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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Public Employees for Environmental Responsibility	)	RM-9913
	)	
Request for Amendment of the Commission's Environmental Rules Regarding NEPA and NHPA	)	

ORDER

Adopted: October 29, 2001 **Released:** December 5, 2001

By the Commission: Commissioner Copps issuing a statement.

I. INTRODUCTION

1. This order responds to a petition for rulemaking filed by Public Employees for Environmental Responsibility (PEER).[1] PEER asks the Commission to amend its environmental rules as applied to submarine cables, fiber optic lines, and radio spectrum requiring use of communications towers. PEER also urges the Commission to conduct a "joint-rulemaking" with other federal agencies, as well as to conduct a rulemaking to determine whether it should establish an "Office of Environmental Compliance." For the reasons set forth below, we deny PEER's petition.

II. BACKGROUND

2. Under the National Environmental Policy Act (NEPA),[2] federal agencies, including the Commission, are required to establish procedures to identify and account for the environmental impact of projects they undertake or authorize.[3] NEPA created the Council on Environmental Quality (CEQ) to oversee the environmental programs and activities of the federal government in order to determine the extent to which these programs are contributing to the national achievement of U.S. environmental

[1] In Re the Telecommunications Industry's Environmental Civil Violations in U.S. Territorial Water (South Florida and the Virgin Islands), and in the Coastal Wetlands of Maine: 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, Petition for Rulemaking, RM-9913 (filed May 17, 2000) (Petition for Rulemaking). PEER is a non-profit organization incorporated under the laws of the District of Columbia whose members include current and former federal and state employees of land and ecosystem management, wildlife protection, and pollution control agencies with an interest in protecting the nation's environmental concerns. *Id.* at 1; Reply of Public Employees for Environmental Responsibility (PEER), RM-9913 (filed Sept. 5, 2000) (Reply Comments), at 3.

[2] 42 U.S.C. §§ 4321-4335, or, the National Environmental Policy Act of 1969, as amended. NEPA is the basic national charter for protection of the environment. It was enacted to require federal agencies to consider environmental factors in making agency decisions.

[3] "All agencies of the Federal Government shall...identify and develop methods and procedures, in consultation with the Council on Environmental Quality..., which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations...." 42 U.S.C. § 4332(2)(B).

policy.[4] CEQ published rules,[5] "tell[ing] federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA]."[6] The CEQ rules "provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969...except where compliance would be inconsistent with other statutory requirements."[7] Thus, each federal agency issues its own rules implementing NEPA, following the requirements in the CEQ regulations.[8] CEQ's rules establish a three-tiered approach to NEPA implementation.[9] First, CEQ regulations require federal agencies to prepare an environmental impact statement (EIS)[10] for any major federal action significantly affecting the quality of the human environment.[11] Second, CEQ regulations require the preparation of an environmental assessment (EA)[12] for any major federal action that may significantly affect the environment.[13] Federal agencies may permit applicants to prepare environmental assessments.[14] Third, CEQ regulations require federal agencies to

[4] 42 U.S.C. § 4344(3) ("It shall be the duty and function of the Council to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto").

[5] 40 C.F.R. §§ 1500.1-1517.7.

[6] 40 C.F.R. § 1500.1(a).

[7] 40 C.F.R. § 1500.3.

[8] 40 C.F.R. § 1507.1 ("All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws").

[9] *See* 40 C.F.R. § 1507.3.

[10] Under NEPA and CEQ's implementing regulations, an environmental impact statement is a detailed statement by the responsible federal official on: (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 the environment and maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources involved in the proposed action if implemented. 42 U.S.C. § 4332, 40 C.F.R. § 1508.11.

[11] 40 C.F.R. § 1507.3(b)(2)(i) (agency procedures shall identify those typical classes of action that normally require environmental impact statements). CEQ's implementing regulations define "major federal action" as an action that may have significant effects and is potentially subject to federal control and responsibility. 40 C.F.R. § 1508.18. In determining whether there is a major federal action, the significance of an action must be analyzed in several contexts such as society as a whole, the affected region, and the locality, 40 C.F.R. § 1508.27(a), and for the severity of impact, 40 C.F.R. § 1508.27(b).

[12] Pursuant to CEQ regulations, an environmental assessment is a document that discusses the need for a proposed action, alternatives, and environmental impacts of the proposed action and alternatives, lists the agencies and persons consulted, and serves to provide evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. 40 C.F.R. § 1508.9.

[13] 40 C.F.R. § 1507.3(b)(2)(iii) (agency procedures shall identify those typical classes of action that normally require environmental assessments but not necessarily environmental impact statements).

