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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

*In the Matter of*

Petition for Rulemaking of Public Employees  
for Environmental Responsibility

RM No. 9913 /

**OPPOSITION OF  
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION**

The North American Submarine Cable Association ("NASCA") hereby opposes the petition of Public Employees for Environmental Responsibility ("PEER") for reconsideration of the Commission's previous denial of PEER's rulemaking petition.<sup>1</sup> PEER's Recon Petition is repetitive and derivative of previous PEER filings, and raises no new issues of law, policy, or fact. The Commission should therefore summarily deny it.

NASCA is a non-profit association of submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems.<sup>2</sup> NASCA and its

<sup>1</sup> See Public Employees for Environmental Responsibility, Petition for Reconsideration, RM-9913 (filed Jan. 7, 2002) ("Recon Petition"); *Public Employees for Environmental Responsibility, Order*, 16 FCC Rcd. 21,439 (2001) ("PEER Order"), recon. pending; Petition of Public Employees for Environmental Responsibility, RM-9913 (filed May 17, 2000) ("Rulemaking Petition"). The Commission should consider PEER's Recon Petition pursuant to 47 C.F.R. § 1.429.

<sup>2</sup> NASCA's current members include: Alcatel Submarine Networks; BCE Teleglobe; Concert Global Networks USA LLC; FLAG Telecom Holdings Limited; Gemini Submarine Cable System, Inc.; Global Crossing Ltd.; Global Marine Systems; Global Photon Systems, Inc.; Level 3 Communications, LLC; New World Network, USA, Inc.; Southern Cross Cables Limited; Sprint Communications Corp.; 360networks, Inc.; Tyco Networks (US) Inc.; WCI Cable, Inc.; Williams Communications, LLC; and WorldCom, Inc. NASCA was organized

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members have long supported the Commission’s environmental processing rules, which implement the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”) and comport with the regulations of the Council on Environmental Quality (“CEQ”). These rules have worked well to satisfy the legal requirements of NEPA and the NHPA, addressing environmental and historic preservation concerns and consumer demand for reliable and sufficient communications capacity. The overwhelming majority of commenters on PEER’s Rulemaking Petition concurred in this view, and urged the Commission to deny the Rulemaking Petition, which it did in a lengthy and well-considered order. NASCA asks that the Commission now reaffirm its previous denial.

**I. PEER Has Not Presented the Commission with Anything to Reconsider**

PEER’s Recon Petition fails to present the Commission with anything to reconsider, particularly with respect to the Commission’s regulation of submarine cables. PEER apparently seeks to persuade the Commission to change its mind—as well as rewrite its environmental processing rules—by filing an amalgam of its previous legal arguments<sup>3</sup> and factual

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in October 2000, and did not exist at the time PEER filed its original Rulemaking Petition with the Commission.

<sup>3</sup> See Rulemaking Petition, at 6-9, and Recon Petition, at 1, 6-7 (both challenging “tiering” and categorical exclusions of certain actions); Rulemaking Petition, at 4-5, and Recon Petition, at 3, 8, 9-10 (both challenging reliance on applicant submissions and certifications); Rulemaking Petition, at 11-12, and Recon Petition, at 8 (both arguing that the Commission must require submission of environmental assessments (“EAs”), seek prior approval of state historic preservation officers (“SHPOs”), and conduct “Section 106” reviews pursuant to the NHPA).

submissions.<sup>4</sup> But the Commission denied PEER's Rulemaking Petition in a thorough order that considered and rejected all of PEER's arguments and generalized factual allegations.<sup>5</sup>

The Communications Act of 1934, as amended, the Commission's rules, and the Commission's interpretations of those legal requirements allow for reconsideration only of genuinely new facts and arguments.<sup>6</sup> The Commission has long held that where a petition for reconsideration simply rehashes or elaborates on arguments that already have been considered and rejected by the Commission, the petition provides no basis for reconsideration and must be denied.<sup>7</sup> Consistent with these requirements, the Commission should deny PEER's Recon Petition.

As for PEER's administrative law arguments, they are entirely misplaced. PEER confuses the standards of judicial review—to be applied by a court in reviewing agency fact

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<sup>4</sup> See Rulemaking Petition, at 7, Recon Petition, at 2, Reply Comments of Public Employees for Environmental Responsibility, RM-9913, at 2, 20 (filed Sept. 5, 2000) ("Reply Comments") (alleging Commission failure to require an environmental impact station ("EIS") for a project in the U.S. Virgin Islands); Rulemaking Petition, at 2, Recon Petition, at 4 n.6, Reply Comments, at 2, 20 (alleging harm to coral reefs in Florida).

<sup>5</sup> See *PEER Order*, 16 FCC Rcd. at 21,446-47 ¶¶ 11-13 (addressing PEER's challenge to the Commission's use of "tiering"), 21,449-50 ¶¶ 17-19 (addressing PEER's challenge to the Commission's use of categorical exclusions), 21,448 ¶ 16 (addressing PEER's challenge to the Commission's reliance on applicant submissions and certifications), 21,447 ¶ 14 (addressing PEER's argument that the Commission must conduct "Section 106" reviews); 21,449-50 ¶¶ 17-18 (addressing PEER's lack of evidence or explanation of effects for cumulative impacts).

<sup>6</sup> See Section 405(a) of the Communications Act of 1934, as amended, *codified at* 47 U.S.C. § 405(a) (providing that "no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission . . . within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration"); 47 C.F.R. § 1.429(b) (same).

finding and legal conclusions—with the standards imposed by the Communications Act of 1934 regarding rulemaking petitions and by the NEPA and the NHPA.<sup>8</sup> Even under the appropriate standards of judicial review, the Commission’s actions are well-placed to withstand judicial scrutiny.

