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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 Meyer:

The Edison Electric Institute (EEI) is pleased to submit these comments on the 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 (EPA 2005). While EEI appreciates the significant amount of work that the Departments have undertaken in compiling the draft report, we are concerned that the draft report has a number of significant shortcomings that need to be corrected before the report is submitted to Congress. In the “General Observation” section of these comments, we will highlight our principal, general concerns, followed by additional comments on individual sections of the report.

EEI Interest in the Section 1813 Study

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 rely on a large array of generation, transmission, and distribution facilities, some of which are located on tribal lands. Many existing right-of-way (ROW) 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.

The provision of electricity to American homes, schools, businesses, communities, and the first responder and defense infrastructure depends on an integrated network of transmission and distribution facilities, each part of which is important to maintaining a reliable and affordable supply. 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 ROWs will remain available in the long-term at reasonable cost, for reasonable permit durations, and subject to reasonable conditions. The process for renewing such ROWs should provide for consistency and predictability and fees should be based on a fair, objective, measurable standard for valuing the encumbered land.

General Observations Regarding the Draft Report

EEI compliments the Departments on their effort to meet the reporting deadline specified by the EPOA 2005 and to do so while reaching out broadly to affected stakeholders to receive their input. We understand the challenges presented by those deadlines and appreciate the time and energy invested by Department officials in producing the draft report, soliciting our comment, and preparing the subsequent final report that ultimately will be submitted to Congress. EEI would like to make some general observations regarding the report before commenting section by section.

First, EEI is pleased that Chapter 4 of the draft report contains a broad range of options that the tribes, industry, the Executive Branch, and the Congress might consider to address process and valuation issues associated with grants, renewals, and expansions of ROWs across tribal lands. We believe identifying these options and including all of them in the final report is important for the public debate and the private dialogue surrounding this suite of issues, especially given the disagreement among the parties regarding their scope and significance, and especially with respect to permit renewals for existing infrastructure and for new ROW grants involving geographically constrained areas. EEI does not believe that it is necessary or desirable, at this time, for the Departments to express a preference with respect to any of the options.

At the same time, however, we strongly encourage the Department of the Interior (DOI) to consider revising its regulatory interpretation that uses fair market value (FMV) as a floor rather than as the standard in setting fees for ROWs across tribal lands. We also encourage DOI to promote a timely and reasonable negotiation process. Together, these steps would provide greater fairness and certainty to electric utilities, their customers, and their shareholders, as we will discuss in more detail in the remainder of these comments.

Second, in this regard, EEI is concerned that the draft report cites approvingly a broad range of valuation methodologies for ROW easements on tribal land that are not consistent with Constitutional and legal precedents that equate “just compensation” with the concept of “fair market value” and for which standard methodologies and practices are well established. It is this body of law that Congress surely must have had in mind when under the 1948 General Right-of-Way Act (1948 Act),¹ it directed the Secretary of the Interior to obtain “such compensation as the Secretary shall determine to be just” when granting, renewing, or expanding ROWs across tribal lands.

Within the confines of the data submissions received in preparing the Section 1813 study, the Departments had substantial evidence available to them – including a copy of their own Uniform Appraisal Standards for Federal Land Acquisitions and other Departmental documents – to suggest, at a minimum, that a highly skeptical approach to discussing the acceptability of alternative valuation methodologies would be appropriate. Indeed, given that tribes accept and use the FMV standard when they acquire land within their boundaries for their own public purpose, given that FMV is the standard for acquisition of allotted lands regardless of whether condemnation authority is being used, and given that FMV is the standard for the federal government when compensating tribes for any past or current acquisition of tribal lands, the final report should recognize in no uncertain terms that FMV is the recognized standard for just compensation and other methodologies are far outside the mainstream and often rejected by the courts as not legally supportable. EEI believes the FAIR Coalition comment on the draft report will include relative analysis to this point.

Third, EEI is concerned that the draft report has a tendency to mischaracterize industry’s major concern as “merely” a complaint about the “rising cost” of energy ROWs across tribal lands. While rising cost clearly is an issue of concern, we believe the record of the public meetings and written submissions has firmly established that industry is equally concerned about the present unpredictable process for negotiating rights-of-way. This process often is lacking in transparency and objectivity, and in recent years it has become divorced from standard and accepted practices for valuing ROW easements, producing an outcome that clashes with historic, contemporary and constitutional notions of the meaning of “just compensation” where valuation of land is concerned. Under the DOI’s current regulations as to valuation of tribal lands, and the Department’s application of those regulations, DOI has untethered “just compensation” from the concept of market

¹ Act of February 5, 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323-328.

value by requiring the payment of “not less than fair market value” and then offered no other framework to assist the negotiating parties to reach a just result.