[14] 40 C.F.R. § 1506.5(b).

identify typical categories of actions – "categorical exclusions" – that normally do not require either an EA or EIS because these categories of activities individually and cumulatively have no significant effect on the human environment.[15] An agency's procedures must provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.[16]

3. The Commission's environmental rules implementing NEPA are set out at 47 C.F.R. §§ 1.1301-1.1319. The Commission's rules are consistent with CEQ's three-tiered approach: (1) any Commission action deemed to have a significant effect upon the quality of the human environment requires the preparation of an EIS;[17] (2) an action deemed potentially to have a significant environmental effect requires the preparation of an EA;[18] and (3) actions deemed individually and cumulatively to have no significant effect on the quality of the human environment are categorically excluded from environmental processing,[19] but in extraordinary cases may require the preparation of an EA.[20] The Commission has identified, in section 1.1307(a) and (b) of its rules, those types of communications facilities that it authorizes that may significantly affect the environment.[21] Specifically, the Commission requires applicants for Commission action with respect to these types of facilities to prepare an EA prior to licensing, registration or construction.[22] Consistent with CEQ regulations, the Commission directs its

[15] 40 C.F.R. § 1507.3(b)(2)(ii) (agency procedures shall identify those typical classes of action that normally do not require either an environmental impact statement or an environmental assessment, *i.e.*, categorical exclusions). *See also* 40 C.F.R. § 1508.4 (definition of "categorical exclusion"); 40 C.F.R. §§ 1500.4(p) and 1500.5(k) (federal agencies shall reduce excessive paperwork and delay by using categorical exclusions to define categories of actions that do not individually or cumulatively have a significant effect on the human environment).

[16] 40 C.F.R. § 1508.4.

[17] 47 C.F.R. § 1.1305. The Commission has reviewed representative actions and has found no common problems that would enable it to specify actions that automatically will require EISs. *Id.*

[18] 47 C.F.R. § 1.1307(a)-(b).

[19] 47 C.F.R. § 1.1306.

[20] 47 C.F.R. § 1.1307(c)-(d).

[21] Section 1.1307(a) provides that Commission action with respect to the following types of facilities may significantly affect the environment: (1) facilities that are to be located in an officially designated wilderness area; (2) facilities that are to be located in an officially designated wildlife preserve; (3) facilities that may affect listed threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior; (4) facilities that may affect districts, sites, buildings, structures or objects that are listed, or are eligible for listing, in the national Register of Historic Places; (5) facilities that may affect Indian religious sites; (6) facilities to be located in a flood plain; (7) facilities whose construction will involve significant change in surface features, such as wetland fill, deforestation or water diversion; and (8) antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by applicable zoning law. In addition, section 1.1307(b) provides that Commission actions granting construction permits, licenses to transmit including renewals of licenses to transmit, equipment authorization or modification in existing facilities require the preparation of an EA if the facility, operation or transmitter would cause human exposure to levels of radio frequency radiation in excess of the limits in 47 C.F.R. §§ 1.1310 and 2.1093. 47 C.F.R. §§ 1.1307(a)-(b), 1.1310, 2.1093.

[22] 47 C.F.R. §§ 1.1307(a)-(b), 1.1308, 1.1311.

license and registration applicants to submit their own environmental information to the agency and to prepare and submit EAs for the Commission's independent evaluation.[23] In addition, these types of facilities may be subject to further environmental processing under the Commission's EIS procedures.[24]

4. In its petition, PEER asks the Commission to rewrite its environmental rules implementing NEPA to treat certain Commission actions as potentially damaging to the environment. Specifically, PEER proposes that the Commission require applicants for all Commission actions concerning submarine cables, fiber optic lines, and spectrum requiring use of communications towers to file an EA for "public utility" facility elements or an EIS for "private utility" facility elements.[25] PEER also requests that the Commission require the "amendment" of applications, licenses and certificates by section 214 applicants and holders (including those entities with blanket authorizations),[26] spectrum applicants and licensees, and submarine cable applicants and licensees to "ensure they comply" with NEPA and the National Historic Preservation Act (NHPA).[27]

5. Second, PEER argues that the Commission's rules, which allow applicants and others to certify whether or not proposed activities (*e.g.*, the laying of domestic fiber optic line or the construction of a communications tower) may significantly affect the environment, result in industry self-regulation, and that this process does not ensure compliance with NEPA and NHPA.[28] According to PEER, only an EA or EIS contains sufficient scientific evidence to support conclusions regarding whether the environment will be endangered,[29] and in the absence of such documents "all FCC licenses may be invalid and without effect."[30]

6. Third, PEER argues that the Commission's environmental rules are obsolete because of the "explosive growth" in wireline and wireless infrastructure since enactment of the Telecommunications Act of 1996, and that this changed circumstance requires the Commission to take a new look at

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[23] *See* 47 C.F.R. §§ 1.1308(a) and 1.1311(a); 40 C.F.R. § 1506.5(b).

