UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Applications for Permits to Site Interstate Electric Transmission Facilities	**)** **)**	**Docket No. RM22-7-000**

JOINT COMMENTS OF IMPACTED LANDOWNERS

We appreciate the opportunity to make the Commission aware of the concerns of real people who have participated in real transmission permitting cases that affected their homes, businesses, health, and environment. Any process the Commission develops for permitting transmission must work for the citizens, in addition to industry and policy advocates. We have all been involved in state transmission permitting proceedings for the past decade or more and possess a wealth of combined experience regarding how the permitting process can be improved to provide transparency and ensure fairness for impacted landowners.

The idea that improving the interaction between transmission companies and impacted landowners would somehow result in happy landowners and a quicker permitting process is a fairy tale. The only thing that will make happy landowners who do not delay a project with entrenched opposition and appeals is to begin to build new transmission on existing linear rights-of-way, such as highway or rail corridors, or buried under bodies of water. If transmission does not require new rights-of-way across private property, most landowners do not oppose it. Landowners also generally support the rebuilding of existing transmission assets completely within existing rights-of-way. If a transmission project does not need to cut a new greenfield right-of-way across private property, much of the Commission's application material would be unnecessary as there would be no impacts to landowners and minimal impact to the environment

through the use of existing corridors. The Commission should consider ways in which it can shape its transmission permitting rules to encourage the siting of new transmission buried on existing rights-of-way.

I. PRE-FILING PROCESS

The Commission's proposal that a pre-filing process may commence "at any time after the relevant State applications have been filed"[1] in order to "ensure that permit applicants receive as timely a decision as possible from the Commission"[2] focuses on the wrong goal. It creates a culture where applications are rubber stamped and pumped out as fast as possible, perhaps without due consideration of justice for impacted citizens. Where do the interests of citizens who would have their land taken using eminent domain, or the interests of ratepayers who must pay for this process, get consideration equal to that afforded permit applicants?

Eminent domain is a solemn undertaking that should not be contemplated in a speedy or cavalier manner by the government that wields it. Use of eminent domain demands a thorough and patient process that affords impacted citizens due process, inclusive and achievable participation opportunities, an equitable outcome, and the same sympathetic care you would use if you were proposing to take your grandmother's land against her will. It's all fine and good when it is proposed for "someone else," but an entirely different dilemma when it happens to you or someone close to you.

The costs of doubling or tripling our transmission infrastructure are going to be enormous. It is unconscionable to increase those costs to captive ratepayers by creating a permitting process based on speed of approval that allows for an unreasonably duplicative

[1] *Applications for Permits to Site Interstate Electric Transmission Facilities*, 181 FERC ¶ 61,205, December 15, 2022, at P 23.
[2] *Id* at 21.

process that may ultimately be completely unnecessary. If a state approves an applicant's project,[3] all the money and time spent on pre-filing will be completely wasted.

A pre-filing process that commences before states have had an opportunity to consider the project is both unduly expensive and unjust. An applicant's cost of constructing a voluminous application with multiple exhibits and no less than fourteen (14) separate Resource Reports is going to be very expensive, costing millions of dollars. If it turns out that the state approves the application, none of this material will be necessary. We request that the Commission work with industry to determine a realistic cost estimate[4] for the pre-filing process so that the Commission can go into this rulemaking with its eyes wide open about the potentially unnecessary consumer costs it may be adding to a project approved by states.

A project using a Commission-approved transmission formula rate to recover its costs would burden captive ratepayers to pay for all this potentially unnecessary application material. In addition, if the Commission has previously granted incentives to a project before it receives its NIETC designation and becomes eligible for a Commission permit, the Commission would make captive ratepayers responsible for the financial fallout of permitting risks created by the Commission. Before knowing that it would have ultimate permitting authority, the Commission may have determined that a permitting process under state jurisdiction is fraught with "risks and challenges" outside the control of the project owner. Once permitting jurisdiction shifts to the Commission, do those "risks and challenges" change since the Commission is in complete control of its own permitting process? Perhaps the Commission should abandon certain incentives altogether in this brave new world where permitting can never fail. An applicant faced with a state denial would simply run to the Commission to have that overturned. If the

[3] Which is likely for the vast majority of proposed projects, therefore the majority of the expenses incurred during pre-filing will be wasted money.
[4] Applicants should be held to this cost estimate in future rate filings in order to make it as accurate as possible.

Commission denies, the applicant may file an appeal with the President,[5] a baldly political process. However, impacted landowners are not afforded the same right and must pursue their appeal of an approval through the Courts, a process based on law, not politics. Possible denial no longer presents actual risk. In fact, the Commission's new authority to overturn state siting and permitting decisions can and will be used by applicants to coerce approval they may not win on the merits, saying to states, "Approve it or we'll have FERC do it for you!" Transmission permitting risk simply no longer exists.

It is also possible that transmission owners could purposefully stall the state permitting process after filing a state application so they may proceed with federal permitting without giving the state a chance to approve. The Commission must pause or extend its pre-filing process timeline to correspond with any such changes to the state procedural schedule in order to prevent the purposeful sabotage of state permitting.

Finally, since an applicant gets the benefit of a faster permitting process at the Commission, should the applicant accept some risk and be denied recovery of pre-filing permitting costs that later become unnecessary, instead of continuing to place all financial risk on ratepayers?

In addition to the unwarranted cost burden on ratepayers, a simultaneous state/federal permitting process puts a huge resource burden on citizens who are threatened with the loss of property due to a proposed transmission project. While a landowner may have certain legal rights to participate in the decision-making for a project, the reality is that participation in siting and permitting processes may be impossible due to time, distance, and financial constraints. State siting and permitting already requires a tremendous amount of time and money to be expended by a landowner who is involuntarily targeted for new infrastructure through no fault of

[5] 16 U.S. Code § 824p (h)(6)(A)

his own. Landowners must spend their savings hiring counsel to represent their interests and devote every spare moment educating themselves about energy policy and process, and then take the time to participate in those processes. The landowner is already stretched to his limits by the state permitting process. Adding a new, federal process that would unfold during the same time frame and requires the hiring of additional counsel, the learning of an entirely different system, and long-distance travel to participate, is simply too much to ask. It is especially hard on landowners when the state is likely to approve the project anyhow and make the federal participation a complete waste of time and money. Landowners are forced to gamble with their savings on whether or not the project will become eligible for a federal permit. While the Commission notes that landowner participation in the pre-filing process is optional, creating unduly expensive and burdensome barriers to participation ensures that they will not be able to participate, even if they want to do so.

The law requires the Commission to determine "…the permit holder has made good faith efforts to engage with landowners and other stakeholders early[6] in the applicable permitting process…"[7] before "the permit holder may acquire the right-of-way by the exercise of the right of eminent domain."[8] Yet the Commission has erected a barrier to early participation by creating a simultaneous permitting process that may be out of the practical and financial reach of landowners and other stakeholders.

[6] What good is "early" participation anyhow? It doesn't change the impacted landowner's mind or alter the outcome of being forced to live with a dangerous impediment on your property. It simply prolongs the misery. There is simply no proof that "early" engagement with landowners produces better results.
[7] 16 USC 824 (e) (1)
[8] *Id*

The Commission reasoned:

> The purpose of the pre-filing process is to facilitate maximum participation from all stakeholders to provide them with an opportunity to present their views and recommendations with respect to the environmental impacts of the facilities early in the planning stages of the proposed facilities.[9]

But then the Commission inexplicably and illogically came to the conclusion that simultaneous processing of State applications and Commission pre-filing proceedings would serve this purpose. It does not. In fact, simultaneous processing erects unnecessary barriers to landowner and stakeholder participation.

Since the pre-filing process determines when an application is complete, and landowners do not have to participate in the pre-filing, are non-participating landowners afforded the right to question the completeness of the application later, after it is filed? Only states are proposed to be afforded a comment period of 90 days after pre-filing before the application is deemed complete. We request that landowners and other stakeholders also be afforded the same comment period.

Despite the Commission's assertions to the contrary, there is simply nothing in the statute that expressly supports a simultaneous state/federal permitting process. The statute does, however, require benefits for consumers.[10] Paying for the creation of an applicant's application material before it is even determined whether an application is necessary does not benefit consumers. We urge the Commission to re-think its proposal to allow a potentially unneeded pre-filing process to begin before a state, or states, have had an opportunity to permit a transmission project over which the Commission has backstop[11] permitting authority.

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[9] *Applications for Permits to Site Interstate Electric Transmission Facilities*, 181 FERC ¶ 61,205, December 15, 2022, at P 21.

[10] 16 U.S. Code § 824p (b)(1)(4)

[11] Backstop: a person or thing placed at the rear of or behind something as a barrier, support, or reinforcement. Backstop permitting authority logically comes behind, or after, state permitting proceedings.

II. CODE OF CONDUCT

The Commission's proposal to meet the statutory requirements for "good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process"[12] by requiring the use of an Applicant Code of Conduct does not demonstrate good faith.[13] In fact, a transmission owner Code of Conduct is often used as a chimera to obscure bad faith actions.

The transmission Code of Conduct came into being as the result of a Motion for Injunctive Relief of the Pennsylvania Office of the Consumer Advocate[14] in a Pennsylvania Public Utility Commission case involving transmission company Trans-Allegheny Interstate Line Co. (TRAILCo)[15]. TRAILCo's contracted land agents were found to have perpetrated despicable acts on impacted landowners in an effort to coerce them to sign legal agreements. TRAILCo fired its contractor and implemented a written Code of Conduct for land agents that prohibited specific actions. This Code of Conduct was also used for a subsequent project owned by the same utility.[16] While ostensibly reading as a list of prohibitions, it must be recognized that these are the things that some transmission land agents actually **did**. For example, the Code of Conduct prohibits land agents from stating that the project is a "done deal" or "99 percent sure." It directs that when agents are asked to leave property that they promptly leave and do not return. It states that if discussions with the property owner become acrimonious, agents should *politely* discontinue the discussion and withdraw from the situation. It prohibits contacting friends or relatives of the landowner, or suggesting that they support the project. It asks that agents not suggest that landowners should be ashamed of or embarrassed by their opposition to

[12] 16 U.S. Code § 824p (e)(1)
[13] Good faith: honesty or sincerity of intention.
[14] See Attachment A, *Motion for Injunctive Relief of the Pennsylvania Office of the Consumer Advocate*, for detail of the abusive acts perpetrated on landowners.
[15] *Trans-Allegheny Interstate Line Company*, 103 Pa.P.U.C. 554, 2008 WL 5786507 (Pa.P.U.C.) at 79.
[16] See Attachment B, PATH Project Code of Conduct for Right-of-Way Agents and Subcontractor Employees.

the project, or that project opposition is inappropriate. It prohibits making threats to landowners, such as calling police, using eminent domain, or seeking federal authorization to construct the project. It also has a special section dealing with confidentiality of landowner negotiations. These are all acts that transmission land agents have perpetrated while harassing, coercing, manipulating, and intimidating landowners to sign easements using high-pressure tactics. Over the years, the horrific specificity of the original Code of Conduct has been eliminated, piece by piece, as it passes from project to project, until it has reached its watered down final form as presented in this rulemaking.

