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May 15, 2006

Mr. Daryl Francois  
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Bureau of Indian Affairs  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

Mr. David Meyer  
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U.S. Department of Energy  
1000 Independence Avenue, S.W.  
Washington, DC 20585

**Attention: Section 1813 ROW Study**  
Office of Indian Energy and Economic Development  
1849 C Street, N.W.  
Mail Stop 2749-MIB  
Washington, DC 20240

**Submitted by e-mail to: [IEED@bia.edu](mailto:IEED@bia.edu)**

Re: "Notice of May 15, 2006 Deadline for Submitting Information and Comments"  
Relating to Energy Policy Act of 2005 Section 1813 Study of Energy Rights-of-  
Way on Tribal Lands, 71 Fed. Reg. 26483 (May 5, 2006)

Dear Mssrs. Francois and Meyer:

The Edison Electric Institute (EEI) is pleased to submit the following data and comments in response to the request of the U.S. Department of Energy (DOE) and the Bureau of Indian Affairs (BIA) for data in the preparation of a study into compensation practices for rights-of-way across tribal lands, which is required under Section 1813 of the Energy Policy Act of 2005.

**EEI's 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. Thus, a number of EEI members already have received or are seeking right-of-way grants for transmission and distribution facilities across tribal lands. In addition, many existing right-of-way grants will require renewal over the next decade and beyond. As a result, EEI member companies have significant experience that is directly relevant to the Section 1813 study.

EEI recognizes and appreciates the unique sovereignty interests that tribes have in managing their lands. We also recognize and appreciate the positive contribution to the nation's energy infrastructure that the tribes have made in the past by allowing transmission and distribution rights-of-way on tribal lands.

In fact, electricity is a vital service to homes, schools, businesses, and communities throughout the nation. Electricity is essential for such day-to-day activities as street lights, traffic signals, hospitals, heating, cooling, cooking, reading lights, and computers. Furthermore, transmission and distribution facilities form an integrated network, each part of which is important to maintaining a reliable, affordable supply of electricity. Unlike most other commodities, electricity generally cannot be stored but must be produced as it is needed, and each part of the grid is necessary to keep the system up and running.

For these reasons, it is important that electric utilities and their customers be able to rely on the transmission and distribution facilities that are located on tribal lands, confident that the rights-of-way for such facilities 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 an objective, measurable standard for valuing the encumbered land.

In this regard, the current process for obtaining and renewing rights-of-way on tribal lands raises a number of concerns. As we will discuss in more detail in the next section of these comments, the current right-of-way negotiation process typically takes years, even for renewal of existing rights-of-way, and is rife with uncertainty. In addition, companies are faced with very large increases in fees for rights-of-way on tribal lands, out of keeping with the fair market value of the lands. Also, the durations of the rights-of-way are getting shorter over time, despite the long-term nature of the electricity and other energy facilities located on the rights-of-way.

EEI hopes that the Departments' study will fully reflect the issues and concerns that EEI, our members, and other industry stakeholders have raised at the public meetings and in written comments and statements. We also hope that the study will include recommendations that will enable the Departments, Indian tribes, energy industry, and

others to make improvements in the current process for obtaining and renewing rights-of-way

### EEI Survey

As a result of the pre-scoping conference calls for the Section 1813 study and the scoping meeting conducted by DOE and BIA in March 2006, EEI undertook a survey of its member companies to develop a useful set of information to contribute to the study. EEI chose this approach over a case study approach as a means of providing a more comprehensive and objective picture of compensation practices and prices than can be achieved through voluntarily submitted anecdotes, regardless of how detailed a specific case study might be. EEI also chose this approach because of the highly sensitive nature of the business information being sought by DOE and BIA, and the serious potential for data and case study disclosures to compromise existing and future negotiations by member companies for the renewal of many existing rights-of-way across tribal land.

### Survey Methodology:

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.

