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EDISON ELECTRIC INSTITUTE

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February 5, 2007

Mr. Daryl Francois
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Bureau of Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Mr. Mark Whitenton
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U.S. Department of Energy
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Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, NW
Washington, D.C. 20245

Submitted via e-mail to: IEED@bia.edu

Subject: Section 1813 Comments

Dear Mssrs. Francois and Whitenton:

The Edison Electric Institute (EEI) submits these comments on the Revised Draft Report prepared by the Departments of Energy and Interior (hereinafter referred to as "the Departments") pursuant to Section 1813 of the Energy Policy Act of 2005 (EPAct 2005). The revised draft report was released on December 21, 2006.

Opening Remarks

In Section 1813, Congress directed the Departments to study and report on four issues related to right-of-way fees being charged by Indian tribes for use of tribal lands for energy facilities, which the Departments rightly note include electric transmission and natural gas pipeline facilities. Congress specifically asked for information on the magnitude of the fees ("historic rates of compensation") and recommendations for fair fees going forward (in the form of "appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals").

On the one hand, EEI is pleased that the revised draft report acknowledges the potential for an impasse in negotiations for rights-of-way across tribal lands and that an external remedy may be necessary to break that impasse so as to preserve facilities that are an important part of the nation's energy infrastructure. We also believe the revised draft report has taken a step in the right direction by acknowledging that Congress has the authority to address such a problem.

On the other hand, we are very disappointed that the revised draft report fails to convey the deep sense of concern by electric utilities and natural gas pipelines that the companies can no longer rely on continued use of existing rights-of-way and the availability of new rights-of-way on tribal lands at reasonable fees. EEI provided the Departments with information showing that recent right-of-way renewals resulted in fees exceeding fair market value of the land involved by multiples of 20 to 30 or more. We also provided information that right-of-way permit terms have dropped by half, from a typical 50 year term to an average of 25 years or less. Yet that information is buried in Chapter 9 of the report.

We also are very disappointed that the revised draft report does not reflect that fair market value is the standard used for setting right-of-way fees not only in utility negotiations and eminent domain proceedings involving private land, but also by federal, state, and local governments in setting fees for use of their sovereign lands. The report treats tribal sovereignty as the beginning and end of the discussion how fees should be set, without recognizing that federal, state, and local sovereigns use fair market value as the measuring rod, and without discussing why this concept should not likewise be the basis of fees for use of tribal lands.

Finally, we are very disappointed that the revised draft report recommends retaining the status quo, whereby each utility must negotiate to renew existing rights-of-way or obtain new ones case-by-case with each tribe, at whatever rate the tribe may demand, without any standards, with the only option being to seek relief from Congress if the negotiations reach an impasse. This case-by-case approach relying on Congressional action is impractical and returns to a model that was wisely abandoned by Congress a century ago. It is an after-the-fact approach that allows current known problems to fester and manifest rather than providing a solution in advance. Further, the revised draft report appears to suggest an unrealistic and extraordinarily high threshold for when Congress should intervene in an individual right-of-way action.

EEI encourages the Departments to revise the report to reflect more prominently up-front the industry's concerns about the recent enormous increases in tribal right-of-way fees set at high multiples of fair market value, the substantial decreases in right-of-way permit durations, and the significant uncertainty that companies now face in seeking to renew existing rights-of-way and to obtain new ones from tribes. We also encourage the Departments to embrace a fair market value standard for setting the fees and to reflect that in their regulations and recommendations to Congress.

EEI Interest in the Section 1813 Study

EEI is the association of United States shareholder-owned electric utility companies and industry affiliates and associates worldwide. Our U.S. members serve 68 percent of all electric utility customers in the Nation and generate almost 60 percent of the electricity produced by U.S. generators. In providing these services, EEI members rely on a large array of generation, transmission, and distribution facilities, some of which are located on tribal lands. Many existing right-of-way grants on tribal lands will require renewal over the next decade and beyond. As a result, EEI member companies have significant interest and experience that are directly relevant to the Section 1813 study.

Over recent decades, the nation's grid system has transitioned from a slightly connected system of thousands of local service providers to a highly integrated transmission and distribution network capable of transmitting power over long distances. Therefore it is important that electric utilities and their customers be able to rely on this network, regardless of where the facilities are located, confident that the facility rights-of-way will remain available in the long-term at reasonable cost, for reasonable permit durations, and subject to reasonable conditions.

