



Public Employees for Environmental Responsibility

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*Office of the General Counsel
Dan Meyer*

August 23, 2001

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: *An Example of Why Rulemaking in Response to the
PEER Petition (FCC RM-9913) is Necessary, and a FOIA Request
Regarding Mormon Peak, California***

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

Last Friday, I signed out an ex parte presentation notification which encouraged the Commission to grant the *PEER Petition* (FCC RM-9913). Today, I am forwarding an example of why that rulemaking is necessary; other examples were provided in the *PEER Petition*, itself.

Native American culture, and the failure of FCC environmental compliance. You have approved a communications tower—and modifications to that tower—on the pinnacle of Mormon Peak, California, and in a Wilderness Area so-designated by the Secretary of the Interior. This would appear to be a site which would require rigorous environmental analysis under the Commission’s environmental rules, 47 C.F.R. §§ 1.1301-1.1319 (“Subpart I—Procedures Implementing the National Environmental Policy Act of 1969”). Both PEER and Wilderness Watch have repeatedly asked to see the environmental review which preceded this decision-making. We have not received that information.

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There are Archaic Period house rings adjacent to the helicopter landing pad used by the tower applicant. Obsidian flakes have been observed in and around these rings. Nearly two decades after you took this action, the State Historic Preservation Officer for the State of California is asking for your Section 106 Review. Where is it? And the California SHPO is requesting these documents still, two decades after your actions? PEER doesn't think the review was done. PEER thinks either the tower applicant ignored the historical site, or the Commission decided to proceed without complying with the National Environmental Policy Act of 1969. See Letter, TinaMarie Ekker, Policy Director, Wilderness Watch to Mr. J.T. Reynolds, Superintendent, Death Valley National Park (August 17, 2001) [Attached].

If the Commission complied with the law, it should be able to produce a bona fide Section 106 Review for that site, one that discusses the impact of the helicopter pad construction on the Native American historical site. It should also be able to produce correspondence reflective of the consultations required with the Native American tribes and/or nations, and appropriate federal agencies—including the Advisory Council on Historic Preservation (“ACHP”).

Freedom of Information Request. Accordingly, and pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended, PEER requests the above-named officials or their Staff provide:

- (1) a bona fide Section 106 Review analyzing the impact of the FCC's actions on the historic resources located on Mormon Peak, California.
- (2) evidence of consultation with the California State Historic Preservation Officer or the Advisory Council on Historic Preservation prior to taking the actions which impact the historic resources located on Mormon Peak, California.
- (3) all e-mails, correspondence, and documentation relating to environmental review of all major federal actions supporting the siting of the communications tower so close to a historic resource.
- (4) evidence of analysis of Mormon Peak's Wilderness characteristics, and the impact of tower erection on those characteristics.

This request includes all documents that have ever been within your custody or control, whether they exist in agency “working,” investigative, retired, electronic mail, or other files currently or at any other time.

For any documents or portions of documents that you block due to specific exemption(s) from the requirements of the Freedom of Information Act, please provide an index itemizing and describing the documents or portions thereof, withheld. The index should—pursuant to the rule in Vaughan v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)—provide a detailed justification for claiming a particular

exemption which explains why each exemption applies to the document or portion of a document withheld.

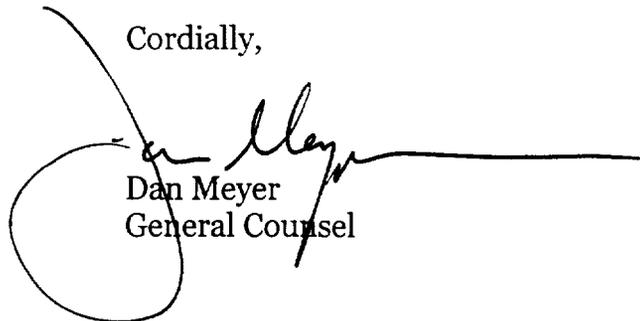
PEER requests that all fees be waived because "disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor". 5 U.S.C. § 552 (a)(4)(A). Disclosure of the above requested information is in the public interest because disclosure will significantly contribute to the public's understanding of the manner which environmental laws are executed. Disclosure is in no way connected with any commercial interest of the requesters.

Waiver is appropriate because PEER is a non-profit, nonpartisan public interest organization concerned with upholding the public trust through responsible management of the Nation's resources and with supporting professional integrity within federal Agencies. To that end, PEER is designated as tax exempt under Section 501(c)3 of the Internal Revenue Code. With 11,000 members spread across the United States, PEER is the foremost service organization for federal, State and municipal employees concerned with the fact that their own agencies are engaging in the subversion of the environmental laws. PEER's National Parks Program gathers information on the process used by all federal Agencies required to comply with the NHPA and the NEPA in their decision-making which impact National Parks such as the C&O Canal National Historic Park.