Fourth, EEI is concerned that the draft report does not adequately explain the problems created by the lack of an objective, transparent, and timely negotiating process based in broadly accepted approaches to valuation when ROWs across tribal lands are acquired or renewed. The draft report does not make clear that the problems differ depending on whether the transaction involves a permit renewal for existing facilities on tribal land, whether it is a siting of new facilities on tribal land, whether it is for the siting of new facilities on tribal land for which there is no available route to bypass tribal land, or whether it is for the renewal or new siting of facilities directly related to the production of energy resources – such as oil and gas – on tribal lands.

Where new, non-geographically constrained facilities would be sited on tribal lands, either party can walk away from the transaction if the terms are not mutually acceptable. However, where the only practical or possible route for a new facility is across tribal land or where the term of an existing facility is being renewed, there is little constraint on what a tribe can demand for that renewal. It is not surprising therefore that those in industry who are providing information or views derived from one class of transactions would have a significantly different perspective from those involved in the other class of transactions. To juxtapose those viewpoints – as the report frequently does – to suggest there is no problem, or to show that the problem stems from a lack of creativity or common cultural understanding, is to ignore the problems created when sovereign governments or “dependent sovereigns” are not held to accepted notions of “just compensation,” which embodies a notion of fairness to both parties to a transaction.

Fifth, the draft report takes the position that the issues raised by EEI and its members – as well as the Interstate Natural Gas Association of America (INGAA), the FAIR Coalition, and individual companies – may have significance for individual parties but are not of “national” concern or importance. Given the special relationship between the tribes and the federal government, particularly DOI, and given Congress’ plenary authority in the area of rights-of-way across tribal lands, EEI contends the issue is a national issue because only the Executive and the Congress can provide a remedy to the current situation, created by the present interpretation and application of the 1948 Act.

Sixth, the draft report’s discussion of sovereignty, self-determination, and the right to consent is not presented with the complexity and the nuance that the subject warrants and which the submissions during the Section 1813 process would support. EEI and its member companies recognize the special status accorded to tribes and the importance of consent to tribes who are seeking to control and manage the activities that take place on trust lands. We believe that a fuller explication of the suite of sovereignty issues is essential to allow for a robust public and private dialogue that can lead to a solution that gives EEI member companies the certainty, transparency, objectivity, and predictability that their market and operational environment requires while protecting tribal sovereignty

interests. The current discussion in the draft report is expedient, but is neither informative nor helpful to a mutual resolution of an issue that by its very nature is a national issue.

Seventh, while including information on shorter permit terms for ROWs across tribal lands and, at the back of the report, information on the number of ROWs yet to be renewed, the draft report downplays the significance of the information. Evidence was provided by EEI to show that for the electric utility industry, the issues associated with ROW valuation on tribal lands are an emerging issue with upwards of 95 percent of renewals yet to happen. Furthermore, EEI provided data on the methodologies used by the tribes in recent negotiations which result in outcomes for short term permits far in excess of the market value for purchasing easements in perpetuity, together with information that permit terms are in transition from 50 year periods to shorter 20-25 year periods. When this information is integrated, it clearly suggests that we are in the early stages of a major transition in how ROWs on tribal lands are negotiated, permitted, and valued with a likely outcome that every 20 years or so companies will have to “financially rebuild” a portion of the interconnected grid intended to serve the nation for decades to come. Thus, the final report needs to make clear that we are in the early stages of an important transition. In discussing the significance of the tribal ROW fee issues and their cost and other impacts, the report must reflect the significantly disturbing trends toward very high ROW fees that are not based on FMV, the impact of which is aggravated by the trend towards much shorter ROW terms, resulting in more protracted negotiations that afford companies little recourse but to agree to demands well outside the norm for the acquisition of easements in perpetuity or for easement terms on federal land

Eighth, the draft report expresses little concern on the part of the Departments about the prospect that the uncertainty and risks associated with renewing rights-of-way on tribal lands are leading to pro-active decisions by companies to bypass tribal lands where at all possible. Indeed, the report uses this trend to argue that the concerns raised by EEI and its members are “self-limiting” because of such bypass decisions. The report does not explain how such an outcome and the report’s implicit preference for the status quo regarding the process for negotiating ROWs on tribal lands is consistent with the nation’s energy policy to facilitate the development of tribal energy resources and improve their integration into the energy infrastructure of the nation. Neither does the draft report address how such an outcome can be reconciled with DOI’s long term trust responsibilities, which presumably should balance both short term and long term needs and issues.