The process for renewing such rights-of-way should provide for consistency and predictability, and fees should be based on a fair, objective, measurable standard for valuing the encumbered land. Inasmuch as the electric utility industry is in the early stages of largest expansion of the nation's grid system in decades, projected to reach $31.5 billion in the years 2006-2009 alone, the uncertainty associated with the treatment of facilities located on tribal lands – particularly in the renewal context – is already having an adverse effect on the willingness of companies to cross tribal lands, even where tribes wish to host such facilities, and could accelerate the isolation of tribal lands from the nation's energy infrastructure for decades to come.

Comments on the Revised Draft Report

- **The revised draft report recognizes and should continue to recognize the serious potential for impasse on negotiating rights-of-way across tribal lands when facilities are being renewed or the siting of a new facility is geographically constrained.**

The Departments are correct in recognizing the potential for an impasse in negotiations for rights-of-way across tribal lands for transmission facilities. As repeatedly noted in EEI's oral and written comments, such impasses raises substantial concerns.

For example, when rights-of-way previously granted by tribes are being renegotiated, the owner of a transmission facility already partially located on tribal land may have few, if any, options to relocate the facility. Build-around routes may not be available, and government approval to abandon existing facilities may not be forthcoming. Further, even if such approvals are forthcoming, the process for siting alternative new facilities is complex and lengthy and requires substantial lead time and advance planning so as to avoid adverse reliability impacts and to obtain the necessary federal, state, and local approvals in time to get the facility on the ground when needed.

Similarly, when a proposed new transmission facility is needed to import power to areas where local generating assets are insufficient to meet electricity demand and the new facility cannot be completed without crossing tribal lands, utilities may have few options. Geography, terrain, and federal and state statutes and regulations may result in no viable alternative route.

Transactions under these circumstances are not arms-length "willing seller-willing buyer" relationships from which a company can walk if the demands are exorbitant, and current Department of Interior interpretations of the governing statutes and their own regulations offer no remedy.

- **The revised draft report recognizes that Congress has plenary authority over tribes and tribal sovereignty and acknowledges the potential need to balance tribal sovereignty against the "responsibility to the general American populace to provide reliable and affordable energy resources." The final report should retain these important points and should include a more robust discussion of Congress' plenary authority. The report would be improved by providing some examples where the need to balance tribal sovereignty against the American public's need for energy resources has resulted in limitations on tribal sovereignty, notwithstanding the broad assertions of sovereignty made by the tribes.**

EEI is pleased that the report recognizes that intervention may be necessary to resolve impasses and that Congress has plenary authority sufficient to do so. The report should prominently note that, in other circumstances, Congress has acted generically to provide just such relief. For example, Congress has placed limitations on tribal sovereignty to enhance the ability of both tribal and non-tribal parties to conclude business agreements in the the Indian Mineral Development Act and the Indian Gaming Act. Furthermore, as discussed in more detail in the following subsections of these comments, Congress has placed limitations on tribal sovereignty in order to strike a balance between the sovereign but dependent interests of the tribes and other important national needs in the Federal Power Act (FPA) and EPAct 2005 Title V regarding compensation that can be paid for tribal energy resources under that title's preference power provision.

In addition, as also discussed further below, the Departments should note the willingness of the federal government to negotiate a limitation on tribal sovereignty to assure reasonableness in the compensation paid by the Bonneville Power Administration for rights-of-way across tribal lands. The pursuit of these limitations clearly reflected a belief by the Department of the Interior that the authority is present under current governing statutes to effectuate a balance between respect for tribal sovereignty and the need for energy infrastructure at reasonable cost. We would like to see the Departments exercise such authority in the context of tribal right-of-way fees.

- *Federal Power Act approach*

Under the FPA, the Federal Energy Regulatory Commission (FERC or the Commission) plays an important role in determining fees for use of tribal lands by hydroelectric projects licensed by the Commission. The FPA model provides an incentive to both parties to reach agreement about the fee payment and has worked successfully for many years, with FERC rarely having to exercise its authority to resolve an impasse.

