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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