Ninth, the draft report does not adequately recognize the need to expand and upgrade our nation’s current transmission and distribution infrastructure, in order to deliver electricity reliably and at reasonable cost. The nation’s transmission and distribution grid is a highly integrated network, each part of which is important to ensure reliability and to avoid congestion that can impede the delivery of electricity when and where it is needed. Further, in the face of population growth, in particular in the Western United States, and

increasing electrification of our economy, the need for existing and new transmission facilities is increasing. This further highlights the importance of achieving tribal ROW fees that are reasonable and based on FMV, and fee-setting processes that are efficient, prompt, predictable, and fair.

According to the North American Electric Reliability Council's 2005 Long-Term Reliability Assessment, as of 2004 the Western Electric Coordinating Council had 58,231 circuit miles of transmission and was planning to add 4,374 circuit miles (230 kV and above) from 2005-2014. More than half of these circuit miles (2,291 miles) is planned to be added by 2009. According to EEI's own transmission investment surveys, Western and Southwestern shareholder-owned utilities spent roughly \$6.8 billion (in 2005 dollars) on transmission between 2000 and 2005 and are planning to spend another \$5.4 billion on transmission between 2006 and 2008. Beyond 2014, substantial additional transmission will likely be added as the nation's transmission system is upgraded and expanded to provide capacity for the next several generations, including the ability to access clean coal and wind generation.

Finally, EEI would like to thank the Departments, particularly the Department of Energy (DOE) and the Argonne National Lab that was tasked with the assignment, for reviewing source documents to provide independent verification of EEI's survey results and data submission, including the methodologies used by EEI to aggregate the data. Aggregating the survey data was necessary to protect confidential business information and respect the confidentiality requirements often imposed with respect to the outcome of ROW negotiations. We believe, however, that the results provide a good data set with respect to recent renewal transactions. These data are informative and can be used to detect trends and emerging patterns. This is something that could not be achieved through the general case study approach adopted by the study.

Accordingly, EEI believes that the draft report should have included all of EEI's consolidated survey results, as contained in EEI's data submission. Some of the important EEI survey information that has been excluded from the draft report is: (a) the high level of dissatisfaction expressed by EEI member companies with the process for negotiating ROWs and some of the outcomes; (b) information about the length of the negotiation processes; and (c) information on the methodologies reported as being used to value the ROWs. Such information is important to provide a complete picture of industry experience with ROW fees and negotiations. If this information was not included in the report because it was not set out in source easement documents, the information still accurately reflects industry experience. Therefore, EEI would like the information to be included in the final report.

As for the case studies the Departments have used, the report should clearly state that, except in a few instances, the non-tribal parties to the case studies were not contacted and involved in the development of the case histories by Historical Research Associates (HRA). By their very nature, case studies are intended to be complete and representative

as to the transactions chosen and the context and history of those transactions. EEI and its member companies are disappointed that non-tribal parties to these transactions were not consulted in the case studies that were selected to provide for a truly complete picture with respect to the transactions. The report must reflect this.

Further Comment on the Text of the Draft Report

Chapter 1. Introduction.

1.2. Scope of Section 1813, p. 2.

The draft report cites a tribal observation that the “case study approach can represent only a few of the thousands of energy ROW on tribal lands” and provides no discussion of why EEI and others chose to supplement the case studies with a voluntary survey – subject to subsequent independent verification. EEI agrees with the tribes as to the limitations inherent in the case study approach, but recognizing that the permitting and valuation of ROWs on tribal lands is in transition, undertook the voluntary survey to try to capture the trends and emerging issues with respect to the transition. The Departments should acknowledge in this paragraph the importance of the supplemental surveys.

1.3. Issues Raised in Scoping the Study, p. 4.

In identifying the common themes, this is one of those areas where the draft report reduces industry’s concern to one of “rising costs” rather than one of process and valuation per EEI’s earlier general observations.

1.3.1. Tribal Sovereignty, Consent, and Self-Determination, pp. 4-5.

The statement, “As an overarching issue, nearly all parties from all perspectives recognized the inherent sovereignty of Indian tribes and supported federal policies of self-determination” is a sweeping introductory statement that is too unbounded and as such is not supported by the record. There was no clear dialogue between the parties about “inherent sovereignty,” what that means, and the limitations on a tribe’s exercise of such sovereignty. Similarly, the “federal policies” of tribal self-determination were not discussed in such a way as to determine whether they were in fact supported by nearly all parties.

