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FAIR Supplemental Report

**Economic Analysis of the Impact of Tribal Rights-of-Way
Fees**

I. Introduction

This supplemental report provides an economic analysis of the impact of tribal rights-of-way (ROW) fees on consumers as requested by Dr. Abe Haspel, Assistant Deputy Secretary, Department of the Interior. Our findings can be summarized as follows:

- Submissions prepared by the tribes and their experts tend to focus on only one aspect of the current policy's impact: the amount by which ratepayers' bills will increase due to escalating ROW renewal fees for existing pipelines and transmission lines.
- The rate impacts of these escalating ROW renewal fees for existing facilities are not trivial, as indicated in Sections IIIA and IIIB. Energy transporters subject to cost of service (COS) regulation have the opportunity to recover 100% of the tribal ROW fees through rate increases.
- Most importantly, however, the submissions prepared by the tribes and their experts fail to capture the full cost impact of current ROW policy on tribal trust land. In particular, current policy creates incentives for companies to build around tribal trust lands using routes that are longer (raising construction costs) and/or more disruptive to the environment. In addition, current policy can delay and deter investments in transportation infrastructure, and may even induce companies to uproot infrastructure that is already in or on tribal lands. These impacts—both current and prospective—can lead to higher costs and fewer energy supply options for consumers.
- Moreover, these impacts are not theoretical in nature; real world examples exist and are presented herein. It is also likely that more examples would be available if companies did not choose to remain silent due to impending ROW negotiations with tribes.
- The negative impacts of current ROW policy on tribal trust lands should not be tolerated simply because they may appear to be diffuse when spread across millions of American households. Changing current ROW pricing policy on tribal trust lands to one that is based on fair market value standards would reinforce provisions of the Energy Policy Act of 2005 that seek to facilitate the construction of vital energy infrastructure projects, such as new electric transmission lines and gas pipelines.

II. Analyses Presented by the Tribes' Experts Have Focused Attention on the "Renewals Pass-through Issue," Ignoring Other Significant Impacts of Current ROW Regime

A. Impact of Current ROW Regime on Tribal Trust Lands

Several of the tribes' May 15, 2006 responses to the DOE/DOI request for submissions analyze the extent to which ROW renewal fees for existing pipelines and transmission lines on tribal trust lands can be passed through to consumers, calculate the pass through amount and express it as a fraction of the average residential customer's gas or electricity bill. However, these analyses alone cannot tell us the full impact of current ROW policy on tribal trust lands because they do not account for all of the costs associated with this policy.

As explained in detail in FAIR's previous submission, current ROW policy on tribal trust lands allows for (1) monopoly pricing of usage rights on tribal trust land and (2) periodic renegotiations of contracts for assets that have already been placed in or on the ground.¹ From a public policy perspective, the most important impact of current policy on consumers is that it distorts and suppresses companies' investment incentives with respect to energy transportation infrastructure. Below, we describe these distortions in more detail.

First, under the current regime, energy transporters have a strong incentive to route their new pipelines and transmission lines around tribal trust land. For new projects, the extra expense associated with routing around tribal trust lands can cause some otherwise attractive projects to appear unprofitable. Moreover, the projects that do get built are likely to traverse less direct routes and consume more resources. To the extent that alternative sites are national parks and wildlife refuges, projects that do get built will also be more costly to the environment, as discussed further below. Many energy transportation providers have had the incentive to remain silent about their build around decisions due to the threat of impending renewals.² Nevertheless, we have learned of several costly build around decisions made by companies seeking to avoid tribal trust lands.

In a study that was commissioned by the Interstate Natural Gas Association of America (INGAA), the trade association for the North American interstate natural gas pipeline industry, several companies reported that they avoid locating on Native American lands and usually seek an alternative.³ Sempra's submission provides two case studies on this issue. The Sempra Submission discusses the Sunrise Powerlink Project, a \$1.4 billion 500 kV electric transmission line that is being built across the Anza-Borrego Desert State Park to avoid the Santa Ysabel reservation and the uncertainties associated with ROW fee

¹ http://1813.anl.gov/documents/docs/ScopingComments/Fair_Access_to_Energy_Coalition.pdf at Exhibit A, p. 6.

² See e.g., <http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf>, see p. 6.