EEI first surveyed its member base to ascertain which companies had concerns or an interest in the issue of fees for rights-of-way (ROW) on tribal lands. Twenty companies throughout the United States identified themselves as possessing rights-of-way across Indian land, which included both tribal lands and allotted lands. Three-quarters of those have rights-of-way across tribal lands. This subset of companies was provided with the survey and asked to respond for each renewal transaction within the past 5 years. Slightly more than half (53%) of those had renewal transactions within the past 5 years and over 70% have expiring rights-of-way that will require renewal sometime in the next 15 years. Nearly 88% of those with recent renewals responded by completing the survey.

The survey requested information regarding the costs, terms, and conditions of any renewals of ROW on tribal reservation lands during the past five years, including information about the appraised value of the lands, comparative data on the ROW that immediately preceded the renewal, and the methodology used for determining the renewal cost. We focused on renewals because in the March 2006 scoping meeting, renewals emerged as the primary issue of concern. A subsequent request was sent out to the companies to determine the number of ROW renewals that are expected in the next fifteen years.

Returns were received for nineteen renewal transactions, including some in which the renewal of multiple rights-of-way expiring at slightly different times were consolidated into a single transaction. In some cases, where land appraisals had not been conducted or fifty-year old price and appraisal data on the preceding ROW were difficult to determine, a complete response to every question in the survey was not feasible in the time frame available to complete the survey.

Overview of Survey Results:

In general, the data from the survey strongly support the following conclusions with respect to renewal transactions for rights-of-way across tribal land:

- Permit periods or easement durations are declining.
- Renewal negotiations often take an unreasonably long time to complete.
- In most cases, the methodologies used to set fees are not those intended to calculate the economic 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.

In addition, EEI members noted that the uncertainties associated with renewal of existing rights-of-way across tribal land are increasingly leading companies not to site new transmission and distribution facilities on tribal lands if possible. In some instances, this policy decision has been made the standard approach to siting, and some companies have explored or are beginning to explore the option of rerouting existing facilities upon expiration of a ROW permit.

Protracted Negotiations:

The survey results reveal a pattern of unnecessarily lengthy negotiation periods for renewal transactions. On average, the contract negotiations for the completed ROW renewals took more than two years (26 months) to complete, and the median<sup>1</sup> negotiation period was 14 months. In fact, over 80% of the negotiations took at least a year to complete and 40% took two years or longer. In addition, some ongoing negotiations have persisted for many years.

Length of Negotiation Period				
	Response Rate (#)	Average	Median	Range
Renewed ROW	19	26 months	14 months	6-102 months

<sup>1</sup> The *median* of a set of data observations is the number that is in the middle of the observations; half of the data is less than that value and half is more than that data. The median, along with the average (or mean) and range are common descriptive statistics in data analyses.

In follow-on discussions with member companies, there appear to be two primary reasons for the extended length of renewal negotiations. The first is the frequent turnover in tribal governorship and in the membership of the tribal councils who have to approve the contracts. Many tribal councils have two-year election cycles (some have annual election cycles). If a midstream change in council membership changes the philosophical or business approach of the council to the presence of transmission and distribution facilities, including its perspective on fair compensation, the negotiations may stall or have to begin from a new starting point.

The second reason cited for the length of time it takes to negotiate a renewal is delays in getting land appraisals conducted and/or approved by the BIA. Indeed, it appears that in a number of instances, appraisals are never conducted by BIA, the tribe, or the company, either because the appraisals are explicitly waived or because the opening asking price of the tribe for the renewal is so far in excess of what would be expected in an appraisal that conducting an appraisal to ascertain the value of the land is considered a waste of financial resources and time. Also, where the spread between the asking price and the proffered price is substantial, a longer period of negotiation may be necessary to reach a meeting of the minds, if a meeting of the minds is possible.

Lengthy negotiation periods add to the internal administrative costs of both the utilities and the tribes and add to the uncertainty which utilities must consider in their investment and planning processes. Another aspect to consider is that the potential costs and risks associated with renewal of existing rights-of-way on tribal lands must be estimated and documented by utility companies. Those costs and risks are evaluated by rating agencies and financial institutions. Without some sort of standard process or limit to the negotiated settlements, utilities face additional risks before these rating agencies and financial institutions, adversely affecting the cost and availability of capital.