While the Commission's proposed Applicant Code of Conduct "avoids" (but does not prohibit) coercive tactics, there's no way to bring up required notification of possible eminent domain without having it interpreted as coercive[17] by the landowner. Mentioning eminent domain informs the landowner that if they don't sign, their land may be taken by court order. The Commission may want to rethink its language here. In addition, it is quite common for a landowner to mistakenly interpret "taking" to be the taking of his land without compensation. It is rather intimidating to the landowner to have a land agent show up at their door unannounced and ask them to sign a prepared easement agreement at their home without benefit of counsel. The easement agreement is always written by transmission company lawyers in the transmission company's best interest. It is common for an easement agreement prepared by a transmission company to award more rights to the company than it would be entitled to under the applicable condemnation law. For instance, easement agreements may allow the transmission company to lease the easement to other companies for compatible uses, such as communications, without additional compensation to landowner. The easement agreement often contains a provision that financial and other consideration paid to landowner may not be disclosed. Preventing a

[17] Coercive: relating to or using threats.

landowner from knowing how much his neighbors were compensated protects the company, not the landowner, during future negotiations. Many easement agreements contain a graduated payment schedule, where full payment for the easement does not occur until construction begins. An easement taken by eminent domain must be paid for in full at the time it is taken. Finally, easement agreements may contain a demand for landowners to "cooperate" with the company and drop any and all opposition to the project.[18] The penalty for non-cooperation may be that the landowner forfeits any further compensation for use of his property. Company-prepared easement agreements include many rights the company may not be granted in an eminent domain taking. Landowners without counsel may not realize how many of their rights they are signing away. The landowner may feel intimidated into signing on the spot, especially senior citizens who live alone. Landowners deserve to receive notice of their right to counsel of their choosing. In fact, the transmission owner should pay for the landowner's chosen counsel to review the company-written easement agreement in a good faith negotiation.

Codes of Conduct do not work because transmission company employees bound by them are not making any contact whatsoever with landowners. Landowners are exclusively contacted by contracted land agents with professional training in manipulating landowners to sign agreements without benefit of counsel that often flies in the face of the Code. Even with a Code of Conduct, land agents will do whatever it takes to get that signature on the easement agreement. Since land agents are employees of contractors, any land agent caught violating the

[18] Cooperation. Landowner shall cooperate with **transmission company** (including signing in Landowner's name, if necessary), at no expense to Landowner, in applying for, complying with or obtaining any approvals and consents, environmental reviews, or any other permits, licenses, approvals or consents requested by **transmission company** for the financing, construction, installation, replacement, relocation, maintenance, repair, operation or removal of the Facilities and any other improvements made by **transmission company** and permitted in this Agreement. Landowner shall take no actions that would cause **transmission company** to fail to comply with permits, approvals, or consents of any governmental authority having jurisdiction over the Property once issued. To the extent permitted by law, Landowner hereby irrevocably waives enforcement of any applicable setback requirements respecting the location of Facilities.

Code of Conduct will be deemed rogue and removed from the project. Another land agent with the same tactics quickly jumps in. Transmission owners never take responsibility for violations of the Code of Conduct because they can disclaim the actions of a contractor and say that the violator has been fired or moved to another project. There is no punishment for violations, therefore violations are perpetrated as needed.

In addition, there is absolutely no policing of the Code. Regulators take a hands-off approach to violations of the Code and may refer complaining landowners to the transmission company or civil court. If a regulator will not take reports from landowners and investigate the incident, then the Code is nothing more than a worthless piece of paper. Asking a transmission owner to police their own Code of Conduct has never worked to protect landowners. It is nothing more than allowing the fox to guard the hen house. Landowners who have attempted to report violations to transmission companies have been brushed off, given the run-around, and ignored. Landowner reports are treated with great skepticism. After all, no two persons will ever see an altercation between them the same way. It is "he said, she said" and the transmission company is likely to believe the side of the story that benefits them. Transmission companies are hardly impartial investigators of landowner complaints.[19]

If the Commission is going to base its determination that the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process on the existence of a Code of Conduct, then the Commission must act to police violations of the code.

[19] For example, see Missouri Public Service Commission Case No. EC-2020-0408, *Missouri Landowners Alliance and Gary Mareschal, Complainants v. Grain Belt Express Clean Line LLC, and Invenergy Transmission LLC,* available at https://www.efis.psc.mo.gov/mpsc/commoncomponents/viewdocument.asp?DocId=936308141

We suggest the following additions to the Applicant Code of Conduct:

- The landowner must be provided with a copy of the Code of Conduct at first notification.
- Company representatives must carry and present photo I.D. when calling on landowners.
- Company representatives must consent to their communications being recorded or photographed by landowners.
- Landowner must be notified of their right to have counsel of their choice review the easement agreement before signing.
- Landowner must be notified that condemnation and taking requires payment of just compensation determined through a court process.
- The Code shall provide the landowner with a Commission contact to report violations.
- The Commission shall independently investigate complaints.
- Commission-verified violations must be punished to prevent recurrence. We suggest hefty fines that cannot be recovered in rates.

Even with a more protective Code, the Commission cannot rely solely on an applicant's "intent to comply" as evidence of good faith. The road to Hell is paved with good intentions. If monthly self-reports of landowner contacts means an applicant has "substantially complied," at what level do insubstantial violations become substantial ones? Which parts of the Code of Conduct can be violated and still result in a finding of "substantial compliance"? The Commission's intent is not clear. The last thing landowners need is a wolf watching the fox watching the hen house.

III. APPLICATION EXHIBITS AND REPORTS

a. Exhibit H – System Analysis Data

The Commission requires that the application shall include "…a detailed description of how the proposed project will reduce capacity constraints and congestion on the transmission system".[20] It is unclear what entity prepares this detailed report, but we recommend that the data be verified by existing entities with impartial expertise in this area, Regional Transmission Organizations and Independent System Operators (RTOs/ISOs). An applicant can pay an engineering firm to produce a report that says whatever the applicant needs it to say to meet its

[20] *Applications for Permits to Site Interstate Electric Transmission Facilities*, 181 FERC ¶ 61,205, December 15, 2022, at P 40.

goals. It is only when the data is also confirmed by an independent entity that it is valid and trusted by the public. Impacted landowners/ratepayers can often be the most knowledgeable experts in the process of determining transmission need because they devote themselves to research and have a thirst for knowledge about why this is happening to them. Transmission utilities and the engineering firms they use to put together boilerplate applications with testimony from paid experts are indisputably biased by profit motives and are not trusted by impacted landowners/ratepayers. No entity studies the real need for, costs, and benefits of proposed transmission projects like potentially impacted landowners/ratepayers.

The ramifications of reducing economic congestion must be fully understood by the Commission. Reducing congestion presumes that distant load centers should pay no more than nodes located close to generation. Proximity to generation should matter in pricing and it should not have a ceiling. Transmission congestion can never be completely eliminated; it can only be shifted from place to place. Relieving economic congestion attempts to levelize prices between different geographic areas. Like a seesaw, the lowering of prices in one area raises them in others. An area with adequate, competitive generation enjoys the benefits of that competition with lower electric prices, while an area without enough competitive generators pays higher prices. It's simple supply and demand, which is something a competitive market should never attempt to artificially "fix". There is more than one solution for economic congestion. New generation in high priced load pockets can also solve economic congestion. Solving congestion with new transmission before competitive markets can work to incite the building of new generation is a market failure. High electricity prices are a demand for new generation, not just transmission. If the Commission makes it easy and profitable to build transmission before markets can do their job to incite new competitive generation, there will be a perverse incentive

for profit-seeking transmission builders to propose new transmission, even if more efficient and economic solutions for consumers are available.

If for-hire engineering firms, self-interested transmission companies, and even the Commission itself, have the required expertise to make a determination of capacity constraints, congestion relief, consumer benefit, and effects on regional transmission plans, then why do we even have RTOs/ISOs? If their function can be carried out by private companies and the Commission, then we're paying for RTOs that we don't need.

Who has authority to make these kinds of transmission planning determinations? We are under the impression that it is the RTOs/ISOs, but now the Commission is suggesting it can bypass their authority to make capacity and congestion determinations to decide the necessity of proposed transmission projects. The Commission must make a clear determination of who has authority to determine these factors and apply them evenly across the board. There is simply no evidence that transmission applicants and the Commission can make better determinations than the RTOs/ISOs, who have been making these determinations for decades. If we need a national level planning authority, it should ideally be made up of a joint group of regional planning authorities, not composed of self-interested companies and regulators without the deep knowledge and expertise in transmission planning that is found at experienced regional planning organizations.

b. <u>Soils Report</u>

The Commission's regulations should be updated to include a deeper dive into the disturbance of soils on agricultural land from construction and operation of a transmission project. New transmission rights-of-way across agricultural land would have massive and detrimental environmental impacts on small family farms. Farmers would not just lose cropland

to the actual footprint of the tower structures on their family farmland – land that will never be arable again – but the surrounding fields as well. The construction and maintenance of the transmission project would leave cropland in those surrounding fields heavily rutted and displaced. Digging footings for the towers would spread less-desirable soil and rock on cropland and introduce invasive vegetation carried from site to site on construction equipment. Fertile topsoil would be contaminated with deeper, less-fertile soils, which in turn means a reduction in crop yield and net loss for farmers and the customers that rely on the productivity of impacted farmland. The soil health will be ruined, not just on the easement but everywhere the construction equipment crosses on the fields.

Digging footings and altering the land contours in new rights of way have also been known to damage buried agricultural drainage systems that were installed decades ago. Buried drain tile may not be mapped, and even the property owner may not be able to pinpoint its exact location. Damage to buried drainage systems can often go unnoticed for several years during periods of normal weather, only becoming apparent during especially wet periods. Transmission construction that cuts a drainage line and then covers the damage without proper repair may not be noted during construction, but when flooding manifests several years down the road, the transmission company may refuse to take responsibility and pay for the damage. Proper drainage is essential to agricultural soil health.

Farmers go out of their way to care for the land and save it for future generations; generations both within their families and throughout the communities who benefit from their arable land. Crops are rotated to preserve soil nutrients. Land is no-tilled to prevent erosion. Wildlife-friendly habitat is built along field boundaries to protect the crops from wind erosion and also to give back to Mother Nature and ensure a healthy environment. Large swaths of the

wildlife habitat built by the farmers will be clear-cut, thus damaging the natural environment and leading to far more wind and water erosion on cropland. A new transmission right-of-way will not only disrupt the soil health when digging tower footings, but the constant coming and going of the massive work trucks needed to build the towers and pull the lines will lead to irreversible soil compaction. New transmission construction causes soil compaction, especially when the route is through the middle of fields and the developer builds temporary roads across the fields to get to the easement. Efforts to "minimize" soil compaction will not eliminate it. Soil compaction is so negative to farm production that farmers plant a cover crop in the fall to keep the soil from compacting over the winter.