³ <http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf>, see attachment at p. 24.

renewals once the project has been installed. As noted by Sempra, this route around the Santa Ysabel reservation adds significant cost and 5 miles of length to the project.⁴ Moreover, Sempra notes that the Sunrise Powerlink Project is a replacement for a link that SDG&E had originally planned to install in 2001. This project, the Valley-Rainbow Interconnect, was eventually cancelled, at least partly due to the activities of the Pechanga Band of Luiseno Indians.⁵

Second, the current regime provides incentives for energy transporters to uproot their existing facilities and build around, causing consumers to pay for the same high cost facilities twice. For example, consider the EPNG pipeline on the Navajo Nation. Today, the Navajo Nation is asking EPNG to pay \$22 million per year in ROW fees (with inflation adjustments) for a 20 year ROW. Under the current ROW pricing regime, EPNG could expect its fees to increase by 50% or more with each successive 20 year negotiation, given the rate of price increase that it has already experienced.⁶ At this rate, the present value of the first 60 years of ROW payments (assuming a 5% real interest rate) would be more than \$540 million. An appraiser has determined that the fair market value (FMV) of a *permanent* easement for EPNG's pipeline and facilities on the Navajo Nation is \$1.2 million.⁷ It is important to recognize that this FMV represents a single ROW payment for all time as opposed to the annual fee requested by the Navajo Nation.

Even if the FMV-based price of ROW fees for the off-reservation build-around route were many times this \$1.2 million figure, it would still be advantageous for EPNG to spend more than \$500 million dollars to build around the Nation if it expected the current regime to persist. Moreover, this half billion dollar cost would be a pure social waste, incurred only to relocate costly facilities that consumers have already paid for.

As noted above, many companies may not have had the incentive to share their stories of relocating facilities due to impending negotiations with tribes. However, it is our understanding that pipelines with far less extensive facilities on tribal trust lands than EPNG face similar concerns. For example, we understand that Questar removed at least a portion of its pipeline from trust land held by the Morongo tribe.⁸ Sempra states that it may be in a similar position when easements for SoCalGas' pipelines on the Morongo tribal land expire in twelve years.⁹ Noting that these pipelines supply 40% of the natural gas used in Southern California, Sempra states that "Relocating SoCalGas' pipelines on the Morongo tribal land would result in the abandonment of 24 miles of pipeline and require the construction of longer pipelines, most likely through difficult terrain in the

⁴ http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Uilities.pdf at p. 2.

⁵ Ibid.

⁶ The Navajo calculate that the \$22 million per year offer is a 57% increase over the 1995 agreement after adjusting for inflation (see http://1813.anl.gov/documents/docs/NavCom/D-1-NN_Case_Study-EPNG.pdf at page 15). Additional evidence presented in the INGAA case study of El Paso and the Navajo Nation indicates that the ROW fees have more than doubled on average every twenty years. <http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf>, at p. 9.

⁷ EPNG Appraiser's Report.

⁸ http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Uilities.pdf at p. 3.

⁹ Ibid.

San Jacinto Wilderness Game Preserve, although this may not be feasible and other, still longer routes may need to be explored.”¹⁰

The discussion above is consistent with findings presented by INGAA and the Edison Electric Institute (EEI), which is a trade association comprised of shareholder-owned electric utilities that serve 71% of all electric utility customers in the U.S. At least one of the respondents to the survey commissioned by INGAA had actually relocated facilities away from Native American lands.¹¹ Similarly, EEI related in its 1813 submission that it also: “... became aware of several instances where companies elected to terminate negotiations and move their facilities off of tribal lands”.¹²

Third, although many tribes have asserted in this proceeding that their activities have never stopped the flow of energy from a pipeline or transmission line,¹³ significant energy transportation infrastructure projects in the U.S. have been delayed and even cancelled due to tribal activities pursuant to the current ROW policy regime. As discussed above, Sempra has documented how a major electric transmission line was scuttled by the tribal negotiation process, significantly delaying a potentially important power link.¹⁴ Idaho Power also discusses how the current policy can lead to construction delays.¹⁵

A tribal ROW policy that eliminated these distortions would improve companies’ incentives to build the right amount of infrastructure in the right places at the right times for the lowest possible cost. All else equal, the impact of this move will be seen by consumers in two ways: (1) lower utility rates arising from projects that do get built and (2) more transportation options available sooner and in more cost-effective locations. The more transportation options that are available, the lower the prices that consumers will pay for both gas and electric power.¹⁶

¹⁰ Ibid.

