIL

Re: *Need to Proceed with Rulemaking in Response to the PEER Petition (FCC RM-9913)*
And Filing of Ex Parte Presentation, Permit-But-Disclose Notice

Dear Chairman Powell, and Commissioners Tristani, Abernathy, Copps and Martin:

On Friday, August 16th at 3:00 PM (EST), I joined the International Bureau (IB Staff) in a conference call regarding the aforementioned rulemaking. PEER filed a petition for rulemaking ("*PEER Petition*") a little over a year ago. We requested a rewrite of the Commission's environmental rules. The conference included myself, Anna Gomez, Linda Haller, Kate Collins and Jackie Ruff. Anna was standing in for a vacationing Bureau Chief Abelson.

The IB Staff were, as always, exceptionally professional. They merely wanted to pass along that they would be making a formal recommendation to the Commissioners concerning the *PEER Petition*, FCC RM-9913. I took the conference call as an opportunity to update the IB Staff on the environmental community's general regard of Commission compliance with the National Environmental Policy Act of 1969 ("NEPA"). We also discussed the effectiveness of the Commission's environmental rules, specifically. I felt these fresh observations should be memorialized pursuant to the Commission's ex parte communications rules, 47 C.F.R. §§ 1.1200-1216 (2000).

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Director



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These were my observations to the IB Staff:

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- (1) The *PEER Petition* (FCC RM-9913) docket has been used over the previous year to record public objections to the FCC's perceived failure in enforcing the NEPA, nationwide and regardless of the technology in question. It is an environmental petition, asking for redress of all practices thought to be offending the NEPA. The IB Staff was tasked with making recommendations to you because the issue of Fiber Optic Cable (FOC) coral reef crossings sparked the filing of the PEER Petition. But this matter also touches on technologies regulated by the Wireless Telecommunications Bureau; the Enforcement Bureau and the Office of the General Counsel also have critical roles to play in this matter.
- (2) The PEER Petition was filed after we received concerns from numerous federal employees at the U.S. Fish and Wildlife Service (USFWS), the National Oceanic and Atmospheric Administration (NOAA), the National Park Service (NPS), and various State Historic Preservations Officers (SHPOs), stating that your streamlining of various application procedures had precluded consultation with your peer agencies, as is required under the NEPA (in certain circumstances). PEER often receives these communications because of the complexities which often cloud inter-Agency communications.
- (3) And I—personally—wanted to provide the Commission with a means of redressing this issue on its own. The alternative will be litigation, and several environmental groups have already advised me that the Commission can not be trusted to resist industry influence throughout the lobbying which is inevitable during rulemaking proceedings. But as a communications lawyer, I am still committed to the process short of litigation. Rulemaking can do the job.

(4) In addition to the general observations, *supra*, I updated the IB Staff on the following developments/observations over the past year:

► **Urban Legend Regarding NEPA "Consultations"**. There is an 'urban legend' with both industry ranks—and among some FCC professionals— that the comments made by other federal agencies *in the rulemaking* that produced the Commission's environmental rules constitute the only "consultations" required under the NEPA. PEER notes that the NEPA is quite clear in its mandate that you must consult with other federal agencies when your actions will impact environmental resources under their jurisdiction. There is no effective means of doing this under the Commission's current environmental rules (and under the manner in which they are administered). This issue is of particular importance when you take an action within the viewshed of a National Park, or within the watershed of an environmentally-significant area.

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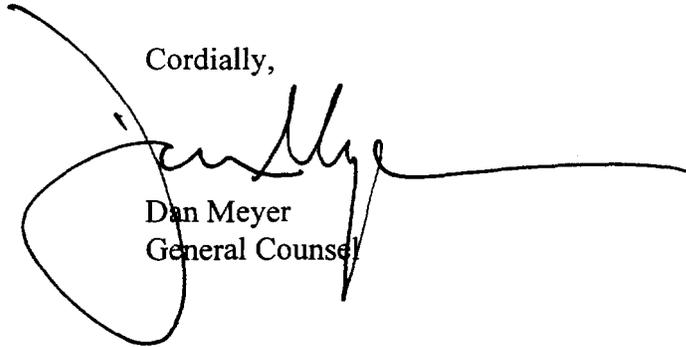
► **Adequacy of Public Notice.** Both employees of your peer federal and State agencies—and members of the environmental movement—have taken the alleged obtuseness of Commission public notice procedures to be your statement that public comment is not welcomed on environmental matters. One environmental activist from Florida opined, “the system is set up for industry, not the public.” So while your public notice procedures may fit the letter of the Administrative Procedures Act of 1949, they may be so obtuse as to have convinced some portion of the public that you are more like the Federal Energy and Regulatory Commission (FERC) (often regarded as the energy industry’s Old Boy Club) rather than like NOAA (which tends to have an excellent public reputation).

► **Means of Addressing Exemptions, Gone Wrong.** The Commission uses the NEPA’s exception/exemption process quite liberally by making findings that certain categories of actions have no environmental impact, and therefore require no environmental review. This is perfectly lawful. What is problematic is when you do this, and then a State, municipality, or other federal agency *does find an environmental impact, or even damage*. So when the Government of the Virgin Islands fined AT&T over a FOC project *you* approved, many Americans regarded the FCC as much the offender as AT&T. Likewise, when the U.S. Army Corps of Engineers fined Columbia Transmission for an FOC project *you* approved, many Americans took that as proof you were more a telecom trade organization than a federal agency charged with protecting their public interest. PEER is now handling six or seven communications tower issues through its National Parks Program. It is saddening to have a National Park Superintendent pick up the phone to tell me he regards the Commission as a greater threat to his operations than forest fires. But that did happen, last week.

The *PEER Petition* is designed to help you meet these public concerns through the Commission’s rules, and not as a party to litigation before the federal District Court for the District of Columbia. PEER has been solicited to join a group of environmental groups anticipating such a law suit, and we may do so at some point in the future. But law suits are poor vehicles for rulemaking; it would be better to do this under Title 1, Subpart C of the Commission’s rules. In conclusion, PEER would like to note the excellent work the International Bureau has put into this matter. Though we have not been privy to their discussions, we have heard from other federal agencies who have met with them, and the word on the street is that the Commission is not dismissing the *PEER Petition* lightly — many environmental employees within the federal Government are anxiously awaiting a grant of the *PEER Petition*.

You have every reason to be proud of the International Bureau's efforts:

Cordially,

A handwritten signature in black ink, appearing to read 'Dan Meyer', with a long horizontal line extending to the right. The signature is written over the printed name and title.

Dan Meyer
General Counsel

cc: Attached Service List.

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