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*Wireless Telecommunications Bureau – Commercial Wireless Division  
Glorietta Tower, Pecos, NM*

**Before the  
Federal Communications Commission**

Washington, D.C. 20554

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**In the Matter of SBA Towers, Inc.,  
and the Glorieta Tower  
in Pecos, New Mexico**

**FCC Reference Nos. 2001006155/6537**

**FCC Dkt. No. RM-9913**

**ASRS No. 1210373**

**COMMENTS AND  
CONCURRENT EVIDENTIARY  
FILING IN RM-9913**

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**COMMENTS AND CONCURRENT EVIDENTIARY FILING OF  
PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (“PEER”)**

**Introduction**

Across the country citizens, their local governments, and the public employees serving those local governments have struggled with required tower site review while the Federal Communications Commission (“FCC” or “Federal Communications Commission” or “Commission”) has declined to meet its statutory obligation to do the same with respect to the environmental review required under the National Environmental Policy Act of 1969. Communities in the Northwest, the East, the Middle West, and Southern California are equally situated with the people of Pecos, New Mexico. Local citizens have rallied around their County governments and local federal employees to inquire as to the legality and the environmental impact of the towers such as the one at Pecos, New Mexico, erected by SBA Towers, Inc. (“SBA”) without the conduct of the required Environmental Assessment (“EA”). SBA has violated the law, and SBA should

not go unpunished.

SBA violated the law, but it was the FCC who bears the burden of the infraction. It is the FCC who delegated the responsibility to file the EA prior to tower erection, and it is the FCC which is required to complete the essential government function — the finding of no significant impact (“FONSI”) or the decision to conduct an Environmental Impact Statement (“EIS”) — based on that contractor’s filing. PEER has petitioned the FCC to reconsider its decision to not conduct rulemaking to correct the environmental regulations which permitted the infraction committed at Pecos, N.M., and this filing is proof positive of the need to end the violation of the National Environmental Policy Act of 1969 under the colour of FCC authority.

The SBA Towers, Inc. project known as “Glorieta Tower” was constructed at its current location near Pecos, New Mexico in March, 2000. In violation of federal law, no environmental review was completed prior to erection. The FCC failed to note the violation of law when it approved tower registration.

Prior to the protest by the Forest Conservation Council and Public Employees for Environmental Responsibility (“PEER”) in March and April, 2001, this act of business development benefited from at least two, if not more, major federal actions by the Federal Communications Commission:

- (1) spectrum was auctioned for this trading area, spectrum which can only be exploited through use of the illegal tower;

—and—

- (2) the tower was registered in accordance with Part 17 of the Commission’s rules. See 47 C.F.R. Part 17.

Even though both these actions presented a substantial likelihood of causing significant impact to the human environment, the FCC failed to comply with the NEPA prior to the award of an auction bid or the registration of the tower. The Pecos, New Mexico site is rich in cultural and environmental resources, and should have been one of the 'easy' cases to manage under the Commission's environmental regulations. But because the FCC's regulations vest oversight of compliance in the regulated entity, the review process failed. The Commission has delegated its environmental compliance to private corporations, and, indeed to the very private corporations it is required—by federal law—to regulate. Neither the auction awardees nor the tower registree made a good faith effort to ensure the 'self-certified' Environmental Assessment ("EA") met the standards to which the FCC is held by federal law.

It was only after inquiries were made by other federal Agencies and jurisdictions, notably the U.S. Park Service and the State of New Mexico, that environmental review commenced. If all concerned had to depend on the FCC to meet its statutory obligation, we would still be waiting for compliance.

Bad faith on the part of SBA Towers, Inc., was confirmed by the dissent of the State Historic Preservation Officer ("SHPO") of New Mexico, who failed the illegal tower in August, 2001 — a minimum of seventeen (17) months after the completion of the latest, but not first, major federal action in support of this commercial enterprise. Mr. Elmo Baca, NM SHPO, was not lawfully consulted prior to either major federal action; nor is it clear from the record that any of the Native American Nations or Tribes with an interest in this project have been lawfully consulted on this project. See "Subject: Preservationists Says Most Cell Towers Breaking Rules" from the ncshpo-listserv [Attached as Exhibit A]. Consultations with peer agencies and sovereign nations and tribes are fundamentally different than the Public Notice and Hearing rights extended to the general public. At no point in the record is it clear that the lawful consultations were

made prior to the major federal actions in question. And if the nations and tribes have not signed out a letter declining review or finding no impact, the MOA can not be signed.

In between the environmental protests and the certification failure by the New Mexico SHPO, Mr. Duane Alire — then the Superintendent of the Pecos, National Historic Park — requested FCC review of SBA's compliance with the Commission's environmental rules. Not until former-Superintendent Alire's intervention on May 15, 2001 did the environmental review of the tower begin. This was a minimum of thirteen (13) months after the completion of the last major federal action. Superintendent Alire was forced to do this because of the FCC's mismanagement of its environmental compliance program. Tensions rose around Pecos, New Mexico, and a federal employee — Mr. Alire — was subjected to a humiliating midnight reassignment.<sup>1</sup> The Federal Communications Commission's lackluster performance on this matter cost a federal employee his job, and he was retaliated against because he asked for the environmental laws to be enforced.<sup>2</sup> Former Superintendent Alire is now expected to finish out his federal career in internal exile; he has been effectively ostracized for his actions.