¹¹ <http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf>, see attachment at page 24. Note that due to confidentiality restrictions, no details are available regarding the company or tribe involved.

¹² http://1813.anl.gov/documents/docs/ScopingComments/Edison_Electric_Institute.pdf at page 13.

¹³ See e.g., http://1813.anl.gov/documents/docs/ScopingComments/Ute_Indian_Tribe_Case_Study.pdf, Analysis Group Report at p. 7, and http://1813.anl.gov/documents/docs/ScopingComments/Jacarilla_Apache_Nation_Revised_Position_Paper.pdf at page 13 and 14.

¹⁴ See http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Utilities.pdf, p.2. Moreover, it is possible that many of the pipelines and transmission lines that traverse tribal trust lands today would never have been built under the current ROW negotiation regime.

¹⁵ See http://1813.anl.gov/documents/docs/ScopingComments/Idaho_Power.pdf.

¹⁶ Electric power costs can suffer two impacts as a result of current policy. First, current policy can impact the delivered price of gas, a key input in electricity production for owners of gas-fired plants. Second, current policy can impact the delivered price of electricity by taxing electric power lines that connect to consumers.

B. The Current ROW Regime on Tribal Trust Lands Conflicts with Policy Changes Intended to Facilitate Construction of New Energy Transportation Infrastructure

There appears to be a growing recognition in the U.S. policy community that policies that distort, delay and/or deter investments in energy transportation infrastructure militate against the national objective of ensuring a secure, sustainable, reliable and affordable energy future. In its June 2006 White Paper, the National Commission on Energy Policy (NCEP), a non-governmental bipartisan group of 20 energy specialists funded by the Flora and William Hewlett Foundation, identified the top five areas in which “current or anticipated siting challenges will most directly affect the evolution of future energy systems.”¹⁷ These top five areas include “intra- and interstate electricity transmission” and “natural gas facilities, including pipelines, storage, gathering systems, and processing facilities, as well as LNG regasification and storage facilities...”¹⁸

According to the NCEP White Paper, there has been a long term trend of declining investment in the nation’s electric transmission system, which may have recently begun to change. Nevertheless, the NCEP White Paper finds that “current levels of [transmission] investment are modest considering the size of the grid and the need for substantial expansion to concurrently address growth in demand and to reduce congestion. Even at projected levels of \$7-\$10 billion per year by 2010, transmission investments are expected to lag, in proportionate terms, behind investment in generation capacity.”¹⁹

For natural gas, “needed pipeline expansions are not projected to be large in the context of the nation as a whole, but may be significant in particular regions that either (1) need expanded pipeline systems to meet high demand growth or (2) that expect to expand production and will need additional capacity to deliver new supplies to market. Overall, EIA [Energy Information Association] forecasts that natural gas pipeline capacity into New England and the Pacific region must increase by over 60 percent and 45 percent respectively between now and 2020. Pipeline capacity going out of the producing areas in the Mountain West will also need to increase on the order of 60 percent in the same timeframe. Implementing capacity expansions of this magnitude will require numerous pipeline projects, each of which will involve regulatory processes of varying complexity depending on the affected locality.”²⁰

¹⁷ See Siting Critical Energy Infrastructure: an Overview of Needs and Challenges, a White Paper prepared by the staff of the National Commission on Energy Policy, June 2006 at p. 3, hereinafter referred to as NCEP study.

¹⁸ Ibid.

¹⁹ Ibid. at p. 17.

²⁰ Ibid. at pp. 14-15. Similarly, Professor Paul Joskow, an internationally recognized energy economist at M.I.T., noted in a recent study of U.S. energy policy that one of the major challenges to future natural gas pipeline projects involves local opposition to new pipeline facilities: “While the Natural Gas Act gives FERC substantial siting authority (unlike the situation with electric transmission facilities), state and local authorities are still a force to deal with. While the ‘Nimby’ syndrome has not yet been as significant a problem for gas pipelines as it has been for electric generation and transmission projects, the continued efforts to block local pipeline projects is a continuing concern. During the 1990s, the U.S. was able to