All of these factors can make it even harder for families to make a living off of the reduced arable footprints of their farms.

c. <u>Land Use, Recreation and Aesthetics Report</u>

We believe that the Commission's regulations regarding reporting of impacts to agricultural businesses are woefully inadequate. Since farmland is always the first choice for aerial transmission line routes because it is generally cleared, level, and seen as "undeveloped land" perfect for transmission lines, the attention paid to agricultural businesses in the Commission's required Resource Reports must be increased. The Commission requires a report of the "direct effects" of the proposed transmission line on a number of specific resources, such as sugar maple stands or orchards,[21] but does not include land devoted to row crops or livestock.

New transmission corridors through agricultural businesses seriously and permanently impact production and can remove prime farmland from its highest and best use forever. Transmission corridors may run for miles across large farms. Agriculture is a business, and any reduction in yield or loss of use must be made up through the purchase of additional suitable,

[21] 18 CFR § 380.16 (j)(4)

unburdened land in order for the business to maintain its production levels.

If the agricultural business simply accepts that it will produce less product, at an increased cost, it experiences a permanent loss of income that is not adequately compensated. On the other hand, when many farms in a limited geographic area are affected by the same new transmission corridor it creates a scramble to rent or purchase available land to replace what has been lost to transmission. The laws of supply and demand come into play and replacing lost farmland becomes a competition that drives up the price of suitable land. A landowner is only compensated for the loss of a linear strip of land at pre-transmission rates for farmland, before new competition for available land increases prices. A landowner with a just compensation payment may be unable to purchase or rent replacement land to maintain historic yields. In either situation, the agricultural business suffers permanent economic harm that is not adequately compensated. A just compensation payment can only cover income loss for so long before it is exhausted. The loss of income is permanent and could be a trigger to eventual business collapse.

Modern farms are not only impacted by transmission lines, but also a plethora of pipelines including liquid petroleum, natural gas, anhydrous ammonia, crude oil and highly volatile liquids. Recently CO2 pipelines have also been added as another way for private businesses to seize private business lands from farmers. All these pipelines and transmission lines decrease yield and increase hazards for farmers. Farmers have been injured or killed by either accidentally hooking a pipeline with an implement, or running into transmission lines. These projects often take specific land, such as pasture, which then leaves a limited amount of land for cattle. Projects may even split parcels of land, making it difficult or impossible to move larger herds or farm equipment from one field to the next. Farmers rarely ever receive consideration by fellow farmers in cases such as this, but rather by people who do not farm and

see our land as large and transmission corridors as small. We should not have to make fighting to keep our land a part of our business plan.

Land devoted to agriculture must be identified by acreage and use. Permanent and temporary impacts to agri-tourism, crops, yields, irrigation, drainage, soil quality, livestock, aerial application of seed, fertilizer, and pesticides must be detailed. The report should also provide estimates of financial impacts to the impacted agricultural businesses from the construction and operation of the project over its expected life. Many agricultural businesses affected by transmission are small family farms, passed down from generation to generation. The report should identify any farms participating in state historic farms programs, any agricultural land that is conserved, or contains conservation easements. The report should identify prime, unique, or farmlands of statewide or local importance and explain how the construction of a transmission project on working farmland complies with the Farmland Protection Policy Act (FPPA). The definition of "planned development" must encompass a landowner's planned development of his own property, whether it is installation of irrigation, the construction of outbuildings, or future plans for sale or rental of property after retirement. The farmer does not have an employer-funded retirement account waiting for him and in many instances his wealth is in his land and its possible future uses.

This report should also investigate a transmission line's interference with farm equipment electronics and GPS systems that are essential to modern precision agriculture. Interference has been widely reported by farmers. Today's farmer uses electronic systems throughout the growing season to manage planting, care, and harvest of crops. Different positions of the transmission line within the field may also produce different effects, where a transmission line at the edge of a field may have less effect than one running diagonally through the center.

d. Alternatives

The Commission should require that at least one of the alternatives explores the use of existing road or rail rights-of-way to site buried transmission, or burial underneath linear bodies of water. Use of existing rights-of-way reduces environmental and economic impacts. Burial of transmission reduces reliability and safety hazards.

e. Reliability and Safety

The information about electromagnetic fields must also be measured for different situational exposures. While a person may stand at the edge of a right of way and be exposed to the reported level only occasionally, a farmer working a field crossed by a transmission line will pass directly under the same transmission line numerous times in a single day while plowing, planting, fertilizing, applying pesticides, and harvesting crops during the growing season. This would result in a much larger and longer exposure for the farmer in regards to time exposed to EMF, as well as its strength. This increased hazard must be considered.

This report is concerned with public safety hazards caused by accidents, natural catastrophe or other failure of an overhead transmission line. Recent attacks on our transmission system should expand this section to cover an applicant's efforts to prevent intentional physical acts that destroy electric infrastructure. Who is protecting transmission structures in remote locations? What danger is there for rural residents living in proximity to transmission lines and substations?

This report must also explore the increased reliability and safety of the transmission line when it is completely buried on existing linear rights-of-way, such as rail or road, or installed underneath bodies of water. The current administration is facilitating the use of highway

corridors to site new electric transmission,[22] therefore this policy should play a large part in this evaluation. The report should compare and contrast the known reliability and safety hazards of overhead transmission across private property with the reduced hazards to reliability and safety of transmission buried on existing linear rights-of-way. Existing rights-of-way means that the corridor has already been disturbed, and burial means impacts would be minimal and limited to construction or maintenance. Installation of buried high-voltage direct current at the edge of highway rights-of-way[23] is similar to installation of fiber optic cable along roadways, which has been happening for years without much opposition or delay. Buried electric transmission is protected from weather hazards and physical sabotage and requires little vegetation management. Transmission buried on existing rights-of-way does not require new easements or eminent domain, and it does not inspire community opposition. If there are no new rights-of-way across private property, then there are no new environmental and economic impacts on affected landowners. Buried transmission on existing rights-of-way would also drastically reduce the amount of application material at the Commission because many of the required reports would not be applicable to a buried project. As well, the burial of transmission on existing rights-of-way may only warrant the preparation of an Environmental Assessment, instead of a full-blown Environmental Impact Statement. The cost difference alone between these two environmental studies would save money on the cost of the project. Transmission buried on existing linear rights-of-way is win – win for everyone.

IV. DEFINITIONS

a. Environmental Justice Community

The Commission proposes to define an Environmental Justice Community as "…any

[22] https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/27/fact-sheet-biden-administration-advances-expansion-modernization-of-the-electric-grid/
[23] https://theray.org/technology/transmission/

disadvantaged community that has been historically marginalized and overburdened by pollution, including, but not limited to, minority populations, low-income populations, or indigenous peoples."[24] The word "disadvantaged" means placed in an unfavorable position in relation to someone or something else. Under this definition, rural communities who are expected to host energy infrastructure that serves urban communities are disadvantaged. The rural communities are outnumbered and lacking political clout, although they do own and control the land necessary to carry out the plans of urban energy users. This puts rural communities at a disadvantage in the Commission's permitting process. "Marginalized" means being treated as insignificant or peripheral. Rural communities have increasingly seen their needs and the sanctity of their communities being treated as insignificant by well-heeled developers intent on scoring the biggest government handouts. Urban communities who say they "need" new power produced in rural communities also put their own needs before those of others. An urban community may "need" power produced elsewhere for the simple reason that they can't or won't place the energy infrastructure they need in their own backyard. Rural landowners are quickly becoming overburdened by pollution as more and more linear energy projects take portions of their working properties and homes. What is pollution? It is the introduction into the environment of something that is harmful. Overhead transmission on new rights-of-way is harmful to rural landowners. Therefore, rural landowners along the center line of a proposed overhead transmission project on a new right-of-way are, by definition, Environmental Justice Communities that shall receive special consideration from the Commission.

[24] *Applications for Permits to Site Interstate Electric Transmission Facilities*, 181 FERC ¶ 61,205, December 15, 2022, at P 32.

b. Affected Landowners

Affected Landowners are just that: Landowners directly affected by the proposed transmission project. The degree of impact is certainly greatest on those directly impacted because they are expected to grant a perpetual easement on land they own. However, landowners not directly crossed can also experience impacts based on their proximity to the project. Impacts are varied, from proximity to homes, destruction of timber, impediments to farming or other agricultural businesses, to visual or scenic impacts. Ratepayers are also impacted in different ways. Local governments may also be impacted if construction and operation of the project lowers the tax base or reduces tourism. The impacts of an overhead transmission project on new rights-of-way are numerous, however the impacts are completely different on each individual landowner, ratepayer, or government.

First of all, we recommend changing the word "affected" to "impacted." Each landowner may explain how the project impacts him, whether profoundly, or only superficially. It is the degree of impact, not an arbitrary distance, that creates an impacted landowner. For instance, the visual impacts would be noticeable at a greater distance in flat terrain than in rolling terrain. Impacted Landowners shall be those who are impacted by the project, which can then be ranked by the severity of the impact.

We also suggest impacted ratepayers, governments, or other interests without direct impacts to their land be grouped and defined as "Other Impacted Entities" and considered separately from Impacted Landowners. The Commission's consideration should not be to attempt to balance the interests of Impacted Landowners who stand to lose something with the interests of other Stakeholders who stand to gain from the project. This can never produce an equitable balance, just mob rule.

No community deserves to be impacted so that others can escape impact. Instead of creating new victims, we should be striving to devise new energy plans that don't require any victims, such as burying new transmission on existing highway or rail rights-of-way.

c. Stakeholder

A stakeholder should be defined as a person or entity with an interest in a project, but who will experience no impacts. Stakeholder interests should definitely be ranked at the bottom of the list of considerations. Grouping severely impacted landowners with individuals who have generalized environmental concerns, or project advocates who will profit from the project, and calling them all equal "stakeholders" is unfair and unjust.

V. PROJECT PARTICIPATION PLAN

The Regulations require a Project Participation Plan that must:

> (1) identify specific tools and actions to facilitate stakeholder communications and public information; (2) list locations throughout the project area where the applicant will provide copies of all project filings; and (3) explain how the applicant intends to respond to requests for information from the public and other entities.[25]

Based on our collective experience in participating in transmission permitting, we offer the following suggestions for improvement.

1. Project participation plans must make concessions for landowners who do not have reliable internet access (or even any access at all). Many senior citizens who own land in rural communities do not have reliable internet service, or the knowledge to find information mentioned in a letter from a project applicant. For instance, the Commission's requirement that the applicant notice must refer to the Commission's *Electric Transmission Facilities Permit Process* pamphlet and state "that it is available on the Commission's website"[26] is not sufficient. A search of the Commission's website fails to find this document. A Google search fails to find this document. If we can't find it, the chances of a senior citizen with limited computer skills finding it are slim to none. Where is this pamphlet? Why is it not included in this rulemaking?