Rather it would be more accurate to say that all parties recognized tribal sovereignty interests, the importance of consent, and a desire to respect tribal rights of consent. But those interests are not unbounded, as evidenced by how Congress has chosen to exercise its plenary authority regarding ROWs across tribal lands and the requirements for “just compensation.” Recognition must be given to other factors, which include the nation’s energy infrastructure needs, the nearly universal use outside the tribal fee context of FMV land valuation in setting fees, the trend toward steep fees divorced from FMV for short

term ROWs on tribal lands, and the protracted, unpredictable nature of the negotiation process with tribes.

Inasmuch as this section repeats the assertion by tribal parties that tribal governments acting as sovereigns provide services but “are unable to raise revenues through taxation as other sovereigns do,” it should be noted that certainly some tribes can and do levy taxes. EEI member companies recently identified four forms of taxation they have experienced: a possessory interest tax based on either the depreciated value of any gas and electric facilities on tribal land or based on the value of the ROW encumbered by the facilities; a business activity tax; a license and use tax, and a gross receipts tax. One or more of these might be levied and can involve annual payments that run into the several millions. So while it may be true that some tribes do not levy taxes, others clearly do. Thus, the assertion that tribes can never raise revenues through other means is not accurate. Further, when a possessory interest tax is based on the value of the encumbered ROW, to the extent a tribe uses its leverage to extract compensation for short-term ROWs far in excess of what would be paid to acquire other ROW easements in perpetuity, the tax further compounds concerns about the present approach to negotiating ROW fees.

This section also contains the assertion that energy ROW management activities require high levels of staff time and tribal resources. The Departments should note in the study 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.

1.3.2. Increasing Costs of Energy ROWs, p. 5.

While EEI’s survey, as noted in this section, does document the increasing cost of ROWs across tribal land, this paragraph misstates the focus of industry’s concern as discussed in EEI’s general observations. Industry’s concern is the unjust result that can occur in ROW negotiations when there is no transparent and objective process for negotiating and when valuation standards are based on novel methodologies that exceed FMV. This is especially a problem where repetitive short term renewals are required for costly infrastructure with a long-term useful life.

EEI and other industry participants clearly expressed the view that it is possible to reconcile the notion of consent with the industry’s concern about process and valuation. The draft report, however, incorrectly suggests that industry views statutory and regulatory consent requirements as incompatible with constraining ROW costs, i.e. that to address industry’s concern about overvalued ROWs one has to abandon tribal consent. That is not EEI’s position. Rather, we believe that there is a need to develop a framework to discipline negotiations in the tribal context that approximates the kind of discipline that occurs in all other markets. In addition to an objective, transparent process

for valuing ROWs, this may require a neutral arbiter or other mechanism to assist the parties where an agreement cannot be reached.

In this regard, industry raised concerns that our options in a renewal context are limited by the costs already sunk into the facility and the practical difficulty of obtaining Federal Energy Regulatory Commission (FERC) or state public utility commission approval to abandon a line when a tribe's renewal price is believed by a company to be unjust. These circumstances serve to augment the power of a tribe to command an unjust price in the absence of a credible valuation framework.

1.3.3. Decreasing Energy ROW Terms of Years, etc., p. 6.

The first paragraph lacks clarity. It links decreasing ROW terms with longer negotiating times in a "but" formulation that makes no sense to EEI. The relevance of decreasing ROW terms has less to do with how long it takes to negotiate a renewed term than it has to do with concern about how often during the lifespan of a facility a company is going to have to "financially rebuild" that infrastructure and undertake an unpredictable process that will put a company's financial capital repeatedly at risk. Of course, longer negotiating periods increase administrative costs and are in themselves a cause for concern because they take more company staff time and resources and prolong the period of uncertainty as to new fees. But the adverse effect of these longer negotiating periods on planning is different from the adverse effect of shorter permit terms, and the two should be distinguished.

Where negotiation of a ROW renewal spans a turnover in tribal government, it can become even harder to secure the renewal in the absence of a consistently applied framework for conducting negotiations and completing valuations. Companies often feel that negotiations start anew after such turnovers. Both sides to the transaction would benefit from a consistent approach that constrains the subjective or situational perspective of individual players at any given time. As illustrated by the closing cite in this section, it is worth the final report noting that where ROW facilities involve oil and gas production on tribal lands, negotiating processes may proceed more smoothly because of the tribe's self interest in moving their product to market. A similar concern for efficiency should be applied to all ROW negotiations, to avoid wasting the limited time and resources of all parties.

1.3.4. Uncertainty in Energy ROW Negotiations, p. 6.

With respect to the tribal concern that "imposition of a standard valuation method would result in great uncertainty about a tribe's ability to exercise self-determination and to manage its energy resources," the draft report should take note of the instances in which tribes use and or accept fair market value as appropriate compensation without any claim of impairment to their exercise of self-determination. Please see comments in this regard submitted by the FAIR Coalition.