Recognizing these needs for increased investment in energy transportation infrastructure, several policies have been adopted to help companies address the many obstacles that currently distort, delay and deter such investment. For example, one of the provisions of the Energy Policy Act of 2005 (EPA05) aims to reduce these obstacles through "...the creation of national energy corridors in the West that would alleviate the need to obtain redundant right-of-ways and reduce regulatory hurdles to the siting of different types of facilities [including electric transmission lines, oil and gas pipelines, and other related infrastructure] within these corridors."²¹ The NCEP White Paper proceeds to describe a number of additional EPA05 provisions that are aimed specifically at removing obstacles to investment in electric transmission lines.²²

In their submissions, however, the tribes and their experts do not fully consider how investment in energy transportation infrastructure is delayed and/or deterred under the current tribal ROW policy regime. Instead, they tend to focus on the ability of companies to pass ROW fees on existing pipelines and transmission lines through to their customers. In essence, the tribes' arguments can be summarized as follows: when the taxes that tribes have the power to impose on energy transportation infrastructure are divided among a large number of ratepayers, the one source of increase in ratepayers' energy bills that the tribes have chosen to focus on is not large.

This argument could be and often is used as a rationale for many policies that harm the many to benefit the few. The key fallacy here is that the tribes have not addressed the full costs of their energy infrastructure tax on the public good; they have focused only on one aspect of that cost. With a fuller accounting of the costs associated with the current policy, it becomes clear that the current policy is not as harmless as the tribes' experts' analyses have indicated and that alternative means for funding tribal sovereign needs should be considered.

III. The Total Dollar Impact of ROW Renewal Fees for Existing Lines is Significant

A. Energy Transporters Subject to COS Regulation Have the Opportunity to Recover 100% of ROW Renewal Fees Charged by Tribes for Existing Lines

Despite assertions by some of the tribes' experts, energy transporters subject to COS regulation have the opportunity to pass on to their customers roughly 100% of the costs

more fully exploit a gas and electric infrastructure that had excess supply capability at the beginning of the decade. The excess capacity has been used up (or more than used up). People may have become comfortable with increasing consumption without seeing major new supply projects. That era has come to an end and we are entering a period when conflicts over siting of energy supply facilities is likely to intensify once again." See e.g., Paul L. Joskow, *U.S. Energy Policy During the 1990s*, NBER working paper 8454 at pp. 31-32 (September 2001).

²¹ See NCEP study at p. 9 and at p. 20.

²² *Ibid.* at p. 20.

associated with expected increases in tribal ROW fees.²³ For example, EPNG is a COS-regulated interstate pipeline, whose main customers are local distribution companies (LDCs), intrastate pipelines, and large industrial customers. To the extent that LDCs and intrastate pipelines are also subject to COS regulation, they too will have the opportunity to recover 100% of any ROW cost increases that arise from their own encounters with tribal trust land, on top of any ROW costs embedded in transportation rates charged by EPNG.²⁴

To address the renewal cost pass-through issue, EPNG's ratemaking staff has quantified the impact of the Navajo ROW fee increase alone on its customers.²⁵ The majority of EPNG's customers are intrastate pipelines, local distribution companies (LDCs) and large industrial customers located in the Southwest and Southern California. EPNG transportation charges include both a fixed portion (referred to as the capacity reservation charge) and a variable portion (referred to as a usage charge).

Under current ratemaking rules, ROW fees are included in the capacity reservation charge, which is by far the most significant charge on EPNG customers' bills.²⁶ EPNG has determined that five Arizona customers would pay roughly 40% of each dollar increase in Navajo ROW costs.²⁷ These customers are Southwest Gas, Salt River Project Agricultural Improvement and Power District, Arizona Public Service, UniSource Energy, and New Harquahala Generation Company, LLC.²⁸ These ROW costs are

²³ Although EPNG as a COS regulated interstate pipeline will have the opportunity to recover 100% of these ROW cost increases from its customers, these costs increases will not be allocated evenly among EPNG customers. In markets with many competing gas transportation providers, EPNG's customers often receive discounted rates and may bear very little if any of the rate impact. However, EPNG is able to recover the total amount of the cost increase from customers that have few if any alternative transportation options. Such customers receive recourse (undiscounted) rather than discounted rates. If a natural gas pipeline had no customers in the latter category, there would be little economic rationale for its rates to be regulated.