[24] 47 C.F.R. §§ 1.1308(c), 1.1314-1.1319.

[25] *See* Petition for Rulemaking at 6. PEER proposes that the Commission adopt the following definitions: a "private utility" would be any facility element of a networked system required to store, supply or generate the commodity moved over the network or used to transmit such commodities over long distances, whereas a "public utility" would be any facility that is essential to the distribution of the commodity to the individual customer – the "last mile." Petition for Rulemaking at 7.

[26] Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, involves new lines and the extension of lines for carriage of domestic interstate and international services. The applicable Commission rules for section 214 services, including the rules for blanket authorization of domestic interstate services, are set out in 47 C.F.R. Part 63. *See also* section 402(b)(2) of the Telecommunications Act of 1996, 47 C.F.R. § 214 nt.

[27] Petition for Rulemaking at 6. NHPA requires a federal agency to take into account, when licensing any "undertaking," the effect of the undertaking on any district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places. 16 U.S.C. § 470f.

[28] Petition for Rulemaking at 4-6.

[29] *Id.* at 5.

[30] *Id.*, Summary at 3.

cumulative impacts.[31] PEER contends that the environmental impact of individual actions such as spectrum auctions, tower registrations, section 214 authorizations and submarine cable landing licenses may be minor but when aggregated across the nation constitutes a cumulative environmental effect that "places them outside the protection of NEPA categorical exclusions."[32] PEER further requests that the Commission prepare a comprehensive EIS addressing the cumulative visual, aesthetic and environmental impacts of telecommunications networks on sensitive ecosystems like the Appalachian Trail and the nearshore coral reefs of the Caribbean, and in addition engage in site-specific EISs regarding the localized environmental effect of each individual tower and each nearshore coral reef breaching.[33]

7. Fourth, PEER contends that the Commission's categorical exclusion regime, whereby the Commission excludes from environmental processing facilities other than those that fall within categories enumerated in section 1.1307 of its rules, constitutes "de facto" non-compliance with NEPA.[34] PEER argues that this approach allows the Commission to circumvent the definition of 'major federal action.'[35]

8. Fifth, PEER states that actions not requiring pre-construction authorization should be treated, for environmental review purposes, the same as those actions requiring pre-construction authorization.[36]

9. Finally, PEER urges the Commission to conduct a "joint-rulemaking" with the Environmental Protection Agency (EPA) and the Advisory Council on Historic Preservation (ACHP)[37] to "ascertain whether the Commission's environmental rules are being lawfully applied" and to conduct an immediate, expedited rulemaking to determine whether the Commission needs an "Office of Environmental Compliance" to ensure the Commission undertakes systematic environmental review of its actions.[38]

10. All of the wireless, wireline and submarine cable system operators that filed on the record in this matter oppose PEER's petition and request that the Commission deny it. They argue that the

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[31] Comments of Public Employees for Environmental Responsibility (PEER), RM 9913 (filed Aug. 14, 2000) (Comments), at 19; Reply Comments at 10. *See also* Letter from Alexander Stone, Director, ReefKeeper International, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Sept. 1, 2000) (ReefKeeper Letter), at 1 ("as permit requests proliferate, the need to develop rules for adequate characterization and review of environmental impacts, including cumulative impacts, is acute").

[32] Reply Comments at 15.

[33] Reply Comments at 22.

[34] Reply Comments at 15-16.

[35] *Id.*

[36] Comments at ii.

[37] The ACHP is an independent federal agency, created by the NHPA, to advise federal agencies and other entities about historic preservation issues. *See* 16 U.S.C. §§ 470i, 470j.

[38] Petition for Rulemaking, Summary at 2.

Commission's existing rules and procedures already ensure compliance with NEPA and NHPA.[39] These parties also assert that PEER offers virtually no evidence or support for its proposals.[40] Various individuals and environmental organizations, including ReefKeeper International and the Center for Marine Conservation (CMC), support the petition for rulemaking.[41] ReefKeeper is concerned that the cumulative impact of submarine cables may not be insignificant, and CMC supports analysis of cumulative impacts and mitigation measures to reduce such impacts.[42]