Finally, and of great concern to EEI and its members, is that renewal delays can place a company in the position of having to operate under a permit beyond the end of its term, even when the renewal process was commenced well in advance of that date. Under the Administrative Procedures Act as interpreted by three federal courts, companies are not legally considered in trespass so long as the application for renewal before the right-of-way grant expires.<sup>2</sup> Nonetheless, some tribes will seek to recover "daily trespass penalties" or some equivalent as part of the final compensation package. The amount sought can add hundreds of thousands, or even millions, of dollars of additional costs to the utility and its customers. When negotiations extend beyond the expiration date of a right-of-way grant, companies are concerned that their access to facilities to conduct line and other facility maintenance could even be curtailed or blocked.

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<sup>2</sup> See 5 U.S.C. §§ 551(8) and 558(c), as interpreted by *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n*, 627 F.2d 499, 506 (D.C. Cir. 1980), *Miami MDS Co. v. FCC*, 14 F.3d 658, 659-60 (D.C. Cir. 1994), and *Natural Resources Defense Council, Inc., v. United States Environmental Protection Agency*, 859 F.2d 156, 213 (D.C. Cir. 1988).

Shorter permit or easement periods:

The survey results reveal a pattern of markedly shorter durations for right-of-way grants upon renewal. The average term of years of previous rights-of-way, most of which were established in the 1950s, was 42 years and the median term was 50 years. In contrast, the average term of the renewals has declined 36% to 27 years and the median term has declined 54% to 23 years.

Term of Length of Right-Of-Way Agreements				
	Response Rate (#)	Average	Median	Range
Previous ROW	19	42 years	50 years	20 – 50 years
Renewed ROW	19	27 years	23 years	10 – 50 years

The effect of these shorter periods is to add additional costs and additional cost uncertainty in two important respects. First, utilities will have to return to the tribes to negotiate new right-of-way renewals much sooner than has historically been the practice. Not only does this add to the utilities' administrative and legal costs, it also makes long-term planning for the distribution and transmission systems more difficult because utilities have less assurance that they will have continued access to the right-of-way. In turn, this raises concerns about the ability of utilities to rely on transmission and distribution facilities on tribal lands as part of a reliable electricity grid.

Second, the rights-of-way are now significantly shorter than the expected usable lifetime of the transmission or gas pipeline facilities, and utilities face the prospect of having to pay for renewed rights-of-way many times over the life of their facilities. In fact, as discussed in the next section of these comments, companies are being asked to pay fees for limited duration ROW on tribal lands higher than the cost to own such ROW in fee simple on comparable federal, state, and private lands. The result is a perception that the tribes do not really want a long term relationship with the energy industry.

Sharply Increased Fees:

The survey results reveal a pattern of inflated costs for rights-of-way across tribal lands. EEI's analysis and assessment of the costs of the ROW is focused primarily on the multiple of the ROW price to the fair market value of the easements. This measure provides a strong indicator of whether or not the settled prices are in line with the economic (i.e. competitive) value of the land, and whether the seller (in this case, the tribe) is exercising its market power to the disadvantage of the utility and its customers.

Analysis of the survey results shows that multiples<sup>3</sup> of fair market value (FMV) range from 2 to 1625, with an average value of 120 times FMV and a median value of 16. In fact, the price of the ROW is at least four times as high as the FMV in all but two of the eighteen observations. Dropping the highest value (1625) from the sample as an outlier<sup>4</sup> reduced the upper end of the range to 143 times FMV, reduced the average of the FMV multiples to 31, and had no effect on the median value.

Renewal Fees as a Multiple of Fair Market Value				
	Response Rate (#)	Average	Median	Range
All ROW	18	120	16	2 – 1,625
Without outlier	17	31	16	2 -143

These multiples are high. Utilities are paying between 2 and 4 times the market value in four cases, 5-10 times the market value in three cases, 11-25 times the market value in six cases, and between 65 times and 1,625 times the market value in the remaining five cases.