²⁴ The regulation of the different stages of gas production has changed dramatically since the 1980s. Gas production is competitive and unregulated. Interstate pipelines, like EPNG, link producing wells with consuming areas and are subject to rate regulation administered by the Federal Energy Regulatory Commission (FERC). Interstate pipelines serve local distribution companies (LDCs), which sell gas to final users, as well as intrastate pipelines and large industrial customers. LDCs and intrastate pipelines are subject to rate regulation by state public utility commissions (PUCs).

²⁵ Of course, this potential \$22 million per year renewal fee is not the only ROW renewal fee that EPNG and its customers will face over the next 15 years. It is our understanding that in that timeframe, EPNG must also renew ROW for its pipeline with numerous other tribes including the Laguna, Acoma, Southern Utes, GRICs, and Tohono O'odham. These negotiations could add many millions more to the ROW fees EPNG pays each year.

²⁶ It is our understanding that in the case of EPNG, the reservation charge comprises approximately 97% of a typical customer's annual invoice. Usage charges account for the remaining 3%.

²⁷ This analysis relies on EPNG's RP05-422 rate filing cost allocation/rate design methods and levels of billing determinants, with one exception. Given that Southern California Gas Company transitions to discount rate contracts as of 9/1/06, the SoCal portion of recourse rate increase calculated using the rate case levels of billing determinants was spread to all other customers proportionate to their share of the total increase without SoCal. This analysis does not include an estimate of potential re-allocation resulting from Article 11.2 (rate cap) application.

²⁸ New Harquahala Generating Company LLC is a 1050 megawatt natural gas fired power plant in Maricopa County, Arizona.

clearly significant for many of EPNG's customers. Moreover, it is our understanding that it is not uncommon for annual charges of far less than \$22 million to be a source of contention in EPNG rate hearings.

Many of EPNG's customers purchase gas from other pipelines such as Transwestern that also face potential ROW cost increases in the near term. In addition, as discussed in detail below, a number of these companies face tribal trust land fee increases for ROW required by their existing pipeline and transmission lines, a fact completely ignored by the tribes' experts.

B. ROW Renewal Fees on Pipelines, Transmission Lines, and Distribution Facilities that Serve Consumers Directly

As noted above, there are a number of companies in the U.S. that serve residential customers directly and also face ROW renewals on their pipelines, transmission lines, and distribution facilities. One company that has raised this issue in the 1813 proceedings is PNM, a gas and electric utility in New Mexico, which faces approximately 95 renewals for its electric and gas ROW with numerous tribes over the next 15 years.²⁹

In order to provide some insight into the potential costs that PNM may face as a result of these renewals, we consider a scenario in which PNM must pay ROW fees similar to those currently being requested from EPNG by the Navajo Nation, roughly \$24,000 per mile per year. It is our understanding that PNM's electric transmission and distribution facilities cover about 3000 acres of various tribes' trust lands. Assuming the Navajo Nation ROW fee request of EPNG and converting miles to acres, we calculate a ROW fee of about \$4,000 per acre per year.³⁰

As a rate regulated utility, PNM has the opportunity to fully recover all of the costs associated with its ROW renewals from customers. To the extent that PNM's residential customers have no alternative to PNM's pipeline or electric transmission lines, they will fully bear the cost increases associated with tribal ROW renewal fees. Our analysis indicates that after the upcoming (approximately) 95 tribal ROW have been renewed, these cost increases could increase electric rates alone by as much as 5%.³¹

IV. Calculations Prepared by Tribes' Experts

²⁹ http://1813.anl.gov/documents/docs/ScopingComments/Public_Service_of_New_Mexico.pdf. Another company facing important known renewals is Sempra. Their easement for SoCalGas pipelines on Morongo tribal land expire in twelve years

(http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Uilities.pdf, page 3).

³⁰ To obtain this figure, we convert the per mile fee into a per acre fee by assuming a 50 foot ROW width. \$24,000 per mile is consistent with the average and median ROW values reported in EEI's survey, see http://1813.anl.gov/documents/docs/ScopingComments/Edison_Electric_Institute.pdf at p. 9.

³¹ Information on the number of electric customers is from <http://www.pnm.com/about/home.htm>.

As noted above, several of the tribes' May 15, 2006 responses to the DOE/DOI request for submissions focus on the issue of ROW renewal fees for existing pipelines and transmission lines on tribal trust lands. As discussed above, these analyses cannot tell us whether current ROW policy on tribal trust lands is or is not costly from a consumer's perspective because they do not address how current policy impacts transporters' investment incentives.