## **II. PEER Continues to Object to Matters Outside the Commission’s Authority or Control**

In repeating its previous arguments, PEER continues to challenge the very foundations of NEPA and the CEQ’s NEPA regulations—legal requirements wholly outside the authority or control of the Commission. The PEER Recon Petition evidences PEER’s continuing dislike of the approach of Congress and the CEQ to environmental regulation.

*First*, PEER objects to the Commission’s refusal to treat all of its licensing and regulatory activities as having actual or potentially significant environmental effects.<sup>9</sup> But as the Commission itself noted, NEPA and the CEQ’s regulations *require* agencies such as Commission to implement tiering, identifying major actions “significantly affecting the quality of the human environment” (for which agencies must prepare EISs) and major actions that *may* significantly affect the quality of the human environment (for which agencies are permitted to prepare EAs to determine whether EISs are necessary).<sup>10</sup> For activities that individually and cumulatively do not significantly affect the quality of the human environment and for which

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<sup>7</sup> See, e.g., *In the Matter of Wireless Consumers Alliance, Inc., Order on Reconsideration*, 16 FCC Rcd. 5618, 5619 ¶¶ 2, 4 (2001).

<sup>8</sup> See Recon Petition, at 4-6.

<sup>9</sup> See Rulemaking Petition, at 6-9; Recon Petition, at 1, 6-7.

<sup>10</sup> See 42 U.S.C. § 4332 (requiring EISs); 40 C.F.R. § 1508.9 (permitting EAs); 47 C.F.R. § 1.1305 (detailing Commission actions that normally have a significant environmental impact), § 1.1307 (detailing Commission actions that may have a significant environmental impact); *PEER Order*, 16 FCC Rcd. at 21,446-47 ¶¶ 11-13.

environmental analysis would be required only in extraordinary circumstances, the CEQ allows federal agencies to exclude categorically those activities from evaluation under NEPA.<sup>11</sup> If the Commission did otherwise—as PEER has urged—it would violate NEPA and the CEQ’s implementing regulations.

*Second*, PEER objects to what it calls “self-certification” by Commission licensees, whereby the Commission relies on certifications and information furnished by the licensees.<sup>12</sup> But the CEQ’s regulations encourage this approach, ensuring that party with the best information regarding the potential effects of the proposed action supplies that information to the Commission, and requiring it to be done in a manner as unbiased as possible.<sup>13</sup> And the courts have upheld this approach, finding that otherwise requiring an agency to conduct independent fact-finding would place “unreasonable and unsuitable responsibilities” on the agency.<sup>14</sup>

A Commission rulemaking is not the appropriate forum for raising such objections. The Commission has no authority to amend acts of Congress, and must abide by laws that Congress enacts. Moreover, the Commission must abide by the rules of the CEQ.<sup>15</sup> The Commission properly rejected PEER’s arguments that the Commission should act to violate these legal requirements, and it should do so again.

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<sup>11</sup> 40 C.F.R. § 1508.4; 47 C.F.R. § 1.1306 (detailing Commission actions subject to categorical exclusions).

<sup>12</sup> *See* Rulemaking Petition, at 6-7; Recon Petition, at 3, 8, 9-10.

<sup>13</sup> 40 C.F.R. § 1506.5(b) (permitting an agency to rely on an environmental assessment prepared by an applicant, but require the agency itself to prepare the EIS if there is there is a major environmental effect).

<sup>14</sup> *See Friends of the Earth v. Hintz*, 800 F.2d 822, 834-35 (9th Cir. 1986) (finding that an agency’s reliance on information submitted by a private party in a permit proceeding was neither arbitrary and capricious nor in violation of NEPA).

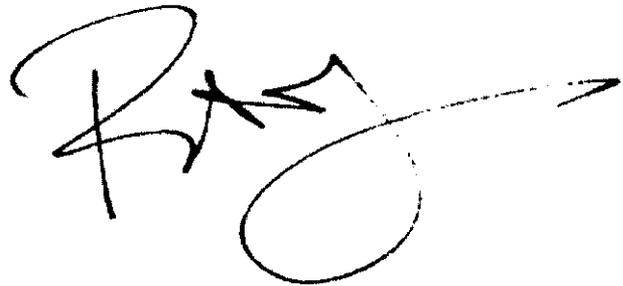
<sup>15</sup> *See, e.g.*, 40 C.F.R. § 1500.1 (stating that the CEQ’s regulations “tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA]”).

**CONCLUSION**

For the reasons stated above, the Commission should summarily deny PEER's Recon  
Petition.

Respectfully submitted,

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21 February 2002

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## CERTIFICATE OF SERVICE

I, Kent D. Bressie, do hereby certify that copies of the foregoing Opposition of the North American Submarine Cable Association have been sent by hand on this 21st day of February, 2002, to the following:

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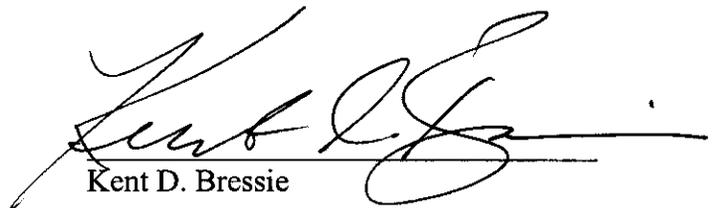
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