Under the FPA, Indian tribes do not have a veto over the use of tribal lands by a FERC licensed hydroelectric project when an original license is issued or at relicensing. Instead, under Section 4(e) of the FPA, federal "reservations," including tribal reservations, may be occupied by a hydroelectric project "after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created…." 16 U.S.C. § 797(e). In addition, Section 4(e) authorizes the Secretary of Interior to impose conditions on the project necessary for the "adequate protection" of tribal reservation lands used for a hydroelectric project." *Id.*

If a tribe and a licensee cannot come to an agreement regarding payments for the use of the tribe's land for a hydroelectric project, FERC has authority to fix a charge for such payments regardless of whether it has been agreed to by the Indian tribe with jurisdiction. 16 U.S.C. § 803(e); 18 C.F.R. § 11.4(a); *Montana Power Co. v. Federal Power Comm'n,* 459 F.2d 863 (D.C. Cir. 1972). If a tribe or the Department of the Interior seek to contest FERC's determination of 10(e) charges, they may do so by petitioning for judicial review of the Commission's order setting such charges. *Id*. at 874.

Moreover, FERC does not delay the issuance of a license for a hydroelectric project if no agreement has been reached between the tribe and the licensee regarding compensation for the use of tribal lands. Instead, the Commission typically issues a license that includes an article directing "the licensee to negotiate with the Tribe, and submit for Commission approval, a reasonable annual charge for the project's use of tribal lands." *Wisconsin Power & Light Co.*, 97 FERC ¶ 61,054 (2001). When this approach has not yielded an agreement, the Commission has set the annual charge issue for hearing before a FERC Administrative Law Judge. *See, e.g., Wisconsin Valley Improvement Co.,* 83 FERC ¶ 61,127 (1998).

In the vast majority of cases, a settlement is reached between the parties regarding the amount of fees for the use of tribal lands. *See, e.g., Wisconsin Power & Light Co.,* 96 FERC ¶ 62,216 (2001). This reflects the Commission's strong preference for settlements of this issue. "The Commission becomes directly involved in establishing annual charges on Indian lands only where it must, because the parties are unable to reach a reasonable accommodation." *Public Util. Dist. No. 1 of Pend Oreille County,* 77 FERC ¶ 61,146, at 61,553 (1996).

In summary, the FPA provides a workable model for the use of tribal lands for energy infrastructure that should be considered by the Departments and Congress. By not giving tribes a veto over the use of their lands for a hydroelectric project, the FPA has facilitated the development of hydroelectric generation that is a key part of the power system in many areas of the country. In addition, FERC has implemented its authority to set the fees to be paid to a tribe for the use of lands for a hydroelectric project in a manner that provides a strong incentive to both the tribe and the licensee to reach a mutually beneficial and equitable settlement. In fact, it has been many years since FERC has had to unilaterally set fees for the use of tribal lands because the parties involved, both tribes and licensees, strongly prefer to resolve these matters on their own rather than take their chances by seeking a decision from the Commission. The Departments and Congress should consider a similar approach to setting compensation for the use of tribal rights-of-way.

- *EPAct 2005 Title V example:*

In Section 503 of EPAct 2005, amending Section 2602(d) of the Energy Policy Act of 1992, Congress authorized federal agencies to give a preference to tribally-owned businesses when purchasing electricity or other energy products. However, Congress prohibited any such federal agency when purchasing such preference power from paying more than the prevailing market price or obtaining less than the prevailing market terms and conditions. Thus, despite the Departments' desire to suggest that any demand for compensation by the tribes is justified under the tribes consent authority, Congress takes a different view. Where the tribes have been given leverage in a market transaction, *e.g.*, the EPAct 2005 preference power provision, Congress has clearly embraced the principle of fair market value and has done so without regard to whether the measurable impact of any single transaction on the consumer is likely to be large or small.

EEI believes the just compensation requirement of the 1948 Indian Right-of-Way statute was intended to achieve a similar result, though such result has been read out of the statute by the Department of Interior's regulations and their application. Despite extensive comments by us and others on these compensation issues, the revised draft report continues to largely ignore that record.