Even on the issue of ROW renewal fees for existing pipelines and/or transmission lines these various analyses arrive at conclusions that conflict with those outlined in Section III, as well as with one another. We briefly discuss these experts' analyses, highlighting the main ways in which we believe these analyses have erred in determining the extent to which ROW fees for existing lines can be passed through to customers, as well as the impact that these fees will have on customers' energy transportation costs.

A. Professor Cicchetti's Analysis on Behalf of the Navajo Nation

Professor Cicchetti focuses his analysis exclusively on the issue of renewal fees for EPNG's existing pipeline on the Navajo Nation. While this restrictive analysis could provide useful information on its own terms, it is important to recognize that the EPNG/Navajo renewal fee issue is but one manifestation of a much larger public policy issue. Professor Cicchetti's analysis does not address the impact on renewal fees on other interstate gas pipeline companies, let alone other types of energy transportation providers that are affected by this issue. Professor Cicchetti also does not consider the impact of any renewal fee negotiation on EPNG other than Navajo, despite the fact that EPNG has an additional 10 ROW negotiations on its horizon.³² Nor does Professor Cicchetti consider the impact of tribal ROW fees charged directly to EPNG's customers, including several of the customers named above. Yet even if one were interested only in the impact of the Navajo fee increase on EPNG and its customers, Professor Cicchetti's analysis is unreliable for several reasons.

First, Professor Cicchetti's analysis does not use an appropriate comparable when calculating the impact of current tribal ROW policy on EPNG. His analysis focuses on the impact of raising rates from EPNG's offer of about \$7 million per year to the Navajo asking price of about \$22 million per year. However, EPNG's \$7 million offer is based on its negotiating position under the current ROW pricing regime on tribal trust lands; this is not the FMV-based offer that EPNG would make to obtain usage rights on comparable privately-owned land.

To determine the impact of the current regime on EPNG costs, we must consider the FMV of EPNG's ROW on the Navajo Nation. As noted above, the FMV of a permanent easement or ROW on these lands was appraised at only \$1.2 million. Today, the Navajo Nation is asking EPNG to pay \$22 million per year in ROW fees (with inflation adjustments) for a 20 year ROW. Under the current ROW pricing regime, EPNG could

³² Communication from EPNG 6/14/06.

well expect its fees to increase by 50% or more with each successive 20 year negotiation, as discussed in Section IIA. At this rate, the present value of the first 60 years of ROW payments (assuming a 5% real interest rate) would be more than \$540 million.

Second, Professor Cicchetti’s analysis does not consider the impact of EPNG’s rate increase on its customers, e.g., LDCs and intrastate pipelines. Instead, his analysis focuses on the rate impact on the customers of EPNG’s customers. As shown in Section IIIA, the impact on EPNG’s customers is significant and can amount to large dollar values for individual customers each year.

B. Study by Dr. Tierney and Mr. Hibbard on Behalf of the Ute Indian Tribe of the Uintah and Ouray Reservation

We focus on the authors’ analysis of ROW costs for existing gas pipelines in order to keep the discussion parallel to the analysis of these issues addressed in this submission. Even with this restricted focus, we identified three significant issues with this analysis.

First, the authors state in the executive summary “For the Western interstate gas companies we studied, tribal ROW costs make up a tiny share of pipeline costs, equaling around 2/1000th of 1% (for El Paso Natural Gas Company) to 34/1000th of 1% (for Mohave Pipeline Company)”. However, these figures do not appear to reflect the share of tribal ROW costs in pipeline costs. Instead, they appear to be an estimate of tribal pipeline ROW costs as a fraction of California consumers’ gas bills.³³

Second, the analysis does not reflect the ROW costs that many companies expect to face as the ROW terms for their facilities expire. The figures used in the Tierney/Hibbard analysis appear to be derived from estimates of the portion of pipeline companies’ costs associated with total ROW acquisition.³⁴ This source reflects the current costs of tribal ROW, many of which were negotiated decades ago. As these ROW are renegotiated, the energy companies most affected could see their annual ROW fees increase many times over.³⁵

Third, the authors proceed to state that with gas transporters facing competition in many markets, “...it is not at all clear that customers would see even that tiny impact.”³⁶ However, this statement ignores the regulatory rules that govern cost recovery in natural gas transportation markets, i.e., companies have an opportunity to recover in recourse rates all costs that cannot be recovered in competitive markets.