III. DISCUSSION

11. We reject PEER's proposal that the Commission require applicants for all Commission actions involving submarine cables, fiber optic lines, and radio spectrum requiring use of communications towers to file EAs (for "public utility" facility elements) or to file EISs (for "public utility" facility elements). First, such action would run counter to NEPA and CEQ implementing regulations. As explained above, the statutory scheme that Congress established in NEPA, and that the CEQ implements, does not mandate EAs or EISs for all federal agency actions, but rather only for those major federal actions that may or will significantly affect the environment.[43] As described above, CEQ regulations provide for a three-tiered approach to environmental analysis, which is intended to identify those activities and programs that may or will significantly affect the environment. The Commission has adopted this approach for environmental processing of applications for Commission authorizations and other actions by: (1) requiring Commission-prepared EISs for actions that will have a significant impact upon the environment; (2) requiring the preparation and submission of EAs for actions that may have a significant environmental effect; and (3) excluding certain actions categorically from environmental processing. As part of this mandated regime, the Commission has identified, in section 1.1307 of its rules, nine types of actions that may have a significant environmental effect and evaluates through an EA all actions that involve facilities that fit within one or more of these categories.[44] In addition, these types

[39] Comments of Tycom Networks (US) Inc., RM-9913 (filed Aug. 15, 2000) (Tycom Comments), at 1, 3, 7; Opposition of Global Crossing Ltd., RM-9913 (filed Aug. 14, 2000), at 4-8; Opposition of Verizon Wireless, RM-9913 (filed Aug. 14, 2000) (Verizon Opposition), at 1, 6-7; and WorldCom Inc. Comments, RM-9913 (filed Aug. 14, 2000) (WorldCom Comments), at 3.

[40] Verizon Opposition at 3; Response of AT&T Corp., RM-9913 (filed Aug. 14, 2000) (AT&T Response), at 4.

[41] Those filing letters, comments or reply comments in favor of PEER's petition are: Center for Marine Conservation; PEER; ReefKeeper International; The Reef Ball Foundation; Dr. Rob Wilder; and Robin K. Craig.

[42] ReefKeeper Letter at 2 ("even if the damage caused by one or two cables is somehow considered 'insignificant,' the cumulative impact of many fiber optic cables installed in the southeast Florida area may not be 'insignificant'"); Letter from Kaitilin Gaffney, Center for Marine Conservation, to the Federal Communications Commission, RM-9913 (filed Aug. 25, 2000).

[43] 40 C.F.R. §§ 1501.4(a)-(b) (a federal agency shall determine whether a proposal normally requires an environmental impact statement or normally is categorically excluded and, if neither is applicable, the agency shall prepare an environmental assessment); 1507.3(b)(2)(i) (agency shall identify typical classes of action requiring environmental impact statements); 1507.3(b)(2)(ii) (agency shall identify typical classes of action not requiring either an environmental impact statement or an environmental assessment); 1507.3(b)(2)(iii) (agency shall identify typical classes of action requiring environmental assessments but not necessarily environmental impact statements).

[44] 47 C.F.R. §§ 1.1307(a)-(b), 1.1308, 1.1311.

of actions may be subject to further environmental processing under the Commission's EIS procedures.[45] Adopting PEER's proposal would contravene CEQ's regulatory approach.

12. PEER also offers no rationale for treating all actions as actually or potentially damaging to the environment. We do not believe that the evidence of environmental harm proffered by PEER reflects any environmental processing failings by the Commission.[46] Indeed, even if PEER were to show such failings in the Commission's environmental processing, a few examples in no way justify the complete overhaul of the Commission's long-standing environmental rules across all service areas.[47] In addition, PEER's more specific proposal to require the filing of EAs for "public" facility elements and EISs for "private" facility elements may similarly run afoul of CEQ regulations, which require federal agencies to consider the actual or potential environmental effects of an activity, not to require EAs or EISs based on the "private" or "public" nature of the facility. Here too, PEER fails to provide a rationale for distinguishing between public and private facilities as the basis for determining whether the facilities in question may or will have a significant environmental impact. Further, as some commenters note, PEER's proposal to require applicants to file an EA or an EIS, regardless of the likelihood of environmental harm, would impose unnecessary and substantial delays in preparation and processing of applications, as well as significant financial and administrative burdens on both applicants and the Commission.[48]

13. Moreover, there is no sound environmental policy reason to adopt PEER's overly broad and inclusive regulations. The Commission has ample means available to address, as necessary, actions that

[45] 47 C.F.R. §§ 1.1308(c), 1.1314-1.1319.