1.3.5. Investments in Infrastructure, p.7.

The draft report draws from EEI's comments to identify the ROW renewal process and valuation issues as a risk that, if perceived by financial institutions, could increase the cost of capital necessary to build new generation and transmission infrastructure. However, EEI's effort to articulate the potential for impact on infrastructure was more complex than that. The record demonstrates that for some companies and their customers, there is a strong probability of an adverse rate impact, regardless of whether that impact seems small in relation to other costs recovered in the regulated rate.

But more broadly, the record also demonstrates that in a time of rising costs of generating and delivering electricity – including fuel costs – every cost needs to be kept as reasonable as possible. In this context, having tribal ROW fees spiraling upward, divorced from traditional FMV land valuation, is both inappropriate and unsustainable.

As EEI attempted to advise the Departments and the tribes during the study process, the electric utility industry is under intense scrutiny by consumers, politicians, and regulators and is under substantial pressure to reduce cost impacts to consumers, even as operating costs have increased significantly and the need for new investment in infrastructure is increasing. Specifically, to the extent companies are allowed to recover these costs in rates, consumers bear the costs, and as rate caps are lifting in many areas of the country, consumer response is to limit the increases.

Furthermore, to the extent the companies are unable to recover land use fees or other costs in rates – for example, because a state rate commission views the fees as excessive – the costs must be borne by shareholders, who are thus equally concerned about company costs increasing. The typical electric utility individual shareholder is over the age of 65 with a length of stock ownership greater than 10 years, and 60 percent of these shareholders earn less than \$75,000 annually. Moreover, if shareholders are asked to bear significant increases in costs, through lower rates of return for example, the company's cost of capital in the financial markets may even rise, another cost that ultimately must be borne by customers.

The draft report relies on the Ute Tribe analysis of 2001-2005 SEC filings to indicate that that the financial risk issues raised by EEI are not genuine concerns since only 3 of 18 western companies in that period listed renegotiation of tribal ROWs as a material issue in annual filings. EEI is not surprised at this finding, inasmuch as fully 91 percent of the outstanding renewals for our member companies are yet to occur. EEI and its member companies have consistently identified the problems associated with renewing ROWs on tribal land as an emerging issue for our energy sector. To place the SEC filing analysis in context, the draft report needs to be clear on this point. Furthermore, it is worth noting that some companies may choose to list the ROW renewal issue as separate risk factor for purposes of SEC filings, others may chose to aggregate the potential risk under a broader

risk category such as siting and permitting. Also, in preparing their financial statements, companies present a broad array of income, expense, asset, and liability information. A company may experience many of the problems EEI has indicated in our comments to the Departments without listing tribal fees as a particular area of concern in its SEC financial statements.

1.3.6. Potential for Uncertainty Related to Trespass Situations, p. 8.

EEI would like to reiterate our concern about the potential liability for “trespass” charges when protracted negotiations lead to a company operating on a ROW 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 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.

1.3.7. Cost to Consumers, p. 8.

The most challenging area for the draft report to handle are the cost implications associated with the transition now underway with respect to ROW on tribal lands. At the beginning of a transition, it is neither unusual nor surprising that cost impacts would have not fully materialized or become apparent. By failing to clearly acknowledge the transition underway, the draft report gives undue weight to any current snapshot.

The draft report cites one tribal analysis for the proposition that customer impacts are minimal. However, that analysis was based on past data looking at the percentage of a customer’s rate attributable to transmission relative to other costs, of which fees for ROWs across tribal lands are only a subset. This approach understates the significance of unbounded tribal ROW fees and is inconsistent with the standard of “just compensation.”

As discussed above, many electric utilities are facing upward cost pressures on multiple fronts. The cost of fuels such as coal and natural gas have risen substantially in recent years for utilities just as the cost of gasoline and natural gas have risen for each of us as energy consumers. In addition, the cost of siting, operating, and maintaining generation, transmission, and distribution facilities has gone up, in particular in areas of the country

where the need for new facilities is straining available resources. Environmental permitting costs also are going up as the federal and state governments demand further reductions in emissions.

In such a setting, each and every cost needs to be kept to a reasonable level. For companies with substantial transmission and distribution facilities located on tribal lands, the tribal ROW fees may in fact be a substantial part of the company's costs in a given year. But even for other companies where the ROW fees may be a more modest part of overall costs, having the fees set without regard to FMV of the ROW involved and through an unpredictable and protracted negotiation process presents significant problems. This is especially true in situations, such as ROW renewals or when there are few options to locating on tribal land, where tribes can exercise essentially unilateral price-setting power. Unfettered tribal ROW fees, even if a "modest" portion of overall costs, put further pressure on company rates. Further, if the fees are too high, electricity rate commissions may not allow them to be recovered in whole or in part in rates.