<sup>3</sup> The multiple of ROW price to fair market value is defined simply as the ratio of the ROW price to the fair market value of the easement. Calculation of this ratio for some observations was complicated by two factors, the term of the renewal, and whether the fair market value was measured as fee-simple or easement. Adjustments were made to normalize the estimates for these factors across the available observations.

First, the term of ROWs ranged from 10 year renewals to 50 year renewals. Since utility assets have very long lives, the ROW prices were adjusted to reflect a usable life of 50 years. For example, if a renewal for 25 years was priced at \$2,000,000, this price would be normalized to \$4,000,000 for 50 years. Transmission and distribution facilities typically have a usable life that far exceeds 50 years. But 50 years was chosen for these calculations because this is a maximum ROW duration used for some facilities under the BIA regulations at 25 C.F.R. Part 169, though electric transmission and distribution and other facilities can qualify for indefinite duration under 25 C.F.R. § 169.18. This adjustment is biased to the low side if we assume that ROW prices will continue to escalate in the future.

Second, the fair market appraisal of the land value was estimated on a fee simple basis in some cases and on an easement basis in other cases. Fee simple is essentially the fair market value of the land if the utility were to buy the land outright and hold it in perpetuity. But in the context of ROW across tribal lands, the land is not being purchased; the utility is only “renting” an easement across it, so fee-simple appraisals overstate the economic value of the land easement and are useful only as indicators of the upper bound of value to the landowner. In order to correct for this, appraisals that were presented as fee-simple were discounted by fifty percent to the easement value, a discount typically applied by real estate professionals for such easements. Even if the fee-simple appraisal values are not discounted, the FMV multiples are very high. In the case where we do not discount the fee-simple to easement, the average and mean FMV multiples were 61 and 8, respectively, for the entire data set and 16 and 8, respectively, after adjusting for outliers.

<sup>4</sup> This value, 1625, was dropped as an outlier. However, we do not believe that it is a statistically spurious observation as one tribe was able to extract that much payment from the utility due to its control over the situation.

By comparison, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) are generally concerned about the possibility of market power when a seller might be able to maintain a “small but significant and non-transitory” increase in the price above competitive market levels.<sup>5</sup> Clearly, the prices that utilities have had to pay for ROW renewals on tribal reservations are at levels that the agencies, courts, and regulators would consider as raising serious market power concerns on other lands. In fact, utilities face numerous constraints on moving facilities located on existing ROW, including in many cases regulatory approvals for removal as well as construction of replacement facilities. This makes the potential for a company to be affected by the exercise of market power a very real concern.

EEI also has considered two other measures related to compensation, which we will present in the following paragraphs: (1) the multiple of renewal ROW prices to prior prices, and (2) the unit price per mile on tribal lands in contrast to that on comparable non-tribal lands. These analyses starkly demonstrate the severity of the inflation in ROW renewal prices. However, they may be less informative on a statistical basis than the multiple over fair market value, for reasons we will discuss.

As to the first measure of compensation, based on the survey results, EEI estimates that on average ROW renewal fees are nearly 870 times as high as the previous prices paid, and the median value of this multiple is 227. In percentage terms, the average and median escalations of ROW fees are approximately 86,900% and 22,600%, respectively. In contrast, prices for all other goods in the economy are only about seven times as high today as they were in the 1950s, a 600% escalation.

Renewal Costs as Multiple of Previous ROW Costs				
	Response Rate (#)	Average	Median	Range
All ROW	11	870	227	9 – 3,812

These comparisons of renewal fees to previous fees are based on fewer data points than our comparison of renewal fees to fair market value. Furthermore, the older data are not especially informative 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 today, as well as the methodologies used to calculate the earlier fees. Given the short time for the survey and the sketchiness of older data, the EEI survey could not develop any comprehensive data set on these points.