³³ “For a California homeowner using 5Dth a month, on average the impact of tribal ROW falls in range of 0.1¢ and 1.6¢ per month, on average monthly bills that are about \$47.”

http://1813.anl.gov/documents/docs/ScopingComments/Ute_Indian_Tribe_Case_Study.pdf, Analysis Group report, p. 43. Note that .001/47 is about 2/1000th of 1% and .016/47 is about 34/1000th of 1%.

³⁴ Ibid. p. 42.

³⁵ For example, see http://1813.anl.gov/documents/docs/NavCom/D-1-NN_Case_Study-EPNG.pdf at pp. 11 to 15.

³⁶ http://1813.anl.gov/documents/docs/ScopingComments/Ute_Indian_Tribe_Case_Study.pdf, Analysis Group report, p. 43.

C. Dr. Nesbitt's Analysis on Behalf of the Southern Ute Indian Tribe

Strikingly, and in contrast to the other submissions cited here, Dr. Nesbitt's analysis concludes that there is zero impact on consumers from tribal ROW fees: "No consumer in any downstream market is at all affected by the imposition of the tariff arising from the tribal ROW charges", "Any assertion that the tariff arising from the tribal ROW charges 'comes down on California or other gas consumers' is wrong".³⁷ However, these findings merely reflect the manner in which Dr. Nesbitt's model fails to capture how the production, transportation and distribution segments of the natural gas market are structured and regulated.

The results of Dr. Nesbitt's analysis appear to have been derived from a model in which the price of natural gas to delivered consumers is determined in a market with many buyers and many sellers. However, as explained in detail above, the transportation component of the delivered price of gas is, in large part, determined through the regulatory process. If transportation were fully competitive as Dr. Nesbitt's analysis implies, there would be no need for cost of service regulation in any segment of the gas industry, since the market alone would keep prices at competitive levels.

There are two key mechanisms through which increases in tariffs arising from higher tribal ROW charges can be passed on to consumers. First, consider the case of natural gas pipelines owned by an LDC that cross tribal trust lands. Most of the LDC's customers will have no alternative gas transportation service available.³⁸ Moreover, as a state-regulated franchise monopolist, the LDC has the opportunity to fully recover all of its cost increases in rates. Hence, if its ROW costs increase, the LDC will have the opportunity to recover 100% of these costs in its next rate hearing. Regardless of whether the LDC purchases gas in a competitive market, its customers will face higher prices due to the increased ROW fees.

Second, consider the case of an interstate natural gas pipeline such as EPNG. EPNG is regulated by the FERC precisely because some of its customers have no other practical source of natural gas other than EPNG. These customers may pay competitive prices for gas in source markets, but must contract with EPNG to have the gas delivered to them. These customers will typically pay the maximum tariff rate (i.e., the recourse rate) set by the FERC to ensure that EPNG does not abuse its monopoly power. As discussed earlier, this rate is set to provide the company with an opportunity to recoup its costs, including a competitive return on its capital. Thus, higher tribal ROW fees will lead to higher recourse rates for these captive customers.

³⁷ http://1813.anl.gov/documents/docs/ScopingComments/Southern_Ute.pdf, Altos report, p.10.

³⁸ See for example http://www.eia.doe.gov/oil_gas/natural_gas/restructure/restructure.html. Note that even when it is possible to purchase gas independently, this gas is generally shipped through the LDC's pipes.

D. Analysis Prepared by The Affiliated Tribes of Northwest Indians (ATNI)

The ATNI attempt to quantify the pass through of tribal ROW fees by multiplying: 1) the average percentage of consumers' total energy bills spent on transportation costs, 2) the average percent of transportation costs spent on ROW acquisition, and 3) the approximate percentage of ROW that are on Indian lands. This analysis is misleading in three significant ways.

First, like the Tierney/Hibbard report, the ATNI analysis focuses on current payments for tribal ROW fees and does not consider the size of these payments on a going forward basis. Thus, the ATNI analysis significantly understates the extent to which consumers will bear increased ROW fees for existing facilities on a going forward basis. As mentioned above, many of the ROW fees currently included in transportation costs were negotiated decades ago when tribal ROW fees were much closer to FMV standards. As transporters' existing tribal ROW begin coming up for renewal, the fees paid could be significantly higher. In fact, the 1813 study was in large part motivated by the significant escalation in tribal ROW fee demands that is confronting numerous energy transportation providers.