1.3.8. Standards for Valuing Energy ROWs on Tribal Land, pp. 9-10.

This section should note that although the body of law regarding just compensation and FMV as a measure of such compensation has been developed in the context of eminent domain proceedings, these same standard methodologies and practices are widely used in the private market, in sovereign-to-sovereign transactions and in sovereign-to-private party transactions without condemnation proceedings ever being filed.

In November 2001, EEI polled members on the use of eminent domain in the acquisition of rights-of-way for new transmission lines. Based on the responses, only 2.9% of the land parcels were acquired through condemnation, i.e. eminent domain proceedings, over the preceding five years.

EEI is very disappointed that this section did not represent the industry's stated objections to some of the novel methodological approaches recently employed by tribes to value ROWs. The final report needs to reflect these industry concerns.

Chapter 2. Implications for Tribal Self-Determination and Sovereignty, pp. 11-14.

In light of information presented during the Section 1813 process, the draft report's discussion of tribal self-determination and sovereignty is surprisingly limited. The discussion centers solely on the issue of "consent" without examining other important considerations. In particular, the study does not explore the extent of or limits on sovereignty, consent, and self-determination in light of Congress' plenary authority, the responsibilities delegated to the Secretary of Interior with respect to "just compensation," the issuance of ROWs and the terms and conditions of their grant, and the Secretary's trust responsibility.

The Section 1813 record contains substantial submittals exploring the interplay between the responsibilities of Congress and the Secretary and the sovereign rights of the tribe. Certainly some of those submittals challenge the extent to which current regulations and policies reflect statutory requirements. Chapter 2 should better reflect the comments in the record on these issues and should include a fuller discussion of the limitations on tribal sovereignty and the federal government's role in granting ROWs and assessing fees for use of tribal lands. A more complete discussion of these issues will help lay a more robust foundation for a public and private dialogue about how the disagreement between the tribes and the energy sector can be resolved in away that is respectful of tribal sovereignty.

Chapter 3. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Land, pp. 15-19.

EEI was surprised by the discussion contained in this chapter. This chapter replays the sovereignty discussion from the previous chapter and discusses energy policy in only a limited way, as it relates to energy resource development on, tribal control of, and access to tribal lands. Instead, the chapter should focus on the implications of the current tribal fee-setting framework – as interpreted and applied by DOI – for the implementation of broader national energy policies.

For example, EAct 2005 Section 368 requires the identification and designation of energy corridors across federal land to facilitate future siting and permitting of transmission and oil and gas infrastructure. This was a subject of discussion during the Section 1813 meetings. A preliminary view of the Section 368 maps shows two routes for potential designation that intersect with tribal lands. In response, the Departments have said that their authority to designate corridors does not extend to tribal lands. However, the intersection of these energy corridors with tribal lands highlights the critical need to address the issues we have raised during the Section 1813 study. Unless properly addressed, these tribal fee issues have the potential to frustrate Congressional purpose in mandating designation of the Section 368 corridors. This will be especially true if the Departments do not simultaneously designate alternative routes to bypass tribal lands, as EEI has recommended.

Likewise, EAct 2005 section 1221(a), adding new Federal Power Act section (FPA) 216(a), requires DOE to study and report to Congress on transmission congestion issues every three years, and that section authorizes DOE to designate areas experiencing capacity constraints or congestion that adversely affects consumers as national interest electric transmission corridors (national corridors). To the extent that DOE pursues a project-focused approach to designating such corridors to address congestion – involving centerlines and widths – the emerging issues that have been identified in this study can complicate permitting and siting within those corridors, creating a geographically constrained area where one may have not previously existed.

In addition, Congress included a host of provisions in EAct 2005, including those mentioned in the preceding two paragraphs, to encourage the development and retention of transmission facilities, to promote reliability and to keep costs as reasonable as possible. For example, in EAct 2005 section 367, Congress codified the Bureau of Land Management's current FMV-based approach to setting ROW fees for use of classes of federal lands, rejecting more expansive notions of appropriate ROW fees. In EAct 2005 section 1221(a), adding new FPA section 216(f), Congress specifically granted FERC authority to approve ROWs in national corridors designated by DOE. In that context, Congress provided for the use of eminent domain authority to acquire rights needed to site the transmission facilities, subject to "just compensation," which Congress defined as "an amount equal to the fair market value (including applicable severance damages) of the property taken."

The Departments' final report needs to reflect these directives and to take them into account in addressing the concerns that EEI and others have raised relating to tribal ROW fees. These points should be included and discussed in Chapter 3.