[46] PEER points to two communications projects constructed in 1996 – one in the U.S.Virgin Islands and one in the State of Maine – to support its contention that "damage has already been incurred due to the Commission's actions...." Petition for Rulemaking at Summary at 3. These projects apparently violated state permits, law or regulation and were subject, or potentially subject, to state enforcement action. *See* Exhibit 2, "Notice of Violation, Order for Remedial Action, Notice of Assessment of Civil Penalty, and Notice of Opportunity for Hearing" issued by the U.S.V.I. Department of Planning and Natural Resources regarding a 1996 bentonite mud spill on the north shore of the U.S.V.I. caused during fiber optic cable drilling; *see also* Exhibit 3, "Administrative Consent Agreement and Enforcement Order" issued by State of Maine Department of Environmental Protection in wake of the construction of a fiber optic line. With respect to these examples, we agree with commenters that the incidents do not demonstrate insufficient processing or review at the application stages, but rather show failure to comply with state regulatory requirements that more appropriately is addressed through state enforcement mechanisms. *See, e.g.,* AT&T Response, at 7; WorldCom Comments at 3. PEER makes similar claims about the possibility of environmental harm from future communications projects in Florida. PEER Petition for Rulemaking at 3-4, Summary at 3. *See also* Exhibit 4 (letters from ReefKeeper International to the Florida Department of Environmental Protection urging development of a policy to address cable landings regionally rather than on a site-by-site basis); Comments, Exhibits A and B (literature on possible effects of dredge and fill projects on coastal habitat and fisheries production); Reply Comments, Exhibits I-IV (newspaper clipping on street cuts due to utility work, and documents associated with U.S.V.I. proceeding alleging illegal construction of a breakwater by a communications company). PEER fails, however, to provide evidence that the referenced activities occurred, or will occur, because of a failing in the Commission's environmental processing.

[47] As one commenter states, "[g]iven all of the applications filed and processed by the Commission each year, the fact that PEER could only cite to three ... examples of alleged environmental harm constitutes evidence that the Commission's rules are in fact working .... " Verizon Opposition at 4.

[48] *See, e.g.,* Verizon Opposition at 5.

are normally categorically excluded from environmental processing but which it or others may deem appropriate to question due to unusual circumstances. For instance, the Commission can act on its own motion to require an applicant to submit an environmental assessment where it determines that a particular action may cause environmental harm.[49] Further, interested persons can allege that a particular action, otherwise categorically excluded, will have a significant environmental effect. In such case, a party may submit a written petition setting forth in detail the reasons justifying environmental consideration in the decision-making process regarding a specific application and the Commission can require an EA prior to disposition of the application.[50] Additionally, in situations where the rules require an EA and the applicant certifies one is not necessary, enforcement action can be taken. For example, to the extent information comes to the Commission's attention after grant of an application suggesting the applicant intentionally incorrectly certified there would be no significant environmental effect, the Commission could impose a forfeiture for violation of section 1.17 of the rules,[51] or potentially revoke the license for misrepresentation. Similarly, if there is evidence of substantial environmental effect that would have caused the Commission not to grant the license had it known all the relevant facts, it potentially could revoke the license.[52]

14. As to the NHPA, section 106 of the NHPA and the implementing rules of the ACHP require federal agencies to consider the effects of their "federal undertakings" on properties included or eligible for inclusion in the National Register of Historic Places.[53] NHPA and ACHP require a consultation process with the appropriate State Historic Preservation Officer.[54] Commission actions with respect to facilities that may affect districts, sites, buildings, structures or objects that are listed or eligible for listing in the National Register of Historic Places are among the types of actions that may significantly affect the environment and thus require the preparation of an EA by the applicant.[55] Moreover, the Commission's rules contemplate consultation with appropriate State Historic Preservation Officers[56] and incorporate NHPA requirements.[57] Finally, PEER's proposal is at odds with the NHPA, which does not

[49] 47 C.F.R. § 1.1307(d).

[50] 47 C.F.R. § 1.1307(c).

[51] *See, e.g.*, 47 C.F.R. § 1.17 (prohibiting intentional misrepresentation); U.S.C. 47 § 503(b).

[52] *See, e.g.*, 47 U.S.C. § 312(a)(1), (a)(2). *See also* Verizon Opposition at 7; Comments of SBC Communications Inc., RM-9913 (filed Aug. 14, 2000), at 3.

[53] 16 U.S.C. § 470f, 36 C.F.R. §§ 800.3(a), 800.8(b) (agencies must determine whether a federal action is an "undertaking" and whether it is the type of activity that has the potential to cause effects on historic properties).

[54] *See, e.g.*, 36 C.F.R. § 800.2(c)(1).

[55] 47 C.F.R. § 1.1307(a)(4).

[56] 47 C.F.R. § 1.1307(a)(4) and Note; *see also* Letter from John M. Fowler, Executive Director, Advisory Council on Historic Preservation, to Federal Communications Commission, State Historic Preservation Officers, and Tribal Historic Preservation Officers (Sept. 21, 2000) (ACHP Letter), available at http: //www.fcc.gov/wtb/siting/nepa106.pdf (applicants, licensees, tower construction companies, and their authorized representatives may consult with SHPOs and THPOs to initiate section 106 review process, identify and evaluate historic properties, and assess effects).

[57] Indeed, pursuant to ACHP regulations, the Commission staff recently entered into a Programmatic Agreement with ACHP concerning the collocation of wireless antennas that is designed to accommodate the requirements of (continued....)

distinguish between the "private" and "public" nature of a facility that is a federal undertaking, but rather stresses the assessment of adverse effects.