[25] 18 CFR § 50.4
[26] *Id* (C)(2)(b)

2. Religious communities such as Amish, Anabaptist, Brethren, Quaker, Mennonite, and others are primarily engaged in agriculture and are therefore inordinately targeted for new transmission rights-of-way. These communities do not own computers, and some do not use electricity. These communities must have all documentation provided in writing via U.S. Mail. The Commission should also consider that due to their religious beliefs, many of these impacted landowners may not become involved in legal proceedings or involve themselves in the permitting process. What does due process for these landowners and stakeholders look like?

3. We suggest expansion of the Commission's requirement that notices must be "…in languages other than English"[27] as appropriate. Public notices must also be in language that is readily *understandable* to the average citizen. Vague notices full of legalese will be quickly dismissed and tossed in the trash by recipients. Recipients should be notified in plain language of how the project may impact them, what they can do, and where they can get additional information.

4. Instead of just state eminent domain laws, the notice must contain a reference to the federal eminent domain laws that would be applicable if the Commission approved the application so that the landowner could easily find and read the law(s). General or vague reference to federal eminent domain is incredibly intimidating to landowners.

5. The location(s) where physical copies of pre-application materials may be found must have detailed maps of the project's proposed route so that interested landowners without access to applicant websites can see how the project will affect their property. The most popular station at any transmission line "open house" is the map table. The first thing people want to know is how the project will affect them. Project maps must be readily accessible to everyone, even those without internet access.

6. The Commission's proposed "Landowner Bill of Rights" must contain a plain language explanation of easement acquisition that notifies landowners that they are not required to negotiate easement agreements written by transmission owners without advice from counsel. The landowner shall be informed that the easement agreement may give the transmission company more rights than they are entitled to under the law. The landowner must also be notified that they do not have to negotiate easement agreements at their home without counsel present. The landowner must also be given a plain language explanation of how eminent domain works and that they are guaranteed to receive just compensation for any land taken for the project.

VI. ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION PLAN

The Commission's definition of Environmental Justice Community does not correspond with its current Commission practice to identify Environmental Justice Communities using only

[27] *Applications for Permits to Site Interstate Electric Transmission Facilities*, 181 FERC ¶ 61,205, December 15, 2022, at P 39.

"race, ethnicity, and poverty"[28] data, or "minority populations".[29] These criteria alone do not define disadvantaged, marginalized communities overburdened by pollution. Is the Commission suggesting that only minority populations can be overburdened by pollution, or that all persons of a certain race or ethnicity must be marginalized? As we have suggested throughout these comments, identification of environmental justice communities may include religious affiliation, occupation, age, or how an individual has been historically impacted by siting of numerous energy infrastructure projects on their property. We suggest that the Commission take another look at this to ensure that all affected communities receive due consideration.

We believe that outreach to all impacted communities should be documented by applicants, along with any proposed mitigation measures intended to avoid or minimize impacts on impacted communities, including any community input received on the proposed mitigation measures and how that input informed such measures.

New transmission will have socio-economic impacts on numerous communities that may not be considered Environmental Justice Communities. In fact, this may be true for the vast majority of transmission that may file an application with the Commission. Our energy system is changing and the Commission must recognize that transmission has become a rural problem that cannot be defined by historic urban considerations.

VII. CONCLUSION

In conclusion, we urge the Commission to consider the many unanswered questions that its new backstop siting authority creates.

Has the Commission considered that a project located in a National Interest Electric Transmission Corridor (NIETC) eligible for its permitting process may not be part of any

[28] *Id* at P 30, N 39.
[29] *Id* at N 40.

Regional Transmission Operator/Independent System Operator (RTO/ISO) plan, or conform with reliability requirements, and therefore have no cost allocation method? Who would pay the costs of the pre-filing process in that instance? Who may allocate the costs of a project that is not a part of any RTO/ISO plan, and what would that process look like? Or would all NIETC transmission projects that are not part of any RTO/ISO plan have to adopt a merchant transmission rate model and pay for the costs of the Commission's permitting process with their own funds?

What happens when a transmission project passing through several states is approved in some states, but denied in others? Will the Commission be permitting the project in only the states where a permit was denied, or will the Commission be permitting the project in all states through which it passes? Does the Commission have the authority to override a state's approved siting and permitting and replace it with its own? How must the Commission condition its own permit to harmonize with the state issued permits?

It is not uncommon for state permits to be successfully appealed in state courts after they are issued. Would the Commission end its permitting process as unnecessary after the permit is initially issued? Or would it pause the process to allow the legal appeals to resolve before continuing? Or would it simply continue the permitting process and ignore the pending appeal altogether?

The more knee-jerk, uninformed, and specific legislation Congress passes to put its thumb on the scale for a gigantic energy infrastructure build-out, the more regulatory dilemmas it creates. The Commission must solve these dilemmas to keep statutes working in harmony, even when two different statutes create an unsolvable conundrum.

The Commission is being asked to serve as a national transmission planning organization with the ability to trump the plans of experienced regional planning organizations and states in order to enrich private investors and achieve political goals. We hope the Commission is up to the task so that we don't just create a different class of victims, or worse yet that we all end up freezing in the dark.

Respectfully submitted May 17, 2023,

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Joint Comments of Impacted Landowners

Attachment A

Motion for Injunctive Relief of the Pennsylvania Office of the Consumer Advocate

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: APPLICATION OF	:	Docket Nos. A-110172,
TRANS-ALLEGHENY INTERSTATE	:	A-1107172F002-F004
LINE COMPANY (TRAILCo)	:	and G-00071229
	:	(Consolidated)

MOTION OF THE
OFFICE OF CONSUMER ADVOCATE
FOR INJUNCTIVE RELIEF

Pursuant to 52 Pa. Code Section 5.103, the Office of Consumer Advocate (OCA) files this Motion For Injunctive Relief. The OCA requests that TrAILCo and its land agents, acting on behalf of Allegheny Power, be enjoined from engaging in activities including misrepresentation of facts, coercive acts, or harassment of consumers, all of which violate Section 1501 of the Public Utility Code and pertinent regulations. 66 Pa. C.S. §1501; see generally, 52 Pa. Code § 56.1 (good faith, honesty and fair dealing required in utility billing, termination and collection practices). In support of this Motion, the OCA provides the following:

I. Background

Ample on-the-record evidence in the form of testimony and exhibits offered by Allegheny Power customers throughout Washington and Greene Counties supports injunctive relief against the agents of TrAILCo, acting on behalf of Allegheny Power. Many Allegheny Power customers testified under oath at the public input hearings that they

have been subjected to harassment, factual misrepresentations and misinformation, and coercive acts used by TrAILCo agents. According to the public input testimony, many customers were pressured by TrAILCo agents to sign "Damage Release-Right of Way" (Damage Release contracts). These Damage Release contracts refer to claimed existing rights of way on the consumers' properties[1]; require consumers to give up all rights with regard to any damages caused by the transmission line; require that the consumers withdraw all complaints against the transmission line, and refrain from opposing TrAILCo in any courts or regulatory proceedings. A sample of such a contract appears in the record as Cheryl Piroch's Exhibit 3 and a copy is attached to this Motion.

According to the public input testimony, the tactics used to obtain these Damage Release contracts include false statements by TrAILCo agents to the effect that neighbors have already signed Damage Release contracts when, in fact, they have not. Other significant misrepresentations by the agents include such assertions as the transmission line is a "done deal" or "99 percent sure." Tr. 392, 446, 1164, 1524, 1526, 1920. The OCA submits that Section 1501 of the Public Utility Code has been violated by the many factual and legal misrepresentations to induce consumers to sign Damage Release contracts, by the TrAILCo agents acting on behalf of Allegheny Power. 66 Pa. C.S. § 1501. The Public Utility Code and applicable case law support the determination that such statements and conduct constitute unreasonable service and the Commission has jurisdiction to act to prohibit such unreasonable service.

[1] The OCA would note the recent filing of a Complaint in Civil Action and For Declaratory Judgment in Washington County Common Pleas Court that challenges the validity of the existing rights of way referenced in the TrAILCo filing. Sawezyszyn, *et al* v. TrAILCo, Allegheny Energy Transmission, LLC, Allegheny Energy, Inc., West Penn Power Co., Docket No. 20078072.

The OCA requests that Your Honors enjoin TrAILCo and its agents, acting on behalf of Allegheny Power, from engaging in any bad faith acts; declare any claimed Damage Release contracts with affected consumers to be voidable, upon the request of any customers induced to sign through misrepresentation and coercion; provide notice and opportunity to be heard anew for those who relinquished their rights as a result of any misrepresentation and coercion; and provide any other such remedies deemed appropriate.

II. TrAILCo And Its Agents Should Be Enjoined From Making Misrepresentations And From Engaging In Harassing Behavior.

A. Section 1501 Issues

As noted above, consumers testified at the public input hearings and site visits that they had been subject to numerous instances of dissemination of misinformation, factual and legal misrepresentations, harassment, threats and intimidation tactics by TrAILCo land agents. Section 1501 of the Public Utility Code prevents public utilities and those acting in their behalf from engaging in such conduct. Section 1501 of the Public Utility Code states:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repair, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.

66 Pa. C.S. § 1501. The term "service" is broadly defined in Section 102 and encompasses all utility interactions with customers. Section 102 defines service in its broadest and most inclusive sense and includes:

> any and all acts done, rendered, or performed, and any and all facilities used, furnished, or supplied by public utilities...in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them...

66 Pa.C.S. § 102. In Pa. P.U.C. v. Hersperger, the Commission held that "(w)e think it is self-evident that any fraudulent or deceptive conduct on the part of the public utility in the provision of its services would be tantamount to unreasonable service and, therefore, in violation of the statute." 1998 Pa. PUC LEXIS 238 at *12-13 (November 16, 1998).

The Commission's regulations impose a duty of good faith and fair dealing on utilities as to their customers. See generally, 52 Pa. Code § 56.1. Moreover, utilities may not evade accountability for violations of the Public Utility Code and regulations by having non-utility entities act on their behalf. Utilities are just as accountable for violative acts of employees of others as they are for the same practices of their own employees. In Borelli v. The Bell Telephone Company of PA and AT&T Communications of Pennsylvania, Inc., the Commission stated:

> While it may be reasonable for AT&T to market its services through sales under contract with specific limitations, it (AT&T) must effectively monitor and control the actions of its agents so as to avoid and prevent unreasonable conduct; otherwise, it will be subject to appropriate penalty for providing inadequate, unreasonable service in violation of 66 Pa.C.S. § 1501. In the instant matter, as aforesaid, the Administrative Law Judge finds and concludes that the conduct of AT&T, through its agents, and the failure of AT&T to adequately monitor and control said agent with

> respect to calls made to Complainant constitute inadequate and unreasonable service.