Chapter 4. Issues for Stakeholder Consideration Standards and Procedures for Negotiation and Compensation for Energy ROWs on Tribal Land, pp. 20-31.

EEI appreciates the attempt in this chapter to reflect the array of input the Departments received about issues of concern to stakeholders, including EEI and other industry representatives. In particular, we appreciate recognition of key industry concerns relating to the need for an objective, FMV-based approach to setting fees, and the need for an improved negotiation process with tribes.

One of our key concerns is that fees for ROWs across tribal lands should be based on FMV of the land. The use of FMV as just compensation in setting fees for ROWs is very widespread, not only in the context of federal and state takings of property under the 5th and 14th amendments to the U.S. Constitution, but also under numerous federal and state laws including the FPA (see e.g. section 21) and EAct 2005 (see e.g. section 1221(a) adding FPA section 216(f) as already discussed). FMV also is used in setting fee schedules for use of federal lands, in particular lands managed by the Bureau of Land Management within DOI and the U.S. Forest Service within the Department of Agriculture. Even more important for this discussion is that FMV is the standard for acquisition of allotted lands, for when tribes acquire fractionated interests, in some of the tribes own eminent domain statutes, and when the U.S. compensates tribes for past and current acquisitions of land. Furthermore, as the term fair market value reflects, the concept is inherent in utility purchases of land and easements from private parties in the marketplace, often under state authority to acquire lands for ROWs backed with eminent domain authority founded on payment of FMV as just compensation.

EEI strongly encourages the Departments to add a list of these many contexts for use of FMV, to convey – as the draft report does not now succeed in doing -- that its use is

widespread. Furthermore, and in addition to EEI's earlier general observation on the opening bullet points in section 4.1 of chapter 4, on page 20 of the report, these inaccurately suggest that a large variety of methods are used to set fees, listing for example "methods used by municipalities" and "methods used for public lands." But in fact, most of the "methods" listed in the bullet points on page 20 employ FMV. The assertion contained on page 23 that "a single standard could not be appropriately used to determine compensation given the variety of energy ROWs and the variety of mineral, natural, cultural, and sensitive environmental resources under their jurisdiction" cannot be supported when a clear delineation is provided of all the circumstances when FMV is used, including when it is used and accepted by the tribes. The final report needs to reflect this, for accuracy.

EEI urges the Departments to reflect input on the Section 1813 study submitted on May 12, 2006 by the Appraisal Institute. In commenting on behalf of its more than 27,000 members, the Institute noted that "the best standard and indicator for 'fair and appropriate compensation' is 'market value.'" Given the unique posture of the Appraisal Institute in relation to all other participants in the Section 1813 study process, EEI was surprised to not see their submission referenced in the draft report.

It would also be appropriate in this chapter of the report to discuss the different property interest acquired by an easement holder on tribal lands and federal lands versus an easement in perpetuity on private lands. The Appraisal Institute comments should be helpful in this regard, including the implications for establishing FMV. Such information is relevant to understanding why tribal fees far in excess of FMV for purchases of easements in perpetuity are of such concern to industry. It also useful for evaluating the merits of the options contained in this chapter. Notwithstanding tribal assertions to the contrary, tribal lands are quite similar to federal lands. Like tribal lands, federal lands cannot be alienated without an act of Congress, they have intrinsic value and special characteristics that caused them to be set aside and protected, and activities on those lands are controlled and managed by a government with sovereign attributes. Easements for these lands are also granted in the form of a term of years. While a fee schedule using a zone concept has been established for easements across these federal lands, that schedule is based on FMV of the land encumbered, a requirement that was reaffirmed last year in Section 367 of EPLA 2005.

EEI strongly disagrees with the sense conveyed on page 24 and point (a) on page 28 that the ROW concerns EEI and other industry representatives have raised are "minor" or not widely shared. This part of the final report needs to be revised to more accurately reflect industry concerns.

EEI supports the listing in section 4.4 of a broad set of options for the parties, the Departments, and Congress to consider without choosing among the options. At this early stage, EEI does not support selection of a preferred option by the Departments.

However, EEI strongly opposes the “status quo” option (a) on page 28. We also disagree with the statement in option (a) that “current policies for granting and renewing energy ROWs are, in general working” and “[o]nly a small number of parties have had significant problems arriving at ROW agreements.” The Section 1813 record does not support such a conclusion. In fact, as demonstrated in the EEI survey mentioned in chapter 5, the majority of EEI members are highly dissatisfied with the current process, a viewpoint echoed by numerous other industry parties, except those involved in producing oil and gas on tribal land. Renewing a ROW agreement through a protracted process producing a very high fee does not constitute success, or at least unqualified success!