- *Bonneville Power Administration example:*

The final report should also discuss the model developed by the Bonneville Power Administration (BPA) in its agreement with the Warm Springs Tribe, negotiated in 1978 and included in the case studies. In this case, the federal government clearly thought its obligations to provide reasonably priced power to its customers warranted negotiating limits on tribal consent authority and the federal government had the leverage to do so. That agreement not only allowed the BPA to obtain perpetual easements, it provided a mechanism external to both the tribes and the BPA for resolving an impasse over compensation, including final resort to the Chief Judge of the U.S. District Court for the District of Oregon. Under the Departments' current interpretation of the governing statutes, electric utilities cannot obtain either long-term or perpetual easements, there is no limitation on what the tribes can demand, and there is no neutral party to help resolve an impasse.

- **The revised draft report should include for Congressional consideration the option for Congress to address the compensation issue wholistically, especially for the renewal of existing rights-of-way and for the siting of new facilities that are geographically constrained.**

EEI does not believe that the Departments' recommendation for Congress to intervene case-by-case basis is practical. Indeed, it is an approach to granting rights-of-way that was quickly abandoned by Congress a century ago, as the revised draft report notes.

Instead, the report should be modified to reflect that Congress has plenary authority to act to establish a framework that is neutral as to the negotiating parties for resolving an impasse in compensation negotiations for rights-of-way. At a minimum, this option should be considered for: (a) the renewal of long term rights-of-way for existing energy facilities, because in such cases tribes have already consented at least once, if not multiple times, to the location of the facilities on tribal lands and the facilities now form part of the backbone of nation's grid infrastructure; and (b) the siting of new facilities where geographical constraints effectively limit options.

The 1948 General Right-of-Way Act's requires the Secretary of Interior to obtain "just compensation," a concept that has long been understood through Constitutional and legal precedent to mean "fair market value" defined through standard and accepted methodologies. This precedent alone should suffice to define "just compensation" in terms of fair market value. But if the precedent is insufficient to obtain such a result, Congress should be presented with the option to revisit the issue and to establish a framework that assures reliance on fair market value, especially in the settings just mentioned, where the parties are involved in a transaction that is not at arms-length.

- **The revised draft report erroneously concludes that Congress reaffirmed the status quo with respect to negotiating rights-of-way across tribal lands when enacting the Energy Policy Act of 2005.**

The Departmental Analysis and Findings contained in Section 2 of the revised draft report concludes that Congress reaffirmed the current framework and process for negotiating rights-of-way across tribal lands is erroneous. The very inclusion of the Section 1813 requirement for a study into compensation practices for rights-of-way across tribal lands is an indication that Congress recognized the emergence of an issue that might require redress. While Congress chose not to provide a remedy in EPAct 2005, it clearly was seeking additional information to help it decide a course of action.

Furthermore, the results of EEI's survey of its member companies clearly established the problems associated with renewing rights-of-way as an emerging issue for industry, with upwards of 90 percent of the renewals yet to come. The survey established that the industry and tribes are in transition from very lengthy right-of-way terms of years to terms that are limited to 20-25 years, with a few tribes even setting terms of 10-15 years. The survey further documented an early trend away from accepted methodologies for valuing rights-of-way – methodologies that are used not only by the federal government, but also state and municipal governments, and by the tribes when valuing land for their own acquisition – toward novel, aggressive valuation methods. The trend is highly problematic for EEI member companies when the result is payments for renewals that are significant multiples over fair market value. The Departmental analysis and conclusions erroneously suggest that the compensation issue was fully mature when EPAct 2005 was drafted and considered by Congress, and that Congress decided not to act, thereby embracing the status quo.

- **The revised draft report does not discuss the EEI survey results in its analyses of Historical Compensation paid for energy rights-of-way across tribal land, confining the discussion solely to the case studies prepared by Historical Research Associates.**

Section 4 of the revised draft report, which purports to discuss the case studies and survey processes and their results, contains no discussion of the survey results provided by EEI. From the outset, EEI explored with the Departments the best approach for obtaining the most complete information available to assist the Departments in their preparation of the study. EEI had expressed concern that at best the case studies would provide examples of how some right-of-way negotiations had been accomplished without providing the reader with any ability to evaluate whether the case studies would be at all representative or merely isolated examples. As such, the Departments' reference to these case studies as a "snapshot in time" is erroneous because they are not a snapshot in time. In fact, the Departments cannot substantiate their assertion that the case studies are representative or explain the degree to which the studies are representative.