However, to the extent EEI and its member companies are aware of older data, we have found nothing to suggest that tribes were paid less for use of their land than other private landowners. In fact, we have anecdotal information that at least some companies paid the

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<sup>5</sup> See sections 0.1 and 1.21 of Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Revised April 8, 1997.

tribes more. Moreover, EEI is aware of anecdotal information where the construction of substantial tribal energy infrastructure was provided as part of some compensation packages, the value of which is not included in the dollar amount paid for the previous term of years for the right-of-way.

As to the second measure of compensation, the per-mile ROW fees are surprisingly large. On an unadjusted basis (that is, using the raw data), the per-mile fees ranged from about \$27,000 per mile to over \$7,000,000 per mile, with an average value of \$969,000 and a median value of \$141,000. After removing the two lowest and two highest values, these costs are clustered in a range from \$50,000 to \$200,000 per mile, typically for rural land where such values are considered extremely high.

Furthermore, as explained above, the ROW renewals span a variety of contract terms, ranging from 10 years to 50 years. Normalization of the renewal costs across a 50-year term increases the effective costs per mile for the rights-of-way. With this normalization, the per-mile fees ranged from about \$27,000 per mile to over \$10,000,000 per mile, for an average value of \$1,700,000 and a median value of \$280,000. After removing the two lowest and two highest values, these costs are clustered in a range from \$100,000 to \$500,000 per mile.

Traditionally, the “all-inclusive” cost of high-voltage overhead transmission facilities, including ROW costs and construction costs, has ranged from about \$500,000 to \$1,000,000 per mile for rural and suburban lands, respectively, while lower voltage transmission and distribution lines have been in the hundreds of thousands of dollars per mile. These recently negotiated tribal land ROW agreements are clearly resulting in costs for *land rights alone* only that rival the utilities’ typical *total* cost for construction and land rights for new transmission and/or distribution lines. EEI is also aware of some instances where tribes have drawn no distinction between transmission and distribution facilities for purposes of charging renewal fees.

Renewal Costs on a \$ per Mile Basis				
	Response Rate (#)	Average	Median	Range
Unadjusted	12	\$970,000	\$141,000	\$26,000 - \$7,000,000
Normalized	12	\$1,700,000	\$280,000	\$26,000 - \$10,000,000

Comparisons of per-mile prices are complicated by differences in the underlying economic value of land in different areas of the country. It would reasonably be expected that the ROW price per mile would be higher in areas where land values are inherently higher. But because we do not have a very large data sample with which to work, it is more difficult to discern how much of the comparative differences in the price per mile derive from exercises of market power, subtle differences in appraisers’ methodologies, or differences in true economic valuation between, say, urban areas and suburban areas or

between arable land and desert. Nonetheless, the magnitude of the per mile fees is troublingly high.

Valuation Methodologies:

Most of the ROW renewals were based on economically flawed valuation methodologies, which were not consistent with the widely accepted practices used by the federal government and the private sector.

More than half of the renewals resulted from methodologies that are not based on land value. In five, the tribal negotiators wanted fees based on the utility's cost of "building around" the reservation. In two, the tribal negotiators used a methodology that attempted to capture the "throughput" value of the ROW. In three, the tribal negotiators sought fees that were based on the prices observed in other recent ROW renewals. And in one, the tribe simply stated its desired price per rod with no accompanying analysis or justification of the value. These methods lack merit and are not based on sound economic or competitive principles.

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.

Some tribes have characterized the "build-around" methodology as an "opportunity cost" method of valuing their land. But in fact it is not. The concept of opportunity cost has merit in financial theory when a party is valuing and comparing alternative investments *which he or she might make*: a land owner might compare the revenue expected from a right-of-way easement and the revenue that could be expected if that land were put to a different use, and the difference between the two would be the opportunity cost. But, as we understand the situation, some tribes or their advisors have turned this financial concept around and are seeking from the utilities' the difference between a fair market cost of the right-of-way easement and the full cost of rebuilding the utility facilities elsewhere. In doing so, the tribes are not comparing their potential profits from a ROW with their potential profits from alternative use of the land, which is the true notion of opportunity cost.