15. For these reasons, we decline to adopt PEER's proposal to require applicants for all Commission actions with respect to submarine cables, fiber optic lines, and radio spectrum requiring use of communications towers to file an EA for "public" facility elements and an EIS for "private" facility elements. For the same reasons, we also decline to adopt PEER's proposal to require amendment of all existing applications, licenses and certificates.

16. We also do not agree with PEER's contention that applicant-prepared submissions and certifications regarding the environmental impact of applications or endeavors do not ensure compliance with NEPA and NHPA. CEQ regulations and NHPA rules allow federal agencies to permit applicants to prepare EAs and related documentation.[58] The Commission's rules require applicants to indicate whether a proposed facility may have a significant environmental impact, as defined by section 1.1307, and to prepare an EA if such possibility exists.[59] The Commission independently reviews the EA as well as any additional information it may request from the applicant or other sources, and renders a determination whether to terminate or proceed with further environmental processing.[60] As several commenters note, the Commission's approach is consistent with that of CEQ, an approach that has been upheld by the courts.[61] Moreover, the Commission's regulations regarding the information to be set forth specifically require that the information be factual and sufficiently detailed.[62] Applicants must respond truthfully[63] and must update submissions with any new material information.[64] And as noted above, enforcement action may be taken in appropriate cases.[65] For these reasons, the Commission's reliance on an overall approach regarding applicant statements as to whether or not Commission grant of an application may have a significant environmental effect, as defined by section 1.1307, is consistent with NEPA and

(Continued from previous page)

the NHPA and the Communications Act. *See Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement With Respect to Collocating Wireless Antennas on Existing Structures*, Public Notice, DA 01-691 (WTB, rel. Mar. 16, 2001).

[58] 40 C.F.R. § 1506.5, 36 C.F.R. § 800.2(a)(3); *see also* ACHP Letter.

[59] 47 C.F.R. §§ 1.1307(a)-(b), 1.1308(a), 1.1311(a). *See also, e.g.*, 47 C.F.R. § 1.923(e) (each applicant in the wireless telecommunications service is required to indicate at the time its application is filed whether or not Commission grant of the application may have a significant environmental effect, as defined in section 1.1307 of the rules, and, for affirmative answers, is required to file with the Commission an environmental assessment that the Commission must review before the applicant can construct).

[60] *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*. Report and Order, 60 Rad. Reg (P&F) 13 (1986) (1986 Order), para. 5; *see also* 47 C.F.R. § 1.1308.

[61] AT&T Response at 3; Tycom Comments at 9 (citing *Friends of the Earth v. Hintz*, 800 F.2d. 822, 834-35 (9th Cir. 1986); 40 C.F.R. § 1506.5(b).

[62] 47 C.F.R. § 1.1311(b).

[63] 47 C.F.R. § 1.17.

[64] 47 C.F.R. § 1.65.

[65] *See* para. 13, *supra*. In addition to the examples mentioned there, a monetary forfeiture also could be imposed if an applicant had failed to update its application as required.

NHPA.[66]

17. We also cannot concur with PEER's claims that spectrum auctions, tower registrations, section 214 authorizations, and submarine cable landing licenses have created harmful cumulative environmental impacts that warrant elimination of the Commission's categorical exclusions.[67] First, while PEER makes general assertions that these actions will have a cumulative impact on environmental resources as a result of build-out and proliferation of facilities along the "entire information superhighway," it fails to describe this cumulative impact or provide concrete evidence of this cumulative effect. Second, the Commission's categorical exclusions comport with NEPA rules, which require federal agencies to use categorical exclusions, where appropriate, to reduce excessive paperwork and delay.[68] CEQ's implementing regulations specifically direct the Commission and other federal agencies to categorize activities to eliminate the need for environmental processing of actions that are not likely to have a significant environmental impact either individually or cumulatively. In the absence of specific claims and factual support, and given CEQ's mandate for categorical exclusions, we find PEER's argument that an aggregated nationwide impact of all wireless and wireline facilities, including submarine cables, warrants elimination of the Commission's categorical exclusions unpersuasive.

18. PEER also suggests that the Commission's 1974 decision to categorically exclude submarine cables from environmental processing is dated given subsequent growth in the number of facilities and their potential cumulative impact on the environment following enactment of the Telecommunications Act of 1996.[69] In 1974, the Commission determined that submarine cables, individually and cumulatively, do not have a significant effect on the environment.[70] In a relatively recent order, the Commission revisited, and reaffirmed, this decision.[71] PEER has not presented convincing evidence that the 1974 determination, as reaffirmed in 1999, is no longer valid following enactment of the

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[66] Moreover, as noted, in all cases the Commission reserves the right to require an applicant to submit an EA, either in response to a public petition or on its own motion. 47 C.F.R. § 1.1307(c)-(d).