The survey developed by EEI, however, is a snapshot in time. In developing the questions to be included in the survey, EEI consulted with the Departments and voluntarily included questions at the Departments suggestion. Given the shortness of time available for completing the survey and the general consensus that to the extent there might be an emerging problem it was likely to involve the renewal of existing right-of-way agreements – where company options are most constrained – EEI focused its survey on renewals within the past 5 years. But within this focus, we tried to be as complete as possible in identifying those recent renewals, and we queried companies among other things on the methodologies used to value the right-of-way, the length of the previous term of years and the renewed term of years, the value paid, the value paid in relation to the fair market value, and satisfaction with the process.

We also worked with DOE through Argonne National Labs to have the results of the survey independently verified, and verification of the method used to aggregate the data (an aggregation that was necessary to protect confidential business information). Because Argonne did not have time to visit each member company, we acquired source documents – or copies in some cases – for use during the verification process. EEI also reached out to all member companies that had right-of-way renewals on tribal lands in the past 5 years that had declined to participate in the survey or had participated but perhaps not provided information on every right-of-way renewed in the past 5 years. With only one member company declining to participate, EEI was quite certain that we had captured the universe of recent renewals and thought that the Departments were satisfied with our effort to do so and the verification process. While that verification process added a few more data points, the new information resulted in only a minor change in the survey results and had no effect on the story that emerged from the results.

Therefore, EEI believes the critical information emerging from the survey results should have been captured in the Section 4 discussion, along with the discussion of the case studies. Furthermore, inasmuch as the report also asserts in several places, including Section 4.5, that the status quo allows for "mutually satisfactory outcomes" and implies that any completed negotiating is a successful negotiation, EEI believes that the revised draft report needs to reflect prominently the high level of dissatisfaction expressed by survey respondents with respect to the process and the outcome of most of their right-of-way renewals.

EEI must repeat that in a renewal context, companies have a highly limited set of options and any option that involves the termination of the agreement and removal of facilities requires a long lead time to implement. Because of this and utility company obligations to assure a reliable and efficient flow of electricity to their customers, the companies often are obliged to reach an agreement, however, unsatisfactory the outcome.

The survey results also do not support the conclusion in the Departments' analysis in Section 6.2.2, which involves rights-of-way associated with oil and gas production on tribal lands. The Departments assert that negotiating with tribes is more efficient than negotiating with private landowners. But this is a subjective representation endorsed by the Departments without any apparent supporting evidence elsewhere in the study to suggest this conclusion is well founded or applies beyond the specific rights-of-way negotiated by the particular oil companies involved.

- **The revised draft report dismisses industry's concern about the unequal negotiating positions of tribes and companies in the renewal context by asserting that the companies should have protected themselves in their original grants.**

In Section 6.5.2, the Departments assert that "these contracts were entered into with the full knowledge that they were for a fixed term of years and that the company would have to enter a renewal negotiation at some time in the future." We believe this Departmental analysis reflects a wholly unrealistic view of right-of-way agreements and what was possible to obtain in previous agreements to protect a company from "extortion" in the renewal context. Companies in the past have been able to obtain – at best – a right to renew only for a second like term of years. In some cases those specified the price (e.g. "like price," "like price adjusted for inflation," or other), in some cases they did not. In some cases, those agreements were honored by the tribes on renewal, in some cases those renewal terms were not honored. In any event, at some point – because of the term of years limitation imposed by the Bureau of Indian Affairs and now picked up by the tribes, companies do face multiple renewal negotiations for facilities whose lifespan extends for decades. In recent negotiations, the most companies have been able to obtain is agreement to extend for one additional like term of years, so long as agreement can be reached regarding compensation at the time of renewal.

The Departments may assert that in that case the companies had the ability to site around the tribal lands and not locate them on tribal land to begin with. As mentioned earlier, however, companies' options are very limited in terms of existing rights-of-way. With respect to original grants of rights-of-way, where all parties knew that an artificial term of years was being imposed on a facility by BIA when the lifespan of that facility was essentially "in perpetuity," it is equally as reasonable to assume that all parties (the tribes, the energy companies, and the BIA) had an expectation upon which they could reasonably rely that these important energy infrastructure facilities would be renewed on reasonable terms during the life of those facilities. Any other interpretation is impractical and would be highly disruptive of the functioning of the nation's grid system – particularly in the Western United States.