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. U.S. courts have tended to reject methodologies that seek to substitute business value for land value as a measure of fair compensation.

Furthermore, "throughput" methodologies are inconsistent with the supporting role of transmission and distribution facilities and with the manner in which utilities and their

regulators establish prices for these services. Utilities charge regulated rates for transmission and distribution services based on the cost of construction and maintenance of the transmission and distribution system, with an allowed rate of return, apportioned among customers based on overall use of the system. Those prices do not vary with the underlying value or cost of the electricity conveyed by those lines. Furthermore, there is no firm guarantee that a utility can “pass through” extra ROW costs that exceed levels that regulators believe are prudent. This is true whether a utility is vertically integrated or a stand-alone “wires” company, and whether it is operating in a traditionally regulated or restructured market area.

As to the third methodology that surfaced in EEI’s survey results, prices based on precedent are not necessarily suitable proxies for subsequent ROW negotiations. First, the circumstances of each ROW are different – so a price based on conditions in one location may have little relevance to the appropriate price in another location. Second, and much more important, the prices arrived at in other ROW settlements should not be used as proxies or regarded as representing competitive market prices when there is doubt about whether those precedents themselves arose from a competitive process. Put another way, our analysis of the pricing policies for ROW renewals during the past several years shows clear evidence of market power. To accept a price from a previous renewal would simply perpetuate this problem.

Finally, seven of the renewals were based, to some extent, on the appraised value of the land, with two of the seven negotiated as “appraisal plus a premium” deals. While the “appraised value” approach generally resulted in ROW fees that were still a multiple of the fair market value, they resulted in ROW renewal prices and terms that were less extreme than the other cases. The FMV multiples were lower, and the renewal ROW durations were not usually reduced.

#### ROW Fees are an Emerging Issue:

The renewal cases are an early warning of an emerging national problem for utilities and tribes. EEI member companies provided 19 renewal cases to us in response to our survey. As explained above, these comprise about 90% of the renewals of which we are aware. However, these same companies anticipate seeking renewals across tribal reservations for 250 to 300 renewals over the next fifteen years. This expected surge, coupled with the experience to date with rapidly escalating ROW prices, portends two developments: (1) significant rate impacts on electric consumers, and (2) reduced willingness by utilities to locate facilities on tribal lands.

First, utility costs will rise if the escalation in ROW fees goes unchecked, and the increases could be significant. Absolute cost increases could be in the billions of dollars and add several percentage points to existing total costs. Furthermore, such cost increases will add to upward pressure on utility rates, at a time when many states are lifting caps that have been in place for a number of years and fuel and construction prices

are increasing, making it especially hard for consumers to face additional large increases in fees.

At the public meeting held in Denver by DOE and the Department of the Interior (DOI) on April 18-20, 2006, some parties averred that the costs of ROW across tribal reservations were a very small percentage of utilities' retail prices and that the consumers would experience only a small increase in their utility bills. However, there was no substantiation or basis provided for those cost estimates. Nor were they accompanied by analysis of how much cost would be added once all the current and upcoming renewals were completed.

In fact, the data EEI has reviewed show that renewals have added tens of millions of dollars of costs to utilities and their customers. This is just the tip of the iceberg. Renegotiation of the remaining 250 to 300 ROW renewals coming due in the next fifteen years across tribal reservations could easily add more than \$1 billion in above-market costs, and if these increases are concentrated on a small number of utilities, there will be noticeable impacts on consumers' rates. Furthermore, if this high escalation in prices continues unchecked and sets a precedent for ROW on non-reservation lands, total tribal ROW cost increases could be in the tens of billions of dollars and adversely affect utilities and their customers on a nationwide basis.

