

**Statement of Meg Hunt  
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Washington, DC**

**EPAct Section 1813 Tribal Rights-Of-Way Fees Study Scoping Meeting  
Denver, Colorado  
April 18, 2006**

- The Edison Electric Institute appreciates the opportunity to make a presentation during this second meeting on the Section 1813 Tribal ROW Fees Study required by the Energy Policy Act of 2005. We learned a great deal from the scoping meeting held last month and hope that this one will also be productive.
- For those of you who were not here in March, EEI is the trade association of United States shareholder-owned electric utility companies. Our U.S. members serve 71 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 have received or are seeking right-of-way grants for transmission and distribution facilities across tribal lands. In addition, many existing grants will require renewal over the next decade and beyond.
- In March, EEI volunteered to survey its member companies in an effort to develop a useful set of information to contribute to the Section 1813 study of compensation practices for rights-of-way across tribal land. Conducting the survey has presented a few challenges:
  - The information is highly sensitive confidential business information;
  - Some of the information is subject to legal confidentiality agreements between a particular company and tribe;
  - Companies were deeply concerned about how participation in the survey would affect on-going tribal relationships; and
  - The time between the March meeting and this one was very short in terms of generating extensive data on compensation practices.

- In conducting the survey, EEI attempted to address these practicalities by avoiding questions that would present the most direct confidentiality problems, agreeing to aggregate the data so as to avoid identification of either the individual tribe or the company, and concentrating the survey questions on renewal transactions within the past 5 years.
- We concentrated on renewal transactions inasmuch as those transactions seemed to generate more concern than those involving the siting of new facilities. Companies increasingly are choosing to route facilities around tribal lands rather than submit to the uncertainties of the existing process for negotiating compensation, particularly with respect to renewals.
- We did not attempt to survey comprehensively our members on previous compensation rates. This had as much to do with the apparent sketchiness of the older data as with the shortness of the time available for conducting the initial survey. We also were not certain that the older data would be especially useful in the absence of a better understanding of the comparative value of the dollar in the year in which those transactions would have been finalized and some certainty as to the methodologies used to calculate those fees. To the extent we are aware of older data, we have found nothing to suggest that tribes were paid less than other private landowners.
- 18 companies have engaged with EEI on the tribal fee issue. The preliminary response rate on the survey was 40%. This appears to be a reflection of the sensitivity of the issues and relationships involved. It also reflects that, in a few instances of no response, the relevant renewal transactions were completed 10 to 15 years ago or are yet to occur.
- For our members, the number of ROW renewal transactions recently completed appear to pale in comparison to the number of transactions currently being negotiated or requiring renewal over the next 5, 10 and 15 years. We hope to be able to document that ratio when final survey results are in. It is already apparent, however, that with the shorter terms now being adopted by tribes for ROW grants, it is

entirely possible for a company to remain in a state of perpetual negotiation for decades to come, with all of the uncertainty and risk associated with that process.

- In general, the preliminary data from the survey suggests some broad trends:
  - Permit periods or easement durations are declining;
  - Renewal negotiations are taking longer to complete
  - The methodologies used are not those intended to calculate the value of the land being used, nor are they consistent with widely accepted practices used by the federal government or in the private sector.
  - Compensation being paid upon renewal is substantial multiples over the fair market value of comparable land (despite being only a permit or a lease for a specific term of years).
- Declining Duration: Whereas original ROW easements appeared to have been granted for 50 years, recent renewals are 30% to 70% shorter on average. 67% were for a term of 20 to 25 years.
- The nation's electricity grid is taking on the characteristics and permanence of the nation's interstate highway system or its rail network. The shorter duration for ROW grants on tribal lands runs counter to that dynamic. Railroad rights-of-way typically are in perpetuity, and ROW grants across federal lands are heading back in the direction of long duration in recognition of the nation's need to rely on the permanence of these linear facilities. In building and maintaining the nation's interstate highway system, no-one advocates that every 20 years the continued existence of a particular segment of an interstate highway should be re-debated with the possible outcome that the pavement will have to be ripped out and returned to green pastures. It should be no different for transmission infrastructure.
- Methodologies: Preliminary data from the survey suggest that methodologies for renewal transactions are departing from the traditional and widely-accepted method generally used for valuing ROWs and are not consistent with the Uniform Standards of Professional Appraisal Standards (USPAP).