Similarly, we have significant concerns about option (b) on page 28. As discussed above, EEI hopes and believes that the notion of tribal sovereignty and a right of consent can co-exist with a reasonable, objective, and transparent process for negotiating the ROW fees. We would like the final report to reflect that goal. Some formulations of option (b), however, could be counterproductive to achieving this goal. EEI also notes that, under Section 1813, Congress requested recommendations for “appropriate standards and procedures for determining fair and appropriate compensation. . . .”. Neither option (a) or (b) appear to fall within the parameters of that request.

EEI encourages the Departments to add two additional options. First, the draft report should contain an option that to establish a process for negotiating and valuing ROW renewals and ROWs for geographically-constrained new siting. Geographically-constrained new siting presents distinct challenges that can and should be addressed. A robust discussion of sovereignty issues is essential to deciding how best to address this circumstance. Renewals also present specific challenges because the tribes have already consented to the location of the facilities on their land and the easement holder has relied on that consent.

Given the anticipated use in term of years for transmission facilities, EEI believes that both parties at the time of the original consent had a reasonable business expectation that the consent would extend for the duration of the facility and that the terms for renewal would be reasonable. Yet, the tribal position reflected on page 23 suggests that companies invested millions of dollars to build long term infrastructure that crossed tribal lands with the understanding that at the end of the permit period, be it 20 or 40 years, the portion across tribal lands could and would be renewed in a circumstance in which the tribes would be largely unconstrained in their demands. The draft report on page 23 needs to reflect the countervailing view expressed by EEI and other industry participants and supported by legal theories of reliance, that ROW lessees on tribal land have a reasonable business expectation that terms of years would be renewed on reasonable terms.

(2) The Departments should also include as an option a reconsideration of the Department of Interior’s regulatory interpretation of governing statutes with respect to term of years for linear energy facilities and the “not less than FMV” requirement for compensation. The Section 1813 record contains information specifically noting that the

governing statutes allow ROWs for transmission facilities and oil and gas pipeline facilities to be obtained without limitation as to term of years. EEI also suggests that when Congress directed the Secretary to obtain “just compensation,” it was not setting FMV as a floor for compensation, but that it was aware of the long-standing meaning of that term and was setting a standard of FMV. The Department of Interior could correct its regulations, without Congress taking action to require it.

Finally, beyond the preceding comments, EEI is not critiquing the individual options in detail because of the limited time to respond to the draft report. EEI does look forward to participating in any public, private or Congressional discussion of these options. Furthermore, EEI would insist on participation in such discussions and would be pleased to facilitate and expedite them.

Chapter 5. Analyses of Negotiations and Compensation Paid for Energy ROWs on Tribal Land, pp. 32-50.

EEI would appreciate a statement in the opening section of the chapter that the industry surveys discussed in section 5.5 identify trends and emerging concerns that simply are not and cannot be reflected in the case studies. Such a statement would provide a better sense of balance to this chapter.

As for the discussion in section 5.5.1 of EEI’s survey, as mentioned above in our general observations, we request the addition of missing survey results related to dissatisfaction with the negotiation process, the increasing length of the process, and fee-setting methods used by tribes in recent years.

In addition, we ask that the current second paragraph on page 46 of the draft report (starting “When information was available”) and Table 3 just following it be moved to follow current Table 4 on page 47 of the report, and Tables 3 and 4 should be renumbered accordingly. The two paragraphs currently at the end of page 46 of the report should follow the FMV discussion in Table 2 and the succeeding paragraph because those points are related and the current placement makes it more difficult for the reader to “connect the dots.”

Also, a statement should be added to the current second to last paragraph on page 46, beginning with “A fourth measure,” to clarify that the land value portion of the all-included cost is for easements in perpetuity and not temporary permits on tribal land. EEI included this clarification in our data submission and we believe it is important to enable the reader to understand the information presented.

Lastly, we encourage the Departments to add a clearer and stronger statement reflecting that DOE verified the EEI survey results and how we aggregated the survey data. During the most recent public meeting in Denver, tribal and other participants appeared to overlook the current statement.

Conclusion

In closing, EEI encourages the Departments to give a much more balanced presentation of industry concerns in the final report to Congress, including our strong desire for a change in the status quo to set fees for ROWs across tribal lands based on FMV and a straightforward, fair negotiation process. The Departments can and should help to find a middle ground that accommodates tribal consent but is founded in just compensation based on FMV. 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,

A handwritten signature in cursive script that reads "David K. Owens".

David K. Owens

cc: Bob Middleton
Abe Haspell
Kevin Kolevar
Jim Cason