[67] Reply Comments at 10, Comments at 19. Section 1.1306 of the Commission's rules specifically provides categorical exclusions for: (1) the mounting of antennas on existing buildings and towers (unless the mounting would affect an historic district or exceed radio frequency radiation limits); (2) the installation of aerial or underground wire or cable over existing corridors of permitted use; (3) the construction of new submarine cable systems; and (4) the construction of an antenna tower in an established antenna farm (unless the construction would exceed radio frequency radiation limits). 47 C.F.R. § 1.1306. Section 1.1306(a) generally deems Commission actions not covered by section 1.1307(a) and (b) as individually and cumulatively having no significant effect on the quality of the environment and excludes them from environmental processing under normal circumstances. 47 C.F.R. § 1.1306(a).

[68] *See, e.g.*, 40 C.F.R. §§ 1507.3(b), 1500.4(p), 1500.5(k).

[69] Comments at 18-19, Reply Comments at ii, 10, 24.

[70] *Implementation of the National Environmental Policy Act of 1966,* Report and Order, Docket 19555, 49 FCC 2d 1313 (1974), at para. 17.

[71] *See 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations,* Report and Order, IB Docket No. 98-118, 14 FCC Rcd 4909 (1999) (1999 Order), at para. 69 (amending Note 1 to Section 1.1306 to reflect the categorical exclusion from environmental processing of the construction of new submarine cable systems).

Telecommunications Act of 1996.[72] In the absence of such evidence, we must reject PEER's proposal to eliminate the categorical exclusion for submarine cables. PEER similarly fails to support its contention that the Commission should prepare a comprehensive EIS on cumulative visual, aesthetic and environmental impacts of telecommunications networks on the Appalachian Trail and the nearshore coral reefs of the Caribbean along with site-specific EISs on each local facility. PEER once again avers that such cumulative impacts have occurred, but fails to explain the nature of these effects, much less provide evidence of them. Such general assertions do not warrant the preparation of EISs as PEER has proposed.

19. We also do not accept PEER's argument that the Commission's environmental approach, which requires environmental processing for those types of communications facilities that the Commission's experience demonstrates may have significant environmental impact and exempts other categories of activity,[73] constitutes "de facto" non-compliance with NEPA. As discussed above, under Commission and CEQ rules, an application for a facility of the type categorically excluded because it is unlikely to affect the environment nonetheless is subject to environmental processing if the Commission determines the particular facility may have a significant environmental impact.[74] Additionally, the Commission's categorical exclusions comport with CEQ regulations, which encourage federal agencies to use categorical exclusions.[75] Perhaps most significantly, Congress empowered the CEQ to review an agency's procedures for identifying classes of activities that can be categorically excluded from EA or EIS requirements.[76] The Commission complied with the CEQ rules by consulting with the CEQ during development of the categorical exclusions and by obtaining proper CEQ review.[77]

20. PEER also contends that actions not requiring pre-construction authorization should be treated the same as those actions requiring pre-construction authorization.[78] Contrary to PEER's assertion, the Commission's rules require, in the case of radio facilities for which no Commission authorization is required prior to construction, that the licensee or applicant ascertain whether the proposed facility may have a significant environmental impact or is categorically excluded from environmental processing. If such a facility may have a significant environmental impact, the licensee or

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[72] *See also* "Final Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries," Final Report, National Ocean Service, National Marine Sanctuaries Program, at www.sanctuaries.nos.noaa.gov/news/newsbboard/newsbboard.html (Dec. 2000), stating that "the installation of undersea fiber optic cables is believed to have relatively limited impacts."

[73] 47 C.F.R. §§ 1.1307(a)-(b), 1.1306(a).

[74] 47 C.F.R. § 1.1307(c)-(d); *see also* 40 C.F.R. § 1508.4 (any procedure adopting categorical exclusions shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect).

[75] *See, e.g.*, 40 C.F.R. §§ 1507.3(b), 1500.4(p), 1500.5(k).

[76] *See* 40 C.F.R. § 1507.3(a) ("Each agency shall consult with the Council while developing its procedures .... The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations").

[77] *See 1986 Order, supra* n. **61**. This order, in which the Commission adopted its categorical exclusions, makes it clear that the "new rules have been coordinated with CEQ to assure compliance with their regulations." *Id.* at 14, para. 3.