1991 Pa. PUC LEXIS 221 at *18 (October 30, 1991). In Bookstaber v. PECO Energy Company, the Commission stated that:

> PECO has outsourced its credit question customer call center to an outside vendor...The employees at this call center, although not directly employed by PECO, serve as its agents and are held to the same standard of conduct as PECO employees. PECO may be held responsible for acts done by these agents on its behalf.

2004 Pa. PUC LEXIS 52 at *12-13 (July 23, 2004). PECO was ordered to "cease and desist from further violations of the Public Utility Code, Commission regulations and Orders and shall take all necessary action to ensure that its agents are acting in compliance with the same." Id. at *16.

The OCA requests that TrAILCo, its agents and employees be enjoined from making misrepresentations and from engaging in harassing behavior.

B. Upon Request By The Affected Allegheny Power Customers, Damage Release Contracts Should Be Declared Null and Void.

According to the sworn public input testimony, TrAILCo agents have been repeatedly attempting to obtain so-called "Damage Release Right of Way" contracts from Allegheny Power customers. The OCA requests that consumers who have been induced to sign such Damage Release contracts through coercive conduct, factual misrepresentations and high-pressure tactics be permitted to request that the contracts be declared null and void by the Commission. Further, the OCA requests that these consumers, who relinquished their due process rights, be afforded an opportunity to be heard at a further public input hearing, if requested.

The Damage Release contracts between the customer and TrAILCo specifically require the customer to relinquish all rights in any proceeding involving the proposed transmission line in exchange for compensation. One of the Damage Release contracts submitted with the public input testimony is attached as Attachment A to this Motion. This Damage Release contract assumes the existence of an already-established Right of Way. The attached Damage Release contract identifies the owner of the land, the land record document number, when the easement was recorded, and offers money to:

> release, discharge and forever quitclaim TrAILCo, its successors and assigns, from any and all damages, losses, costs, charges, claims or demands whatsoever, in any way or manner accruing to the undersigned or the legal representative of the Undersigned for the construction of the Transmission Line. TrAILCo shall repair all damages to fences, crops, and other property damage resulting from the construction of the Transmission line on the premises.

Attachment A at 1. The contract provides for the payment of an initial ten percent and the remainder once TrAILCo obtains approval for the transmission line. The customer also "agrees not to oppose TrAILCo's construction of the construction of the Transmission line in any state or federal court, regulatory or administrative proceeding and to withdraw within seven (7) days after the date hereof any opposition to the Transmission Line previously filed." Attachment A at 2.

This Damage Release does not create an easement *per se.* The Pennsylvania Superior Court stated that "[a]n easement is an abstract property interest that is legally protected." Forest Glen Condominium Association v. Forest Green Commons Limited Partnership, 2006 Pa. Super 99; 900 A.2d 859 (2006). The Damage Release does not appear

to expand Allegheny Power's claimed existing property interest,[2] but instead is a limitation of TrAILCo's future liability in exchange for a payments, as well as withdrawal of the customer's protest. The Commission has the authority to vary, reform or revise such contracts under the Commission's Section 508 power. 66 Pa. C.S. § 508. Section 508 states:

> The Commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth, the commission shall determine and prescribe by findings and order, the just, reasonable, and equitable obligations, terms and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract.

66 Pa. C.S.A. § 508; see also, PPL Electric Utilities Corp. v. Pa. P.U.C., 912 A.2d 386, 409 (1998).

Fraudulent misrepresentation is grounds for voiding a contract. In Brentwater Homes, Inc. v. Weibley, the Pennsylvania Supreme Court determined "fraud is composed of a misrepresentation fraudulently uttered with the intent to induce action undertaken in reliance upon it." 471 Pa. 17, 23 (1976) (citing Edelson v. Bernstein, 382 Pa. 392 (1955)) (appellees were induced to sell their land due to fraudulent misrepresentations). The

[2] In some instances, the Damage Release contracts may include language intended to expand or modify the claimed existing rights of way; however, we have only the examples offered as exhibits during the public input hearings to review at this juncture. These examples merely acknowledge that a deed containing a reference to a right of way was recorded at the County Courthouse.

Supreme Court upheld the lower courts and determined that fraudulent misrepresentation was made and that the contract was voidable and unenforceable. Id. at 25; Miller v. Fulmer, 25 Pa. Super. Ct. 106 (1904).

Sworn testimony supports the conclusion that TrAILCo agents acting on behalf of Allegheny Power have misrepresented facts and engaged in undue pressure or coercion to obtain settlements that require affected customers to relinquish due process rights and waive TrAILCo's future liability, as more fully described below. Due to this conduct, affected Allegheny Power customers, upon request, should be permitted to void their Damage Release contracts if induced to sign them through Allegheny Power's misrepresentations and coercive tactics. If requested, Allegheny Power customers should also have an opportunity to be heard at a public input hearing, if deprived of that opportunity due to TrAILCo land agents' misrepresentations.

The issues presented in the instant Motion are related to the tactics TrAILCo used in procuring signed Damage Release contracts. Although issues regarding the validity of an easement may be outside of the Commission's jurisdiction, the OCA submits that the Commission has jurisdiction over the Damage Release contracts in the instant case. See, Kintzel v. PPL Co., 1980 Pa. PUC Lexis 27 (September 18, 1980). In Kintzel, the Commission stated that it "has at least initial jurisdiction, if not exclusive jurisdiction to determine matters involving, inter alia, rates, certifications, service, facilities, safety, extensions, and transfer of utility property." Id. at *3-4. In Kintzel, the Commission stated:

> no principle has become more firmly established in Pennsylvania law then that the courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is the PUC - - not in the courts. It has been held involving rates, service, rules of service,

> extension and expansion, hazard to public safety due to use of utility facilities, installation of utility facilities, location of utility facilities, obtaining, altering, dissolving, abandoning, selling, or transferring any right, power privilege, service, franchise, or property, and rights to serve particular territory.

Id. at *4-5.

The Messina v. Bell-Atlantic Co. case involved two issues: (1) the validity of an easement and (2) the proximity of a proposed telephone cable to the Complainant's home. The Commission determined that it "clearly has jurisdiction to decide whether the location of Bell's cable in relation to the Complainant's home constitutes reasonable and safe service." 1998 Pa. PUC Lexis 190 at *28. The Commission declined to decide the easement issue, but did apply its regulations to reach the conclusion that that there was no violation of the Public Utility Code regarding the distance of the cables from the house. Id. at *29-30.

The issues raised here relate to issues within the Commission's jurisdiction: the provision of reasonable service under 66 Pa. C.S. Section 1501 and the duty of good faith and fair dealing by utilities and entities acting in their behalf with respect to their customers. The OCA submits that the authority granted by Sections 1501 and 508 permit the Commission to determine whether the Damage Release contracts were obtained through TrAILCo actions that are compliance with the Pennsylvania Public Utility Code. 66 Pa. C.S. §§ 508, 1501. Further, Section 508 permits the Commission to void, revoke or amend such contracts.

C. Harassment, Misinformation and Deceptive Conduct

Public utilities and entities acting in their behalf should not be permitted to engage in deceptive conduct. As discussed above, the Hersperger case stands for the principle that

deceptive conduct by a utility toward its customers violates Section 1501. 1998 Pa. PUC LEXIS 238 at *12-13. The sworn statements in the public input testimony in the instant proceeding support findings of similar violations of Section 1501 by TrAILCo agents, acting on behalf of Allegheny Power. 66 Pa. C.S. § 1501. Many Allegheny Power customers have asserted that the TrAILCo agents made factual misrepresentations and harassed them in attempt to obtain signed Damage Release Agreements.[3] Many examples of Allegheny Power agents' behavior, supported by the sworn testimony of customers at the public input hearings, are inconsistent with the concepts of good faith and fair dealing.

Witnesses complained of unsolicited visits, refusal of the land agents to leave when asked, factual misrepresentations, and threats. Allegheny Power customers have been threatened with police arrest for failure to permit entry, even in instances where the Allegheny Power had no existing easement. Tr. 893. TrAILCo agents told customers that they would get nothing if they did not sign agreements immediately. Tr. 1780-1781, 1919-1922, 1970, 1975. Such examples of harassing and deceptive conduct were prevalent throughout the testimony given at the public input hearings, as further described below.

1. TrAILCo And Its Agents Should Be Enjoined From Stating That The Proposed Transmission Line Is A "Done Deal."

TrAILCo frequently asserted to Allegheny Power customers that the proposed transmission line is a "done deal." Tr. 1164, 1524, 1526. Multiple customers used the same or similar language when quoting the agents. Many other customers stated that they were told by TrAILCo agents that it is "99 percent sure" that the line is going to be approved. Tr. 392, 446, 1920. This tactic was used repeatedly to coerce the customers

[3] It is impossible to know at this juncture precisely how many Allegheny Power customers have signed such agreements; however, the Applicant should be required to disclose such information in the event injunctive relief is granted, so that customers can be properly advised of their rights.

to sign over the rights of way and withdraw their protests. Ms. Tina Martin testified about a land agent's conversation with her brother, during which the agent "said things like, 'This is 99 percent positive that this is going to go through. You might as well just give in.'" Tr. 392. Her brother, Carl Burkhardt, testified "(t)he words she said to me...Ninety-nine percent, this power line is going to come through.'" Tr. 446. Ms. Jerri Dire testified that the land agent "said I should take the money because this is a done deal" and also testified that TrAILCo representative "Jim Taylor told me yesterday that this project is going through no matter what. I was told by Jay Roberto's office that same thing yesterday by the secretary, or whoever answers the phone." Tr. 1524, 1526.

Jon Hildebrand testified:

> When we met with Bonnie [a TrAILCo land agent], what did she say to us? You know, it might not be as much as you think it's worth, you know, you might not care about the money, but you know, this is going through no matter what because if Allegheny Power doesn't get the PUC, then we'll get the eminent domain. This is a done-deal, we're coming through, get out of our way.

Tr. 1164. Laurie Nicholl testified:

> In addition, by pressuring people to sign now, before the expert testimony, Allegheny Energy, Allegheny Power, TrAILCo is attempting to take the siting of the lines off the table through these damage release right-of-way agreements unbeknownst to unsuspecting landowners who are being told by TrAILCo land agents that they better take this offer because this line is 99 percent sure and they'd he (sic) foolish not to try to get money for their families.

Tr. 1920.

Clearly, the Company cannot guarantee what the Pennsylvania Public Utility Commission will decide in this matter. It was deceptive for TrAILCo agents to make such misstatements in order to deter consumers from testifying about the impact to the

proposed line will have on their land and to coerce them into signing the agreements. TrAILCo agents' statements have created the misimpression that the landowners have no rights and that any protest is pointless. As Robbie Matesic testified: "(w)e don't know who wouldn't come forward because they heard this project was a done deal. It compromises the ethics of your decision." Tr. 1191.