Second, the share of ROW on Indian lands is not a good measure of the share of ROW costs due to tribal ROW fees. This is true both because tribal ROW fees can be many times higher than non-tribal ROW fees (for comparable property) and also because tribal ROW are temporary, while ROW on private lands are typically perpetual. Consider a pipeline that does not acquire new ROW. Eventually it will have completely depreciated the cost of its non-tribal ROW, but have continual ROW payments for its tribal ROW. For such a pipeline, tribal ROW cost would be 100% of all ROW cost no matter what the percentage of all ROW on tribal lands.

Third, the ATNI calculation spreads ROW costs equally across consumers. However, the true impact of tribal ROW fees falls unequally on customers, depending on their location (since current policy tends to present greater issues in the Western U.S.), and their access to competitive transportation options, among other factors. Hence, this analysis does not capture the range of increase consumers will face. While some energy consumers may be essentially unaffected by tribal ROW fee increase, others will see much higher increases.

E. Analysis Prepared by the Jicarilla Apache Nation

In its submission, the Jicarilla Apache Nation calculates the fraction of the wellhead value of gas produced by Reservation wells between 1976 and 1995. The Nation appears

to take this small fraction, less than 3/100th of 1%, as an indication that it has been under-compensated for its land.³⁹

The finding that a tribe has received minimal compensation for the ROW it has provided to energy transporters is not, in and of itself, an indication that the tribe was unfairly treated in some way.⁴⁰ On the contrary, under an FMV standard, one would expect minimal compensation to be paid for ROW so long as the land usage rights imposed no significant cost on the owner. For example, the FMV of ROW costs for a pipeline buried underground on land that has been and will continue to be used for sheep grazing should be minimal to the extent that sheep grazing is not significantly impacted by the presence of a buried pipe.

In order to determine whether a tribe has received less than the FMV associated with its ROW, it is necessary to compare fees paid to independent appraisals of the compensation required to keep the tribe whole for its providing land usage rights to the energy transporter. Additional information that can be helpful in such an analysis is the amount that private landowners received on similar lands at the time the ROW was granted. In the case studies submitted by INGAA, there is no evidence that tribes were ever paid below FMV for the ROW they provided and current ROW charges are often large multiples of FMV.⁴¹

V. Conclusion

Submissions prepared by the tribes and their experts tend to focus on only one cost associated with the current policy—the extent to which companies can pass through to their customers ROW renewal fees for existing pipelines and transmission lines. These submissions largely ignore how current policy distorts and suppresses companies’ incentives to invest in energy transportation infrastructure and creates incentives for them to uproot infrastructure that is already in or on the ground.

These distortionary impacts are not simply theoretical in nature; important real world examples exist and it is likely that more would be available if companies did not have the incentive to remain silent due to the threat of impending ROW negotiations with tribes. Moreover, there appears to be a growing recognition in the U.S. energy policy community that new approaches are needed to remove market distortions that frustrate the construction of vital energy infrastructure projects.

³⁹http://1813.anl.gov/documents/docs/ScopingComments/Jacarilla_Apache_Nation_Revised_Position_Paper.pdf p. 17.

⁴⁰ For other tribes that believe that ROW fees should reflect the economic value of the ROW to the energy company see, e.g., http://1813.anl.gov/documents/docs/ScopingComments/Southern_Ute.pdf, p. 3, and http://1813.anl.gov/documents/docs/ScopingComments/Shoshone-Bannock_Tribes.pdf, p. 9.

⁴¹ For additional utilities evidence regarding payments in excess of FMV see, e.g., http://1813.anl.gov/documents/docs/ScopingComments/Idaho_Power.pdf and <http://1813.anl.gov/documents/docs/Presentations/apr06mtg/BPA18134-19-06.pdf>, slides 25 to 29.

However, even if we take the perspective of the tribes' submissions and focus only on the degree to which renewal fees for existing facilities can be passed on to customers, we find that energy transporters subject to cost of service (COS) regulation have the opportunity to recover 100% of these fees through rate increases and that the dollar impact of such fees can be significant.