- **The revised draft report appears to accept the tribes' justification for demanding exorbitant right-of-way fees to finance general tribal government functions.**

In Section 5, the Departments state that "unlike federal, local and state governments, tribes cannot rely primarily on taxation to provide fiscal support for these [tribal] governmental bodies and must capture the costs" through other means, including right-of-way fees. This analysis ignores information contained in EEI's last set of comments, in which we noted that in fact many EEI companies are paying taxes to the tribes in addition to the right-of-way fees.

EEI member companies have experienced four forms of taxation by tribes: a possessory interest tax based on either the depreciated value of any gas and electric facilities on tribal land or the value of the ROW encumbered by the facilities; a business activity tax; a license and use tax, and a gross receipts tax. It is not unusual for one or more of these to be levied and for the taxes to involve annual payments that can run into the several millions.

We believe the above information should be reflected in the draft report. Also, as the FAIR coalition points out in its comments on the revised draft report, we believe that before the Department can embrace right-of-ways fees as akin to a tax to support general governmental functions, an entirely different legal analysis is required and would have to be set forth in the report to Congress. EEI member companies also concur that where the municipal franchise fee model is mentioned as an appropriate means for assessing right-of-way fees, it is important to point out that municipal franchise fees are paid only by the residents of the municipality not by all who are served by the facility and who live outside the boundaries of the municipality.

The revised draft report also continues to accept the assertion that energy right-of-way management activities require high levels of staff time and tribal resources. The Departments should note in the final report that the single reference point for this observation involves facilities associated with the production of oil and gas facilities on tribal land. The record does not contain any information to suggest that high oversight costs are imposed on the tribes for transmission lines located on tribal lands, nor that the one example cited is common even as to other facilities. Neither does it recognize that companies may be paying a separate charge over and above the valuation fee to cover costs to a tribe of managing a right-of-way.

- **The revised draft report continues to dismiss as an unrealistic concern by companies that they will face "trespass damages" or face restrictions on their ability to manage a right-of-way when operating beyond the expiration date of a permit during renewal negotiations.**

EEI would like to reiterate our concern about the potential liability for "trespass" charges when protracted negotiations lead to a company operating on a right-of-way beyond the end date of a permit term. As the draft report notes, the Administrative Procedures Act and three federal court rulings take the position that if an applicant has timely filed a renewal application, the applicant is not considered to be in actual trespass.

This does not mean, however, that tribes do not attempt to assess "trespass" damages for operating beyond the term of a ROW, even though an application to renew has been timely filed and other requirements of federal law have been met. EEI is aware of specific instances where tribes are alleging trespass precisely for operating beyond the easement term despite timely filing for renewal. Some of these cases have not yet been resolved. Others where settlements were reached included additional amounts to respond to the tribes' trespass allegations. In a renewal circumstance unbounded by normal standards and processes for reaching agreements, it should not be surprising that compensation can be demanded and received regardless of whether the basis for the charge is a violation under federal law if it becomes the price of doing the deal with the sovereign entity.

Ironically, the revised draft report notes on page 38 that the tribes view "trespass" situations as "an opportunity to create opportunities for improved long-term business relationships." We believe the experience of member companies who are being asked and sometimes agree to pay "trespass damages" – despite having met the requirements of federal law to avoid being found in legal trespass – deserves to be reflected in the draft report and helps to illuminate what is really meant by an "opportunity to create opportunities."

This issue underscores the need for relief from an impasse so that renewal agreements can be completed and in place by the time an existing right-of-way agreement expires. Regardless of whether a company is in legal trespass, the expiration of the permit term together with an uncompleted negotiation only expands an already unequal bargaining position between the parties.

- **The draft report fails to clarify that the method for setting right-of-way fees universally used in other contexts is fair market value.**

Fair market value is the valuation method used by federal, state, and local governments in setting right of way fees for energy facilities, used by utilities and other businesses when negotiating with private parties, used in eminent domain proceedings to determine just compensation for takings of land, and used by tribes themselves when seeking to acquire land. In fact, Congress used fair market value in EPAct 2005 Section 367 as the standard for energy right-of-way fees on Federal lands. In Section 367, Congress required the Bureau of Land Management and U.S. Forest Service to base their right-of-way fee schedules on "the current values of land" in each zone set out in the agencies' per acres rental fee zone schedules.