Misstatements such as those discussed above are not examples of good faith and fair dealing, they run contrary to Section 1501 and should be enjoined.

2. TrAILCo and Its Agents Should Be Enjoined From Making Misstatements About Who Has Signed A Damage Release Contract.

Many customers testified that the Company's agents stated that neighbors had signed the agreements when that was not the case. Debra Bandel testified about the methods used by TrAILCo land agents:

> I have to wonder what deceptive strategy West Penn Power used then especially when I hear about the deceptiveness and lying that seems to be going on today. By that I mean when one household along the path has been told that the neighbors have already signed, it is not even the case.

Tr. 359. Judy Kirschner testified that she had been told by an agent that her neighbors had signed agreements and later learned that this was not the case. Ms. Kirschner testified that "He kept pushing the confidential issue. We weren't supposed to talk things over with our neighbors." Tr. 1699. She asserted:

> he sent a letter to one of our attorneys stating that our neighbors, Robert Cameron and his wife, Elizabeth, have signed on with TrAILCo and accepted their money. This call took place yesterday. This statement is so false. This shows us just how underhanded Mr. Peterson and the whole TrAILCo group can be. They tried to manipulate us all. I am sure there are more instances of this type of thing, too.

Tr. 1699-1700. Laura McPeake alleged in her testimony that TrAILCo falsely implied to another neighbor that Ms. McPeake had signed an agreement with the Company:

> It's come to my attention that my name has been used and that somebody from TrAILCo has said that they have spoken to me. I have spoken to nobody from TrAILCo...
>
> In speaking with one of neighbors, it was - - apparently my name specifically, Laura McPeake, came up and it was stated that I was a nice person and I had talked to them already about the towers, and they presented it as though I was in support of this project, which I am adamantly opposed to, and I have never spoken to anybody from TrAILCo...
>
> That's a misrepresentation of the attitudes of the neighbors. ..for Jerri [her neighbor], she would think that the neighbors aren't opposed to it, and I am. We're on the same side.

Tr. 1538-40. Jerri Dire, her neighbor, confirmed this and testified that "when I was in that meeting with John Carter, he was flipping through all these damage adjustment and he said he had talked to Ms. McPeake, and said, oh, she's a very nice lady." Tr. 1539-40. Ms. Dire testified "just in the way he was talking about it...He was going through these things, the damage releases...Why would he have her on one of those?...she doesn't have a right-of-way on her property." Tr. 1540.

Such misrepresentations by TrAILCo agents, acting on behalf of Allegheny Power, to induce customers to sign Damage Release contracts do not constitute good faith and fair dealing. Such conduct is prohibited under 66 Pa. C.S. § 1501 and should be enjoined.

3. TrAILCo And Its Agents Should Be Enjoined From Disseminating Inaccurate Information About Damage Release Contracts And The Proposed Transmission Line.

Consumers alleged that they have been provided inaccurate information by TrAILCo agents. The OCA submits that this inaccurate information, too, violates the duty of good faith and fair dealing with customers. For example, Nicole Thomas testified about her meetings with TrAILCo land agent, Mr. Peterson:

> we were told that this offer was final, there would be no negotiating, and we had only 24 hours to decide. They said after the 24 hours our offer was zero, just like our neighbors, because they had previously turned down their offers. He said, "Take your number of acreage, multiply it times zero, and that's what you get, zero."
>
> The next day we spoke to our neighbor who informed us that they had received a letter signed by Mr. Peterson for an agreement and money to repurchase their right-of-way. These neighbors had already declined their first offer, and this was their second offer.
>
> We were told at the meeting the night before that no one would receive a second offer. Mr. Peterson lied to us, and Ms. Morrison sat right next to him. They told us the night before that none of our neighbors would receive another offer. Well, they did.

Tr. 1780-81. Ms. Thomas asked in her testimony "How can we trust a company whose employees lie?" Tr. 1781. Allegheny Power customer Carl Burkhardt also testified about a similar high-pressure experience with the TrAILCo land agent regarding his 200 foot wide, 1,200 foot long easement:

> And she kind of placed it like if you don't act now and sign this blanket for us to enter your property and have no liability to the property or anything like that, you better talk to him and make arrangements in signing his paper, and, you know, everything will be all right...

> She threatened numerous times about court orders. She says well - - the last thing she said to me, "I'm going to get a court order, and we're going to come out here with the State Police, and we are going to drill on this property." So that's the encounters I had with Allegheny Power trying to make me understand where do I stand. Every time I ever discussed anything with Allegheny Power, it seems like they always led me the wrong way to believe in their trust.

Tr. 446-447. At Mr. Burkhardt's site visit, he testified that the land agent "wanted to come on this property and do core drilling without any permits, not any insurance. She was going to get an order to bring the State Police on here [sic], and they wanted to drill in between these two stakes all the way through our property." Tr. 551-552.

Allegheny Power customer Cheryl Piroch testified that two land agents came to her home on September 10th with an offer of $54,468, with 10 percent given that day if they signed the Damage Release contract[4] and the remainder of the money when the line is built. Further, she was told that the offer would not be valid for very long. She testified, quoting from the agreement:

> "The undersigned, for and in consideration of the payment set forth below does release, discharge and forever quit claim TrAILCo, its successors and assigns, from any and all damages, losses, costs, charges, claims or demands whatsoever, in any way or manner accruing to the undersigned or the legal representative of the Undersigned for the construction of the Transmission Line."…
>
> Why would they be paying us for damages…dependent upon our giving up all of our rights?

Tr. 1897-1898. See also Tr. 1455-56 (Piroch site visit). Faith Bjalobok, an ethics professor and property owner, also testified about TrAILCo agent Bonita Rockwell's high pressure tactics:

[4] See Attachment A to this Motion.

> I actually heard Bonita Rockwell call Dave Pyrop's (phonetic) [David Piroch's] family, and his wife put the phone on the speaker of the phone. She attempted to threaten and intimidate and spoke to his wife as if she was an idiot. The woman is in fact a registered nurse.
>
> They were trying to gain access to their property and attempting to tell them if they did not sign the paper and give them access, that they would seize their property under eminent domain because surely you, the PUC, are going to grant this line, and then they would be forced to take whatever Allegheny Power felt was a reasonable price for their property. People who enter into these kind of contracts I would argue are not entering into it voluntarily, and I find this to be very unethical.

Tr. 374-375. Laurie Nicholl alleged in her testimony that misinformation was provided by a TrAILCo land agent concerning the Damage Release contracts. Ms. Nicholl testified that the land agent said:

> that my in-laws were getting no money...because we have been vocal and refused access to the land. A multiplier of zero, zero times zero, is what the Nicholl's are getting. Imagine our surprise when on the very same day, a formal offer arrived in the mail for my in-laws from Jeff Peterson [the land agent]...
>
> We were told by Jeff Peterson that the damage release right-of-way agreements were to bring up to current market value the existing right-of-ways. In fact, in Jeff Peterson's cover letter, he calls the agreements an additional compensation program, but the damage release right-of-way agreements ultimate purpose is to buy extended right-of-ways to fix previous mistakes and give them the flexibility to move the line!

Tr. 1919-22. Eric Mark stated he felt "very intimidated" by the actions of the Allegheny Power agents in entering his property without permission and their coercive statements. Tr. 1968-70. Mr. Mark testified that the agents provided nothing when he requested information to prove the validity of the utility right-of-way:

> All I asked for was proof that the right-of-way was consummated. I probably would have acknowledged that fact and would not be here today. I would not even expect to be compensated. This cash offer made with its strings attached has the feeling of blood money.
>
> If cash offerings being made to individuals for damage are sincere, then why does Mr. Peterson use coercion? He has told me that the money will go away if I do not sign by the end of the month. That offer was made in August. I feel the tactics being used by Mr. Peterson and TrAILCo are very unethical and immoral.

Tr. 1969-1970. John Hildebrand testified about the problems with the Damage Release contract. He also asserted that the land agent promised answers to his questions about the impact of the line on their horses and how the line would impact existing gas lines on their property, but when she returned with another offer, no additional information was provided. Tr. 1162-1164. As Mr. Hildebrand also testified:

> They talk about they've had the line for years and they have no history, they have no idea what effects it has or hasn't had. Aren't they responsible to have the information when they go in and do things that are controversial like this, to keep statistics on what happens around those power lines?
>
> Well, the answer to that would be, I believe they do, but of course they do not want to say what the problems are, so you give us this damage waiver, this right-of-way here, have some money. You know, might be everything to you folks, but it's not to everybody in Greene County, so when you put something like this out there, when people read it closely, it's not just about you buying or giving me, as I think the president or CEO of Allegheny Power said, we feel it's the right thing to do, give them some money because, you know, we did buy it 30 years ago and now we're going to use it, so it's the right thing to do.
>
> What it really is is a way to limit your liability. It states that there will be no further damage, whatsoever. I sign this, it basically says, Allegheny Power, do what you want. You don't have to worry about anything else if you hurt anything

> else, if you do any other damage, you're not responsible. It's a damage waiver, it's not a payment for a right-a-way (sic). It's a pay-off. It also says that you won't testify, you'll pull your - - whatever it is, appeals or the protest and then we'll give you the money. So what are they trying to do there; they've tried to undercut your job. They tried to tell people, here's some money, go away, the PUC doesn't need to hear from you because it doesn't matter because it's a done-deal in their minds.

Tr. 1162-1164.

As set forth above, the public input testimony included numerous assertions concerning TrAILCo agents' failure to provide information or dissemination of inaccurate information about the Damage Release contracts. TrAILCo and its agents, acting on behalf of Allegheny Power, have a duty of good faith and fair dealing toward customers and to provide accurate thorough and accurate information to customers when negotiating the Damage Release contracts. TrAILCo and its agents should be enjoined from disseminating inaccurate information about the Damage Release contracts and the proposed transmission line.

4. TrAILCo And Its Agents Should Refrain From Using High Pressure Tactics To Procure Damage Release Contracts.

Witnesses also complained of high pressure tactics including repeated calls and visits from TrAILCo land agents and their refusals to leave when asked. Mr. Nicoloff testified that "(n)ot only has she [the land agent] left messages, she has also called his house and spoken with his young daughter of the urgency in which she needs to present her father with a very lucrative monetary offer." Tr. 1034-1035. Barbara Gall also testified about TrAILCo's land agent, Ms. Rockwell, contacting her:

> She showed up on my doorstep. I didn't go talk to her. I told her on the phone, I don't want the power line. You're not allowed on my property. Stay away. She shows up anyway. Well, didn't talk to me, so she sent me a contract in the mail offering me $58,000 for that six-acre right-of-way. She was going to give me $1,500 right off the bat, right that day when I signed it.