A simple example, based on the statistics casually mentioned at the April meeting sponsored by DOE and DOI, further illustrates this problem. During presentations by tribal representatives, it was posited that transmission costs are 10% of a utility's costs, that total ROW accounts for 3.4% of transmission costs, and that tribal lands account for 5% of the total ROW costs. Even assuming that these numbers are roughly correct, the recent escalation in tribal ROW costs can have a tangible and substantial impact on consumer prices. If tribal ROW costs increase by a factor of 227 (the median escalation shown in the EEI survey data as discussed above), total costs for electricity will rise by nearly 4 percent just as a result of the tribal fee increase. Furthermore, if tribal ROW costs rise by a factor of 870 (the average escalation shown above), total costs will rise by nearly 15%, again just as a result of the tribal fee increase. These are substantial increases, and they do not even begin to address the staggering results that would occur if the rapid escalation in tribal ROW were to spread to non-reservation lands.

Additionally, the uncertainties associated with short term agreements and more frequent renewal negotiations, together with ever escalating charges for rights-of-way, will be viewed by financial institutions and ratings agencies as a risk, especially when divorced from accepted methodologies and processes that prevent the "seller" from capturing the entire public benefit of a project to him or herself. In turn, this new risk can adversely affect the cost of the capital needed to build new generation and transmission infrastructure, putting further upward pressure on electricity rates.

Second, as a result of the uncertainty relating to ROW renewals and fees, utilities are increasingly opting to avoid building infrastructure on tribal lands and to reevaluate – where possible – their reliance on infrastructure presently located on tribal lands. Across the country, the utility industry as a whole is poised at the start of a major expansion and upgrade of transmission and distribution infrastructure to enhance its reliability and satisfy increased demand for energy. The ROW cost increases experienced to date and the high number of upcoming ROW renewals have prompted many utilities to review their planning and siting plans as they prepare to meet their customers' energy needs for the next several decades. Further, utilities are beginning to consider alternatives to retaining existing facilities on tribal lands. In conducting the survey, EEI also became aware of several instances where companies elected to terminate negotiations and move their facilities off of tribal lands when no meeting of the minds on fair and reasonable compensation appeared likely between the tribe and the company.

A very unfortunate side effect of this is that ROW revenues to tribes could decrease over the long run and economic development opportunities could be more limited for the majority of tribes whose tribal lands do not straddle major infrastructure choke points and who may wish to host right-of-way facilities on their land. Neither EEI nor its member companies believe that this result would be good for the tribes or the energy industry, but such an outcome may be inevitable as companies seek to control their risks and reduce the uncertainties associated with their transmission infrastructure. Given the U.S. government's trust relationship with the tribes as to tribal lands, we would hope that DOE and DOI would be concerned about this possible development.

Today, the industry is at a crossroads. The costs of providing electricity and assuring the reliability of the nations' grid infrastructure have escalated dramatically. These rising costs, whether for fuel to generate electricity, for the installation of new air and water pollution control technologies, 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 of new investment. Already, the public debate has begun about how these costs will be born by electricity consumers. 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. Regulators, financiers, and shareholders expect companies to control and reduce their risks.

### **Additional Comments**

EEI and its member companies recognize tribal sovereignty, including their desire to consent to the location of facilities on tribal land. The issue is inevitably more complicated when the nation has come to rely on critical infrastructure located on tribal

land and that infrastructure is subject to renewal periodically. In this circumstance, EEI hopes that the tribes in exercising their right to consent will recognize the need to reach a bargain that is acceptable to both parties to the transaction and that the current process for negotiating rights-of-way – in particular renewals, where the tribes exercise considerable market power – is imposing an unacceptable level of uncertainty and risk on many companies.

At the same time, EEI and its member companies acknowledge the extraordinary proud history of the tribal nations and the difficult circumstances that have confronted these nations today and in the past, as they have sought to establish and maintain an economically viable foundation for preserving their culture and its traditions. That struggle continues today. Awareness and sympathy for that difficult history does not mean, however, that companies should be asked to redress that history. It is worth noting again, that although tribes believe that they were historically underpaid for their rights-of-way, neither EEI nor its member companies have become aware of any data to suggest that tribes were underpaid relative to other landowners at the time or perhaps even relative to the tribes' own perceived value of the land at that time, given that the tribes did agree to the previous ROW fees.