- Two different methodologies were most often substituted: the “build around cost” and the “throughput cost.”
  - Under the “build around cost,” the fees charged are based on the cost for a company to build around the reservation, including the costs of land acquisition, labor, material and permitting. This approach essentially asks a utility to pay a large portion of the replacement cost of the facilities upon renewal.
  - Under the “throughput” valuation method, fees appear to be based on portion of the presumed “profit” or “revenue” derived from a line. This approach seeks to capture for the tribe some portion of business value, rather than recovering for the value of the land used for the ROW. It is my understanding that U.S. courts have tended to reject methodologies that seek to substitute business value for land value as a measure of fair compensation. We are concerned about what the impact would be on national energy markets, costs and security if every landholder along the line tried to levy such a tax on energy transport. It clearly would not be in the public interest.
- EEI and its member companies continue to believe that land values and the fair market valuation of such is the appropriate baseline for setting compensation. As a baseline, it affords a degree of certainty and predictability to the outcome of a negotiation. It also assures that tribal lands are not being undervalued in relationship to comparable lands owned by others, including state and federal governments. EEI member companies recognize the unique characteristics of tribal land and are willing to pay a premium above FMV and hope a process can be developed for determining the premium.
- Protracted Negotiations: Preliminary data from survey responses indicate that the average negotiation on a renewal takes 28 months, with a significant number taking 3 years or longer. This not only increases the level of uncertainty associated with the long term reliability of the line but adds significantly to the cost of the renewal process. More than 75% of survey respondents expressed high dissatisfaction with the renewal process, even those where the

resulting agreement was viewed to be within an acceptable range in terms of actual compensation.

- Another aspect to consider as to the uncertainties associated with the renewal process is that potential costs associated with renewal of existing rights-of-way on tribal lands must be estimated and documented by utility companies and that risk is evaluated by rating agencies and financial institutions. Without some sort of standard process or limit to the negotiated settlements, utilities face what they consider to be an unreasonable risk.
- In conducting the survey, we also became aware of several instances where companies have elected to terminate negotiations and move their facilities when no meeting of the minds on fair and reasonable compensation appeared likely between the tribe and the company.
- Compensation: Finally, preliminary data tends to show that compensation in renewal agreements always exceed the fair market value of comparable lands. If FMV is typically seen as the easement value (easement value is 50% of fee), and the approximate life of a line is 60 years, then the multiple is 10x in about 67% of the cases. We cannot provide additional detail on a preliminary basis in that we've had to ask for supplemental information to help in aggregating the data results.
- We hope our final survey results will be able to provide some data on issues related to access and facility maintenance.
- In conclusion, electric utilities are looking for reasonable fees and conditions for rights-of-way, based on objective assessments of comparable nearby land value and the nature of the use and location of the rights-of-way.
- Utilities also seek stability and certainty that right-of-way fees and conditions will not change dramatically over time and that the companies can continue to rely on existing rights-of-way to serve their customers, including the tribes and their members. These outcomes are important to maintain investor confidence in the electric utility

industry and preserve access to the capital needed for expanding the nation's electricity infrastructure.

- The industry is at a crossroad. The costs of providing electricity and assuring the reliability of the nation's grid infrastructure have escalated dramatically. These rising costs, whether for fuel to generate electricity, the installation of new pollution control technologies to address air emissions or water quality issues, or for rising labor and health care needs, have not yet been felt by the American consumer. At the same time, the industry is anticipating for the first time in decades, the need to site major new multi-state transmission lines, as well as the need to add new baseload generation. This will require new investment in the billions of dollars.
- Already, the anxiety about how these costs will be born by electricity consumers is being reflected in public debate. Public utility commissions, governors, state legislators, and electricity customers are scrutinizing these costs closely and may not be prepared to accept them, however legitimate. As a result, companies are under enormous pressure to control costs, including those associated with acquiring and maintaining rights-of-way.
- EEI hopes that this study can serve as a vehicle for reaching an agreement between the tribes, our companies, and the Departments of Interior and Energy on a framework through which tribal objectives of fair compensation and our members' need for a transparent, predictable and objective measure for compensation can be met.
- We further note that the text of Section 1813 specifically requires the report to include recommendations to Congress. We believe that this aspect of the study should not be overlooked and look forward to participating in the discussion about solutions and recommendations.
- EEI believes that it should be in the long term interests of our members, the tribes, and the federal government to work towards a resolution of concerns. We intend to work constructively towards that end.
- Thank you.