Tr. 1085; see also, Tr. 235-236. As noted above, Ms. Dire testified that the Company assured her that the power line's application was a "done deal," also threatened her with being removed in handcuffs for refusing access, mocked her protest as a joke, and told her that her property was not worth what she paid for it because of the easement. The Company also refused to identify where on her property the line was actually going to go. She testified:

> [the land agent] said he was given money by TrAILCo to give to the landowners. He said, wouldn't it be better to take the money from him instead of being taken away in handcuffs for refusing access to the property...
>
> John Carter, the right-of-way agent has made two different offers of money and wants me to sign an agreement that releases TrAILCo from any responsibility for damages ever. There have been a lot of calls and pressure to sign this agreement.
>
> I told him that I went to first round of PUC hearings and filed a protest, and he said that we should be embarrassed by the protests we filed, that the people who are fighting this project are a joke. He said I should take the money because this is a done deal.
>
> If I take the money, I was told that I am not allowed to testify. At the last meeting with John, he brought his boss, Jim Taylor, his supervisor. He said this was his final offer, take or leave it because they would be moving him to another area. He said, "This is a great deal for you and you should take it."

Tr. 1523-24. Ms. Dire also testified to her inability to obtain accurate information about the line:

> This was my second meeting with John, and twice I asked where the proposed line will be and if they are putting a tower on my land. I can't get a straight answer. He said the could be 30 or 40 feet different than the satellite pictures show, and they can't say for sure where the towers are going. I already said that.

Tr. 1524. Ms. Dire testified that she asked for "West Penn Power drawing 304-101, page 9 of 16, which is on my easement agreement...Both times I met with them, they couldn't find that drawing." Tr. 1526. Finally, she stated that the land agent told her "(i)t means nothing. It is a blanket easement and it gives TrAILCo the right to go anywhere on my property that they want. It is not going to make a bit of difference." Tr. 1526.

Other landowners testified to similar actions. Lisa Palma testified that the land agent, "kept calling me and calling me that whole month. I kept on saying, you're not coming on this property." Tr. 1973. She testified that the land agent "threatened me that she was going to get a court order and the State Police...Anyway, I got a surprise visit from her..." Tr. 1973.

Witnesses at the public input hearings repeatedly reported that TrAILCo's agents have used threats and intimidation techniques in an effort to procure rights of way. James Blockinger testified "(w)e can document many instances of TrAILCo's representatives misleading an (sic) intimidating property owners." Tr. 188. Christine Robker testified "My husband and I let your representative in our home in good faith. He lied to us and bribed us with money. It's not the way to gain our trust. When you did that, we cannot believe anything you say to be true." Tr. 438.

The OCA submits that such behavior is not permitted by the Public Utility Code and should be enjoined. TrAILCo and its agents acting on behalf of Allegheny Power should not be permitted to continue to violate the Public Utility Code by making misrepresentations to procure rights of way or by otherwise acting in bad faith. Robbie Matesic, Greene County Economic Development Director, summarized the misinformation and intense pressure applied in this case:

> Over and over we hear that the facts of the project process and the project are being misrepresented, and information is not consistent between neighbors. Is this project approved? Is it 99 percent sure that it's going to be approved? The answer is yes or no...There are no shades of gray here.
>
> Either this project is approved or it's not and it's my understanding that it is not, and why would anyone be told anything differently. But why and when would it become the responsibility of the media, of volunteers, of a grass roots organization, of the County Commissioners and staff and everyone else not on your payroll to disseminate the truth, to work so hard to offset the misrepresentations, to help the landowners understand this process, to interpret the documentation they received, to assure them that this is a fair process, assure them that the Pennsylvania PUC is protecting their rights and that neither Allegheny Power nor TrAILCo have corrupted its process.

Tr. 1185-1186. TrAILCo and its agents should be enjoined from engaging in further high-pressure and coercive tactics.

5. Conclusion

Sworn testimony provided numerous examples of deceptive conduct by TrAILCo and its agents, acting on behalf of Allegheny Power. The Pennsylvania Public Utility Commission has determined that a utility's deceptive conduct, including the actions of its agents, constitutes unreasonable service and a violation of 66 Pa. C.S. § 1501. See also, Hersperger, 1998 Pa. PUC LEXIS at *12-13; Borelli, 1991 Pa. PUC LEXIS at * 18;

Bookstaber, 2004 Pa. PUC LEXIS at *12-13. A determination of deceptive conduct is a basis for voiding a contract. Brentwater Homes, 471 Pa. at 23.

The OCA submits that such actions should be enjoined and that, upon the request of an Allegheny Power customer, any Damage Release contract signed by that customer should be voided. If requested, further public input hearings should be scheduled to afford such customers an opportunity to be heard, if unfairly deprived of that opportunity.

III. Conclusion

WHEREFORE, the Office of Consumer Advocate respectfully requests that Your Honors enjoin TrAILCo and its agents, acting on behalf of Allegheny Power, from engaging in further acts of bad faith or coercion; making further misrepresentations as described above; declare any claimed Damage Release contracts with affected consumers to be voidable, upon the request of customers induced to sign through misleading statements and coercive tactics; and provide notice and opportunity to be heard anew, if requested, for those who relinquished those rights as a result of the misrepresentation and coercion.

Respectfully submitted,

_____

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Joint Comments of Impacted Landowners

Attachment B

PATH Project Code of Conduct for Right-of-Way Agents and Subcontractor Employees

Potomac-Appalachian Transmission Highline PATH Project - Code of Conduct for Right-of-Way Agents and Subcontractor Employees

This Code of Conduct applies to all communications and interactions with property owners and occupants of property by all right-of-way agents and subcontractor employees representing the Potomac-Appalachian Transmission Highline ("PATH") Companies[1] in the negotiation of right-of-way and the performance of surveying, environmental assessments and the other activities for the PATH Project on property not owned by the PATH Companies.

1. All communications with property owners and occupants must be factually correct and made in good faith.

a. Do provide maps and documents necessary to keep the landowner properly informed
b. Do not make false or misleading statements.
c. Do not misrepresent any fact.
d. If you do not know the answer to a question, do not speculate about the answer. Advise the property owner that you will investigate the question and provide the answer later.
e. Follow-up in a timely manner on all commitments to provide additional information.
f. Until the PATH Companies have been authorized by the state utility commission in each state to construct the PATH Project, do not suggest that the PATH Project is a "done deal" or is "99 percent sure" or make similar statements suggesting that the state utility commission has authorized construction of the project.
g. Do not suggest that the project is required for national or homeland security reasons or has been authorized by the federal government.
h. Do not send written communications suggesting an agreement has been reached when, in fact, an agreement has not been reached.
i. If information provided is subsequently determined to be incorrect, follow up with the landowner as soon as practical to provide the corrected information.
j. Do provide the landowner with appropriate contact information should additional contacts be necessary.

2. All Communications and interactions with property owners and occupants of property must be respectful and reflect fair dealing.

a. When contacting a property owner in person, promptly identify yourself as representing one or more of the PATH Companies and display your PATH Project photo ID badge.
b. When contacting a property owner by telephone, promptly identify yourself as representing one or more of the PATH Companies.
c. Do not engage in behavior that may be considered harassing, coercive, manipulative, intimidating or causing undue pressure.
d. All communications by a property owner, whether in person, by telephone or in writing, in which the property owner indicates that he or she does not want to negotiate or does not want to give permission for surveying or other work on his or her property, must be respected and politely accepted without argument. Unless specifically authorized by a PATH Company, do not contact the property owner again regarding negotiations or requests for permission.
e. When asked to leave property, promptly leave and do not return unless specifically authorized by a PATH Company.
f. If discussions with the property owner become acrimonious, politely discontinue the discussion and withdraw from the situation.
g. Obtain unequivocal permission to enter property for purposes of surveying or conducting environmental assessments or other activities. Clearly explain to the property owner the scope of the work to be conducted based on the permission given. Attempt to notify the occupant of the property each time you enter the property based on this permission.
h. Do not represent that a relative, neighbor and/or friend have signed a document or reached an agreement with a PATH Company.
i. Do not ask a relative, neighbor and/or friend of a property owner to convince the property owner to take any action.
j. Do not represent that a relative, neighbor and/or friend supports or opposes the PATH Project.
k. Do not suggest that any person should be ashamed of or embarrassed by his or her opposition to the PATH Project or that such opposition is inappropriate.
l. Do not argue with property owners about the merits of the PATH Project.
m. Do not suggest that an offer is "take it or leave it."
n. Do not threaten to call law enforcement officers or obtain court orders.
o. Do not threaten the use of eminent domain.
p. Do not suggest that the PATH Companies will seek federal authorization to construct the project.
q. Avoid discussing a property owner's failure to note an existing easement when purchasing the property and other comments about the property owner's acquisition of the property.

All communications and interactions with property owners and occupants of property must respect the privacy of property owners and other persons.

a. Discussions with property owners and occupants are to remain confidential.
b. Do not discuss your negotiations or interactions with other property owners or other persons.
c. Do not ask relatives, neighbors and/or friends to influence the property owner or any other person.
d. Avoid discussions or personal matters about the property owner, others and yourself.

Source:
http://www.pathtransmission.com/docs/Filings/WestVirginia/Appendix%20H,%20Tab%209%20-%20Ruberto%20Direct%20Testimony.pdf

[1] For the purposes of this Code of Conduct, the term "PATH Companies" includes PATH West Virginia Transmission Company, LLC; PATH Allegheny Transmission Company, LLC; PATH Allegheny Virginia Transmission Corporation; PATH-WV Land Acquisition Company; and PATH-Allegheny Land Acquisition Company and their affiliates.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Applications for Permits to Site Interstate Electric Transmission Facilities	**)** **)**	**Docket No. RM22-7-000**

JOINT REPLY COMMENTS OF IMPACTED LANDOWNERS

We have read the initial comments filed in this proceeding and offer a few additional comments and suggestions for the Commission regarding its Notice of Proposed Rulemaking to revise its regulations governing applications for permits to site electric transmission facilities under section 216 of the Federal Power Act.

I. LANDOWNER PROTECTIONS SHOULD COME FROM LANDOWNERS

We didn't find it surprising at all that the biggest fans of the Commission's proposed rulemaking were large environmental groups and industry. After all, those are the entities that would benefit the most from building more transmission, whether it is needed or not. What was surprising however was the assertion of certain large environmental and "public interest" groups[1] that they represent the concerns of landowners affected by new transmission projects. Landowners impacted by new transmission have never spoken to or worked with these national groups. These groups are policy-oriented special interest groups based in large cities and do not interact with or understand the needs of rural landowners most impacted by new transmission. In fact, numerous entities that are now concerning themselves with landowner protection are the very same groups that we have seen intervene in state proceedings on behalf of transmission owners. The concerns of landowners never seem to matter when these transmission advocates

[1] Niskanen Center, Earthjustice, National Wildlife Federation, Natural Resources Defense Council, NW Energy Coalition, Sierra Club, Sustainable FERC Project, Union of Concerned Scientists, and WE ACT for Environmental Justice.

are requesting that a state utility commission approve new transmission with eminent domain authority to take private property. Reinventing themselves in this proceeding by claiming that they somehow know best about landowner needs is nothing more than the fox guarding the henhouse. The Commission should not rely on the assertions of uninformed and unaffected transmission advocates when making decisions that profoundly affect impacted landowners. If the goal is to fashion new rules for a fair permitting process that considers landowner impacts in order to facilitate faster and more durable project approvals, the only consultation that matters is with impacted landowners. Under state permitting adversarial procedures, impacted landowners have scientifically and legally proven over and over again (at their own expense) that many proposed projects are detrimental to reliable electric service, consumer costs, and environmental concerns. The barriers for intervention under these processes are already enormous for landowners, so it is unconscionable that the Commission would seriously consider putting a big fat thumb on the scales in favor of transmission proponents. If impacted landowners are the only parties sometimes willing to truly scrutinize the claims of transmission proponents, the Commission should encourage and incentivize them to do so in order to uncover the truth of the matter. Creating a federal permitting system that is unfriendly to, and uneconomic for, impacted landowners is nothing more than purposeful disenfranchisement.