[78] Comments at ii.

applicant must submit an EA to the Commission and may not initiate construction until the Commission has completed environmental processing.[79] Similar rules apply to wireline facilities not requiring pre-construction authorization.[80] To the extent such construction proceeds improperly, the licensee is subject to potential enforcement action for any unauthorized construction or operation, including, for example, a monetary forfeiture, a cease and desist order, or potentially license revocation. If there may be a significant environmental effect, to come into compliance with the law, the licensee must cease operation at the location and file an EA and undergo environmental processing by the relevant licensing bureau.[81]

21. PEER proposes the creation of an "Office of Environmental Compliance." The Commission's current environmental rules provide for consistent agency-wide application of NEPA. The Commission's compliance with NEPA on an agency-wide basis has been successful under this approach. Nothing in PEER's petition persuades us that such an office is necessary to continue to ensure Commission compliance with NEPA. We will, however, take steps to make it easier to locate information regarding environmental issues on the Commission's web-site. Although the web-site currently has extensive information regarding environmental issues,[82] it would be useful to provide a central location to guide interested parties to information on environmental issues before the Commission. Consequently, we intend to add a link on the Commission's home page that will direct users to the information on environmental issues and staff contacts if they have questions regarding those issues.

22. Finally, PEER asserts that ACHP and EPA must participate in a joint rulemaking with the Commission. PEER argues that ACHP must participate because ACHP is the federal agency with expertise to determine whether an EA under NEPA and a section 106 review under NHPA are identical.[83] However, ACHP recently issued rules, which apply to the Commission, explicitly addressing how to use the NEPA EA process to fulfill NHPA section 106 review requirements.[84] Further, it is the CEQ, not EPA, that Congress has designated to review and appraise federal programs for compliance with NEPA, and the Commission's rules both conform to the CEQ rules and were coordinated with CEQ to assure compliance with its requirements.[85] Thus, even if we were to proceed with a rulemaking in response to PEER's petition, which is not the case here, PEER has not demonstrated a need for a joint rulemaking with other agencies.

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[79] 47 C.F.R. § 1.1312 (environmental processing procedures for facilities that do not require a pre-construction license). These rules apply in the case of both site-specific licenses and geographic or blanket licenses. Thus, a geographic license holder must obtain specific Commission approval of sites within its licensing area that require environmental review.

[80] 47 C.F.R. § 63.01(b) (requiring domestic common carriers constructing new lines to comply with the environmental rules).

[81] *See, e.g.*, 47 C.F.R. § 1.1312(d).

[82] *See e.g.* www.fcc.gov/wtb/siting.

[83] Petition for Rulemaking at 11.

[84] *See generally* 36 C.F.R. § 800.8 (2000).

[85] *See1986 Order* at 14; *See also 1999 Order,* 14 FCC Rcd 4909, at para. 68.

23. In summary, we conclude that PEER's petition does not provide sufficient justification, as required by section 1.407 of the Commission's rules, to warrant the initiation of a rulemaking proceeding.

IV. CONCLUSION

24. Accordingly, for the reasons stated above, PEER's request for rulemaking IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas WTC

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

RE: Public Employees for Environmental Responsibility Request for Amendment of the Commission's Environmental Rules Regarding NEPA and NHPA, RM-9913 (released December 5, 2001)

I agree with today's decision because PEER has not provided us with sufficient record evidence to support the fundamental changes to the Commission's environmental procedures that the Petition seeks. Nonetheless, the PEER Petition and the record developed in this proceeding raise many important questions about the Commission's process of fulfilling our Congressionally mandated environmental responsibilities, and, in addition, about how environmental concerns are accounted for in public interest reviews.

While this proceeding did not provide adequate record evidence for a restructuring of our policies at this time, the Commission should undertake a thorough review of our obligations under the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA), as well as our rules in this area. I support the Chairman's recent initiation of a thorough review of Commission procedures. He is working hard to improve our agency's performance. I respectfully suggest that we specifically include an examination of our performance regarding environmental regulations.

First, we should determine if we devote adequate resources to meeting our environmental responsibilities under NEPA and NHPA. While Commission staff work hard to do the job assigned to the agency, do we have enough staff specifically dedicated to these responsibilities? Do we need staff with more specific environmental expertise? We enjoy the advice of the best communications engineers in the country, but do we need environmental engineers as well? The practices of other federal departments and agencies may provide us with a roadmap. We should study how other government entities, such as the Departments of the Interior, Agriculture, and Energy fulfil similar responsibilities so that we may learn from their experiences.

The Commission should also examine how accessible our proceedings are to non-traditional stakeholders. The communications industry and bar know how to participate in an effective and timely manner in our proceedings. I question whether this is the case for local homeowners or small businesses concerned with the environmental impact of our actions on their communities, or even for the most sophisticated environmental groups where Americans come together to voice their concerns with the government. These people may not even know when we are considering applications that they consider critically important, or what types of information are needed to support their positions. The Commission should determine whether this is the case, and should take actions to make our proceedings more accessible and transparent if our findings support such action.