Once compiled, the information will be analyzed to compare the actual decision-making with the procedures required by law. In this manner, the public can verify compliance and take action against slovenly managerial habits or outright lawbreaking. Without PEER's efforts, the comparison between 'real' and 'required' decision-making will not be made.

PEER possesses significant in-house expertise and can use this expertise to analyze this information. In addition to two (2) environmental lawyers, and (1) communications lawyer, PEER's Board of Directors includes a number for former National Park Service professionals with property law experience. PEER will analyze the information, and it will then be disseminated in two ways: citizen activists on-site will work the issue locally, and PEER's national press operation will move the information into the larger public realm. The targeted population includes those citizens of California and the American Southeast most affected by this project, and the larger circle of environmentally-concerned Americans monitoring NEPA and National Historic Preservation Act of 1966 compliance.

Cordially,



Dan Meyer
General Counsel

cc: Attached Service List.



Wilderness Watch

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August 17, 2001

Mr. J. T. Reynolds
Superintendent
Death Valley National Park
PO Box 579
Death Valley, California 92328

Dear Superintendent Reynolds,

On April 3, 2001 Wilderness Watch wrote to you asking for an explanation of Death Valley's failure to produce legal descriptions and maps of the wilderness created by the California Desert Protection Act of 1994. We also asked for a written explanation of the National Park Service (NPS) decision of July 24, 2000 to approve expansion of a microwave tower on Mormon Peak in the Death Valley wilderness when the temporary right-of-way granted in 1982 appears to have expired by its own terms. The NPS also authorized the tower owner (PacBell, a subsidiary of SBC Wireless, Inc.) to land helicopters in wilderness. The NPS categorically excluded its decisions to extend a right-of-way and land helicopters in wilderness from review under the National Environmental Policy Act (NEPA). We realize that these are complicated issues. However, it is now four months since we have written and the NPS has neither acknowledged our letter nor responded.

We ask again that you please respond to the questions and concerns that we raised in our April 3, 2001 letter to you. We specifically wish to reiterate the following request: If the NPS has issued a new right-of-way (ROW) for the Mormon Peak microwave site, please provide us with a copy as soon as possible.

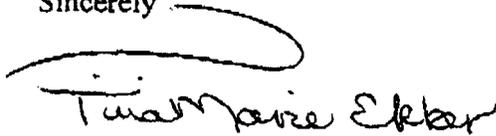
As you may be aware, there have been other irregularities attached to the Federal Communications Commission (FCC) decision of August 8, 2000 to renew the Federal license for PacBell to continue to use the Mormon Peak tower. The renewal also constituted a Federal agency action that required NEPA review by the FCC. On October 13, 2000 the FCC wrote to SBC Wireless, Inc. (a Dallas, Texas based company that is the parent company of PacBell) and gave them 30 days to produce a copy of the environmental review for the tower. An environmental review does not exist, as SBC's response to the FCC of November 13, 2000 makes clear. Any environmental review, if it is ever produced, must assess, among other things, the effects of the tower and associated activities upon wilderness and other park resources.

You also may be aware that Mr. Knox Mellon, California State Historic Preservation Officer, has now requested the FCC to determine if the FCC or the NPS consulted with the State under section 106 of the National Historic Preservation Act before making decisions relative to the Mormon Peak tower. Wilderness Watch would also like to ask you if the NPS conducted any section 106 review or consulted with affected Indian Tribes prior to making the decisions to approve the tower expansion, to (possibly?) issue a new right-of-way and to approve the landing of helicopters at the site within wilderness.



We look forward to any clarifications you can provide us on the two issues of wilderness legal descriptions and the Mormon Peak microwave tower and right-of-way.

Sincerely

A handwritten signature in black ink that reads "TinaMarie Ekker". The signature is written in a cursive style with a large, sweeping flourish at the beginning.

TinaMarie Ekker
Policy Director

Richard Ring, Associate Director, NPS
Don Hellman, Chief Office of Legislative Affairs, NPS
Jake Hoogland, Chief Environmental Compliance, NPS
Knox Mellon, California State Historic Preservation Officer
Tom Mulhern, Chief, Park Historic Preservation, NPS
Wes Henry, NPS Wilderness Coordinator

National Jurisdictions

The Honorable Pauline Estes, Chairperson
Timbisha Shoshone Tribal Council
P.O. Box 206
Death Valley, CA 92328

Federal jurisdictions

Ms. Magalie Roman Salas, Secretary
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Death Valley, CA 92328

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State jurisdictions

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