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.

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 also believes that this widely accepted methodology is able to account for the unique characteristics of tribal land and value it.

Rights-of-way for energy delivery systems are in the public interest. The delivery of goods and products, whether for matters of commerce or for matters of public interest, depend often on the ability of the economic agent to legally convey those goods and products across lands that do not belong to him. This is the importance of a right-of-way. Without these rights-of-way, commerce and the economy would be stifled, and goods and products critical to the well-being, health, and security of the nation (and the tribes) could go undelivered.

U.S. law and regulations in the non-tribal context allows for the establishment of rights-of-way, assuring fair treatment of land owners' rights and protection against the exercise of market power. The core of economic and legal policy toward rights-of-way can be found in Amendment 5 of the U.S. Constitution: "nor shall private property be taken for public use, without just compensation." To the extent that an entity, such as a utility, is granted the right of eminent domain and can, under appropriate circumstances, exercise that right to condemn private properties to create a right-of-way, it must also provide just compensation to the land owners. In practice, just compensation has come to be equated with measures of fair market value (also known as fair value or market value), and these valuations have also provided the basis for assessing property easements for right-of-ways. The USPAP "Yellow Book" methodologies have become the standard for these valuations and have been widely accepted by the U.S. Court system.

Neither EEI nor its member companies is seeking authority to condemn tribal land for use as rights-of-way. That does not mean that the methodologies developed under the discipline of the courts to assure a fair valuation of land assets to a willing seller and willing buyer are inappropriate for use in valuing tribal lands, particularly as a baseline for assuring tribal land is not undervalued relative to other lands.

U.S. laws and regulations also protect buyers and consumers from sellers' abuses of economic market power. Issues of market power are familiar to federal and state governments, as well as market participants. Under various circumstances – for example, when a merger is proposed, when a group of companies is suspected of colluding, or when a Federal Energy Regulatory Commission (FERC)-regulated company seeks market-based rate authorization – there are prescribed analytical and investigative procedures that must be followed based on U.S. law, state law, and the regulatory authorities of government agencies like FERC, DOJ, and the FTC (e.g., the Sherman Act, Hart-Scott-Rodino, and Appendix A of the DOJ and FTC merger review guidelines).

These agencies have authority to withhold approval for mergers, contracts, or market-based rate authorizations, to condition a company's behavior or corporate structure, to require corrective action, or even to prosecute for anticompetitive behavior. These authorities are all based on analytical determinations of whether the prices charged, or which could be charged, for products and goods are much higher than would be expected in competitive markets. Similarly, the right or ability of a company, such as a utility, to exercise eminent domain serves a purpose of mitigating against exorbitant demands from a landowner who desires to capture the public benefit of project to him or herself.

But many of these protections against market power may not exist in the context of rights-of-way across tribal trust lands. Because of tribal sovereignty, there is a significant concern that the tribes may not be fully covered by the antitrust laws and FERC, DOJ, and FTC regulations. Also, the sovereign rights of the tribal nations may make the application of these laws, like eminent domain, less suitable to resolve market power issues arising in the context of acquiring and renewing rights-of-way.

Nevertheless, EEI and its member companies believe that a solution is essential. That solution should be consistent with tribal sovereignty, the needs of the United States for a robust, reliable, and stable electric grid infrastructure, and the companies' needs for certainty, predictability, and reasonable fees and ROW terms and conditions as to the process for negotiating rights-of-way and their continued reliance on existing infrastructure to meet the power needs of customers. Avenues to protect against anti-competitive pricing do exist between sovereign nations (e.g., arbitration before the World Trade Organization), so it is reasonable to explore possible forms of third-party oversight and arbitration in right-of-way matters between the utilities and tribal authorities.

EEI and its member companies are committed to working towards such a solution and encourage DOE and BIA to assist in reaching towards such a solution through a fair and accurate report on Section 1813 of EPAct 2005.

Sincerely,

A handwritten signature in black ink that reads "David K. Owens". The signature is written in a cursive, flowing style.

David K. Owens