- **The draft revised report continues to provide a laundry list of other, non-fair market value methodologies used by tribes to value rights-of-way, asserting that these methodologies are equally acceptable. The draft report also contains an erroneous description of the net-benefits methodology and when it has been used by FERC.**

EEI objected to the inclusion of a laundry list of non-fair market value methods and the suggestion that these methods are acceptable in the first draft, and we restate our objection now. Build-around costs and through-put valuations are <u>not</u> accepted methodologies for valuing rights-of-way. We are aware of no other circumstance in which these approaches are considered accepted methodologies for valuing land rights, particularly where a government exercising sovereign, dependent sovereign, or limited sovereign authorities under the U.S. Constitution are parties to the transaction.

Furthermore, the revised draft report includes a discussion of a net benefits approach for calculating charges for use of tribal lands that is erroneous. While the draft report makes no mention of the authority of FERC to unilaterally authorize the use of tribal lands for a hydroelectric project and establish the amount of compensation, it does include a short discussion of the "net benefits" approach that has been used by FERC in the past for calculating charges for the use of tribal lands. However, the draft report's description of net benefits is incomplete and inaccurate in a number of respects.

To begin with, the report incorrectly states that FERC has used the net benefit approach "with some consistency" in "recent years." Draft report, at 29. In fact, FERC has not prescribed a particular methodology such as the net benefits approach for calculating annual charges for the use of tribal lands. *Wisconsin Power & Light Co.*, 97 FERC ¶ 61,054 (2001). Instead, "the concern here is not with the method used so much as with the end result, which must be reasonable." *Portland Gen. Elec.*, 12 FERC ¶ 63,055, at 65,216 (1980).

One of the methodologies that has been used in the past to determine annual charges is the "net benefits" approach. The Commission has never indicated that net benefits is the preferred methodology for fixing annual charges for the use of tribal lands. Moreover, the Commission has not issued an order setting Section 10(e) annual charges based expressly on the net benefits methodology for almost 25 years. *See Portland Gen. Elec.*, 20 FERC ¶ 61,294 (1982).

Under the net benefit approach, the cost of producing power from a hydroelectric project is compared with the cost of a hypothetical alternative generation resource. The delta between project costs and the costs of an alternative generation resource is the "net benefit." Then an approach to apportioning the net benefit between the licensee and the tribal land owner must be devised. In some cases, a 50/50 split of the net benefit is used as a starting point for allocating the net benefits. However, there is no definitive approach to this issue. In addition, the net benefit must be allocated in a manner that takes into account the percentage of the land used by the Project that is comprised of Indian lands.

A fundamental flaw in the draft report's description of net benefits is the statement that "the most straightforward allocation is to determine the portion of the net benefit that accrues to Indian lands by multiplying the net benefit by the percentage of Indian land used by the project." Draft Report, at 29. Under this approach, which has never been taken by FERC and is completely counter to FERC precedent, a tribal landowner would receive 100 percent of the net benefit of a hydroelectric project located on tribal lands and the licensee's customers and shareholders would receive no benefit whatsoever from their investment and assumption of risk associated with building a hydroelectric. The final report should be revised to make clear that such an irrational and inequitable approach to setting fees for the use of tribal lands should not be applied to the use of tribal land for electric transmission and natural gas and oil pipelines.

If retained, the description in the report of FERC's net benefits methodology should be revised to be consistent with the facts and FERC practice, as just discussed.

Conclusion

In closing, EEI encourages the Departments to make the suggested changes to assure Congress is adequately informed as to the issues surrounding rights-of-way across tribal lands. The Departments can and should help to find a middle ground that accommodates tribal consent but is founded in just compensation based on fair market value. EEI plans to work with the Interstate Natural Gas Association of America and the FAIR coalition to provide a redlined copy of key sections of the revised draft report reflecting the above comments. We plan to provide the Departments with this redlined text by the end of the week.

If you have any questions about these comments, please contact either me, Meg Hunt at 202/ 508-5634, Henri Bartholomot at 202/ 508-5622, or Ed Comer at 202/ 508-5615. Thank you.

Sincerely,

David K. Owens

David K. Owens

cc: Bob Middleton
Abe Haspell
Kevin Kolevar
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