As such, the draft Environmental Assessment submitted by SBA Towers, Inc., on July 26, 2001 came sixteen (16) months after it was required to be submitted by law. It was not produced in any manner responsive to the Commission's rules; it was produced upon protest. The draft review led to the professional bleeding of a federal employee charged with oversight of federal law as it impacts natural resources such as Pecos, N.H.P.

<sup>1</sup> To regional support staff in Sante Fe, Mexico.

<sup>2</sup> In a conversation with the PEER General Counsel on December 20, 2001, Deputy Regional Director Mike Snyder told PEER Mr. Alire was reassigned not for performance reasons, but because of his 'inappropriate' communications with SBA Towers, Inc.

### **INSUFFICIENCY OF THE ENVIRONMENTAL REVIEW**

The Commission now proposes to bind two of the regulators charged with this federal law enforcement matter to a Draft Memorandum of Agreement that effectively denies any violation of law in this matter. Such “regulation by contract” is unlawful unless the environmental review so delegated by the FCC to a private industry actor such as SBA Towers, Inc., meets minimum standards at law. The Draft Memorandum of Agreement is legally insufficient, and its signing by either the New Mexico State Historic Preservation Officer or the Bureau Chief of the Commercial Wireless Division of the Wireless Telecommunications Bureau (FCC) makes a contract predicated on an unlawful act, namely the failure to conduct the environmental review required by NEPA. Such a contract is, by its nature, void.

To cure this failure, the Federal Communications Commission must:

(1) Issue a finding of no significant impact, and attach the list of environmental resources studied in determining that impact level. A rationale, reasoned explanation of why those resources are not significantly impacted must accompany any signed agreement. The failure to list and analyze Native American or Civil War sites subsequently impacted is grounds for judicial challenge.

(2) Extend a consultation offer to federal recognized Native American tribes and nations, and either attach the consultation of the Tribal Preservation Officer (“THPO”) or the a letter from the THPO stating that the tribe is declining consultation. See Draft MOA (January 3, 2002) at 7, ¶ 5 (stipulating consultation without providing evidence of communication with the THPO). See also, Draft MOA (January 1, 2002), Section 1 (“Introduction”) at 1 (where the tribes should either be listed as a party or it should be noted that they have declined consultation).

(3) Conduct a Native American Graves Repatriation Act of 1990 ("NAGRA") analysis to ensure that the FCC's actions do not violate this Act, compliance with which is separate and distinct from the NEPA requirements met through the offer of consultation to the THPO. See Public Law 101-601 (Nov. 16, 1990) and sub. amend. As the Commission has yet to complete rulemaking in support of the NAGRA, any further action on this Applicant's request should be delayed until rulemaking is completed.

(4) Conduct its own 'Alternatives Sites Analysis' in order to remove the effect of SBA Towers' failure to conduct consultations for the FCC. The Applicant's handling of the after-the-fact EA is prima facie evidence of bad faith. As such, the Commission can not rely on the delegated, 'self-certifying' submissions of this applicant. The FCC must do its job the old fashion way: internally. See Draft MOA (January 3, 2002) at 2 (evidence that the contractor relied upon by the FCC exhibited bad faith by issuing a 'no adverse impact' determination without, presumably, consulting with the SHPO who found otherwise two months later). In the analysis of the Alternative Sites that is submitted for the public record, the public must be informed as to what technical standard is being applied, and the result produced when the review is completed under that standard. The Draft MOA offers only conclusory allegations, and does not provide the level of detail necessary to meet the legal standard. Evaluation of Proposed Alternatives to the Glorieta Tower (Nov. 29, 2001) at 3 (restricting universe of alternative sites to only those proposed by non-professional citizen activists, leaving other options unexplored); 9 (alleging coverage gap without stating criteria used to define what constitutes a failure of coverage); 10 (id.); 11-12 (alleging offer of rent to not be within marketable options without provided empirical evidence thereof); 14 (alleging prohibitive utility expense without providing proof thereof).

(5) As reparations for its actions, SBA Towers, Inc. should be required to increase its gift to the State of New Mexico to \$12,000. Two thousand dollars should be allocated for the public outreach effort suggested in their Draft Memorandum of Agreement; a further \$10,000

should be provided to fund communications tower compliance oversight efforts by the New Mexico SHPO. Another required gift of \$50,000 should be made to the FCC in support of its proposed website dedicated to environmental compliance. In addition, SBA Towers, Inc. should be required to author a concession letter stating that “it understands that federal employees retain the same First Amendment rights of enjoyed by all Americans, and that it is inappropriate for federal officials to retaliate against their employees who, in pursuit of their duties, criticize the actions of corporate law-breakers.”. Compare Draft MOA (January 3, 2002) at 5 (financial contributions).