Fiction presented as "studies" and "reports" created by industry and transmission advocates that purport "early" interaction with landowners breeds trust and acquiescence is simply not true. None of these studies consulted actual landowners impacted by transmission, and none of these studies gives concrete examples to prove their hypotheses. It's all so much self-serving nonsense. By working with and actually being impacted landowners, we have a much different view of the efficacy of "early" interaction. First of all, no landowner trusts an

entity that proposes to take their property against their will. Our experience is that impacted landowners are gaslighted to believe the project is needed, but the truth uncovered by landowner research and investigation often proves just the opposite. We do not trust companies and groups that want to take something that belongs to us in order to create a profit for themselves, or to achieve their political goals. Trust in transmission owners is unlikely to happen. The premise that "early" interaction allows transmission companies to change plans to alleviate landowner concerns does not work because it has been our experience that transmission companies are never truly open to change. Transmission owners approach a community of impacted landowners with a fully formed idea, a *fait accompli*. Any changes suggested by landowners are met with excuses and denials. For instance, one of the first requests of impacted landowners is often to route the project buried on existing rights-of-way (such as road or rail). The transmission owner will likely come up with a plethora of ridiculous excuses, such as that it is impossible to find faults on buried lines and that the line must be completely dug up to find the fault and make repairs. They must think we're really stupid. Would you trust someone like that? Another excuse is cost. We know that while the upfront cost of buried transmission is likely to be double (not ten times higher!) there is a host of savings that can be made on a buried project. Not having to negotiate with hundreds or thousands of different landowners and take legal action is a huge savings. Negotiating with only one landowner, like a railroad or highway department, is not only much cheaper, but saves time. Burying the project on existing rights-of-way also pretty much guarantees that there will be little to no costly opposition, delays, or appeals. A buried line doesn't require constant vegetation management, especially one on a right-of-way that is kept cleared for its main purpose. Buried lines are protected from weather and sabotage, requiring fewer repairs. Buried lines are unlikely to start wildfires that destroy property and take

lives, which can result in huge payouts to victims. These are all significant savings that can make a buried project on existing rights-of-way cost comparable to an overhead project on new rights-of-way.

At the end of the day, the assertions of transmission proponents that following their suggestions will prevent landowner opposition to transmission on new rights-of-way is a false promise. Rural landowners will continue to defend their agricultural businesses and their way of life when they are impacted by new transmission. We do not need transmission proponents to marginalize us while pretending to defend our rights.

II. LANDOWNER BILL OF RIGHTS

Some of the suggestions for improvement to the Landowner Bill of Rights made by transmission advocates are not only harmful to landowners, but also downright incorrect. For instance, the Public Interest Organizations suggest that the Landowner Bill of Rights state:

> "If the project identified in the notice provided to you is approved by the Federal Energy Regulatory Commission (Commission), your property, or part of it, may be necessary for the construction of modification of the project. If it is, the applicant will need to **take ownership** of the part of the property that is necessary for the construction or modification of the project."[2] (emphasis added)

Transmission companies do not "take ownership" of private property, except in very rare circumstances. They take an easement. The landowner retains ownership of the property and tax liability for the land in the easement, although the transmission owner acquires the right to use a portion of your land. It appears that the Public Interest Organizations do not understand the use of private property by transmission owners and therefore their suggestions for a Landowners Bill of Rights should be ignored.

Niskanen Center suggests this language for the Bill of Rights:

"By law, the applicant is required to engage in a good faith effort to engage with

[2] Joint Comments of Public Interest Organizations at 142.

> you to try to **purchase your property OR an easement across from your property** early in the process of applying for a permit granting permission to construct the project."[3] (emphasis added)

Niskanen seems to be under the same incorrect presumption as the Public Interest Groups about purchasing property for transmission. Also, it is not appropriate to suggest to landowners that transmission owners want to purchase an "easement ***across from*** your property." What is that supposed to mean? That the transmission company purchases an easement on the neighbor's property? This is incorrect and calls all Niskanen's suggestions into question.

Niskanen also suggests that the Bill of Rights limit landowner comments by informing them what topics they may comment on.[4] Landowners should be free to comment on any aspect of the transmission project that concerns them and not be limited by the Bill of Rights.

III. CODE OF CONDUCT

Both the Public Interest Organizations and Niskanen suggest that the Commission's Office of Public Participation take landowner complaints about violation of the Code of Conduct.[5] What is supposed to happen then? Does the OPP have staff, procedure, and authority to investigate these complaints and punish violators? We are not aware of any such authority; therefore this suggestion is a worthless platitude that will produce no results, except to give impacted landowners a false sense of security and a sympathetic, but ineffective, ear.

Sec. 216 requires the Commission to determine that "…the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process…"[6]. Other than suggesting a Code of Conduct, the Commission has been silent about when and how it will make this determination.

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[3] Comments of Niskanen Center at 15.
[4] *Id* at 16.
[5] Joint Comments of Public Interest Organizations at 142.
[6] 16 U.S. Code § 824p (e)(1)

When does the "applicable permitting process" begin? Does it begin when the application is filed, or when the pre-filing starts? Or must transmission owners engage in good faith from first contact, which will oftentimes be well before it brings its project to the Commission. When will the Commission make its good faith determination? Will it happen when an application is filed, or when a permit is issued? It is likely that land acquisition efforts will become more volatile after a permit is issued and the transmission owner seeks to finish the process so it may begin construction. Is good faith not required after the permit is issued? Could the Commission stop work or rescind a permit if evidence of bad faith treatment of landowners surfaces?

What are the standards the Commission will use to make its determination of good faith? How many and what kind of violations of the Code of Conduct will be allowed while still determining the company has acted in "good faith"? Is it possible that the Commission may deny a permit if it determines the company has not acted in "good faith"? The Commission must set clear standards for a "good faith" determination and hold the applicant to them. It does not ensure "good faith" to make a subjective determination without any standards and it certainly will not be legally durable on appeal.

Some commenters suggested that the Code of Conduct be mandatory. We agree. However, the Commission must set clear standards to guide its good faith determination and create an office to investigate landowner complaints that also has the authority to take strong action against violators.

IV. TIMING OF PRE-FILING PROCESS

The advocates for building new transmission have attempted to provide the justification the Commission is lacking for its change of policy regarding the timing of its pre-filing process.

For instance, Niskanen Center claims that state commissions have unnecessarily held up both the Grain Belt Express (GBE) and the Potomac-Appalachian Transmission Highline (PATH) projects.[7] This is just not true.

The Grain Belt Express project has been delayed because of its change of ownership and changing business plan. In Missouri, GBE has changed its interconnection point and amount of capacity offered, and also added a new 40-mile spur affecting new landowners. Of course its permit needs to be amended. In Illinois, state law prevented the company from using an expedited permitting process reserved for public utilities. That is why the original permit was vacated and remanded to Illinois regulators. Instead of re-applying in accordance with the law, GBE simply worked to change the law to declare it a public utility and grant it eminent domain authority in specific counties along its route. This new law is being challenged as unconstitutional and could result in another remand. But perhaps the biggest problem with GBE is that it is a merchant transmission project without sufficient customers to make the project economically viable. Even with state or federal permits, the project cannot proceed until it has enough customers to support project financing. In addition, testimony submitted in state permitting cases shows that GBE could be attempting to sell service or exclusive use shares in the project in a manner that is incompatible with the Commission's Negotiated Rate Order[8] for the project, an issue the Commission should investigate promptly in order to prevent further delays. All of GBE's delays have been caused by the company itself, not state permitting processes.

In the case of PATH, the company created its own delays by repeatedly requesting to toll the case at the state commissions because of a shifting need determination by PJM. The

[7] Comments of Niskanen Center at 5, 6.
[8] *Grain Belt Express Clean Line LLC*, 147 FERC ¶ 61,098 (2014).

project's in-service date kept slipping, year-by-year, and because PATH and PJM could not support the project's need at the state commissions, they sought to pause the permitting process at least 3 times. PATH voluntarily withdrew all its state applications when PJM finally admitted the project was not needed and removed the project from its regional transmission expansion plan. PATH's delays were not the fault of the state commissions. The fact is that PATH's numerous delays actually saved ratepayers more than $2B in project costs for a project that turned out not to be needed after all.

Far from demonstrating that state permitting processes unnecessarily delay needed projects, these examples show that nearly all delay is the fault of project owners. That will not change if the Commission permits transmission projects.

V. RESOURCE REPORTS

We support the suggestion of the Rail Electrification Council that existing resource reports, or a new report, require "…information about any relevant existing ROW and how such ROW will benefit, or could affect, the environment or other socio-economic factors."[9] The Rail Electrification Council makes compelling arguments for the Commission to encourage optimal transmission siting for the projects it permits. Sec. 216 requires a determination that "the designation maximizes existing rights-of-way."[10] Requiring this new resource report information will help the federal government meet the requirement.

VI. REQUEST FOR LISTENING SESSION

In conclusion, we ask the Commission to conduct a formal listening session with landowners who have been impacted by transmission line proposals in the past, as well as those who are currently being impacted by projects that are in the permitting stage and may soon end

[9] Comments of Rail Electrification Council at 9-12.
[10] 16 U.S. Code § 824p (a)(4)(G)(i)

up under the Commission's jurisdiction. We believe that consideration of impacted landowner concerns could be a learning experience for the Commission since it has not yet permitted an electric transmission project. A targeted listening session will allow the Commission to hear and understand landowners before crafting new rules so that it may get this process right from the start, without the distraction of other entities claiming to protect landowners that do not have any practical experience working with landowners impacted by transmission. Knowing why landowners oppose new transmission rights-of-way and how their concerns can be satisfactorily ameliorated can help shape the Commission's rules to ensure that its permitting process is successful, instead of just another flashpoint that draws protestors to the Commission's headquarters because the people understand they have been stripped of the last vestige of any fair process to defend their rights by a federal agency captured by the industry it is supposed to regulate.

Respectfully submitted June 17, 2023,

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