(6) Paragraph 3, Page 6 should be amended to include the following statement, “The registration of the proposed tower under this paragraph is a major federal action requiring the submission of an EA to the Federal Communications Commission.”. Draft MOA (January 3, 2002) at 6, ¶ 3.

(7) Paragraph 4, Page 7 should be amended to make it clear that each collocation is a separate and distinct federal action requiring the completion of an Environmental Assessment. Draft MOA (January 3, 2002) at 7, ¶ 4.

(8) Paragraph 7, Page 9 must be deleted in its entirety. Given the fact that an EA was not initiated until the passage of nearly thirteen (13) months, this paragraph is inappropriate. The factual record in this case proves bad faith on the part of the carrier; otherwise, the EA would have been completed prior to the FCC taking the federal action.

### CONCLUSION

For all the foregoing reasons, PEER requests the Commission unilaterally amend the Draft Memorandum of Agreement to include the changes advocated in these Comments. If such changes are not made, the Federal Communications Commission must

proceed with an Environmental Impact Statement (“EIS”) on the SBA Towers, Inc. communications tower at Pecos, New Mexico. Furthermore, this filing is submitted in Dkt. No. RM-9913 as proof positive that the Commission environmental rules — based on the fiction of self-certification — are failed attempts to comply with federal environmental law. Accordingly, rulemaking in support of Dkt. No. Rm-9913 should proceed without delay.

Dated: March 1, 2002

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**Exhibit A**

*From the ncshpo-listserv:*

Subject: Preservationist Says Most Cell  
Towers Breaking Rules (2 items)

Tribes ignored, says historic council

Indians.com  
Thursday, November 15, 2001

Tribes throughout the nation are not being consulted on the construction of cell-phone towers, said an analyst of the Advisory Council on Historic Preservation, an independent government group.

Charlene Dwin Vaughn said less than 5,000 of the 100,000 towers now in place underwent review for impact on sacred, archaeological and historic sites. In particular, she said tribes are rarely even contacted.

Vaughn made her remarks at a conference on towers and historic preservation held in New Mexico on Wednesday.

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Preservationist Says Most Cell Towers Breaking Rules

Albuquerque Journal  
Thursday, November 15, 2001

By Wren Propp  
Journal Staff Writer

ALBUQUERQUE -- Fewer than 5,000 of the 100,000 cell-phone towers across the nation were reviewed for their impact on historic properties, said a representative of the federal Advisory Council on Historic Preservation.

State historic preservation offices and Native American tribes rarely get calls or letters asking whether cell tower plans impact archaeological ruins, ancient houses and sacred religious sites, said advisory council program analyst Charlene Dwin Vaughn.

"This is what we hear: 'We hired people to do it. They did it wrong.' Neighbors are surprised and don't know who to talk to," Vaughn said during a one-day conference on towers and historic preservation Wednesday.

Vaughn said she expects the industry to continue to operate as it has in the past, with few requests for environmental or historical property impact reviews, unless the public is drawn more into the licensing loop.

Dan Abeyta, a team leader for the Federal Communications Commission Wireless Bureau, also spoke to 100 people Wednesday during the conference sponsored by Crown Castle USA, which owns and operates cell-phone towers across the country.

Sheldon Moss, Crown Castle national director for government affairs, said during a conference break that he doubts Vaughn's numbers.

Application of the rules have been muddy and unevenly applied, he said.

The industry is faced with providing services to hard-to-reach areas where consumers have no other phone service but wireless.

The industry also must improve services because consumers expect more from cell-phone service since the Sept.

11 terrorist attacks and public safety agencies must work harder to increase access to emergency services via cell phones, Moss said.

Abeyta's bureau is weighed down under a backlog of nearly 350 applications to license cell-phone towers, a backlog that didn't exist two years ago. The agency must question whether the prospective licensees have done all their homework on environmental and historic properties impacted by the towers, he said.

For now, tower builders need a letter from Vaughn's advisory council, a state historic preservation officer or a tribal historic preservation officer clearing a tower location of any cultural property hindrances, Abeyta said.

"You can't build a tower unless you've received a letter from them," Abeyta said.

The future of a tower built near Rowe by SBA Tower Inc., which has drawn fire from residents, is still to be reviewed, Abeyta said.

Nearby residents questioned whether SBA completed proper environmental and historical property reviews before building the 240-foot tower.

The federal Telecommunications Act of 1996 allows the industry to regulate itself -- giving cell-phone tower builders responsibility to report whether reviews have occurred -- but the FCC will step in when complaints arise, Abeyta said.

An e-mail, a letter or phone call to his bureau from any individual questioning whether a tower builder has completed all the paperwork will draw bureau scrutiny, he said.

Meanwhile, the FCC bureau is likely to be flooded with applications from public safety agencies facing new telecommunications demands in light of terrorist threats, he said.

Yet another wave of towers is expected from the digital television industry -- towers as high as 1,000 to 1,500 feet -- when people demand the new television service, Abeyta said.

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