UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Applications for Permits to Site Interstate Electric Transmission Facilities	))	Docket No. RM22-7-000

JOINT COMMENTS OF THE AMERICAN FARM BUREAU FEDERATION, THE ILLINOIS AGRICULTURAL ASSOCIATION A/K/A THE ILLINOIS FARM BUREAU, THE IOWA FARM BUREAU FEDERATION, THE KANSAS FARM BUREAU, THE MISSOURI FARM BUREAU FEDERATION, AND OTHER STATE FARM BUREAUS

These farm bureaus appreciate this opportunity to comment on the Federal Energy Regulatory Commission's ("FERC") proposed rules on the federal permitting for electric transmission lines in designated geographic areas expected to experience constraints or congestion. We represent farmers and rural landowners who will be directly impacted by the proposed rule, which would usurp the authority of the states and the roles the Independent System Operators (ISOs) and Regional Transmission Operators (RTOs) have over transmission planning and siting while negating effective state landowner protections and processes.

We appreciate this Commission's task to amend its regulations to Section 2016 of the Federal Power Act, which provide for backstop permitting authority under limited circumstances, but urge this Commission to enact rules that do not allow developers to exercise eminent domain authority against landowners for projects that have been rejected by a state, have avoided state review in bad faith, or lack independent support by an ISO or RTO.

We agree with Commissioner Christie's comment that the premise for this rule, that states are blocking or standing in the way of critically needed transmission, is a false narrative.[1] Yet, the proposed rule's simultaneous state application and FERC pre-filing process preempts state authority and forces landowners to participate in two processes at the same time. We urge the Commission to revise this provision and allow states to meaningfully review proposed projects prior to federal involvement.

In addition to the states' permit reviews, stakeholders are addressing the buildout of interregional transmission lines. Multiple rulemakings and administrative proceedings are pending before this Commission to address issues such as constraints and congestion

[1] Morehouse, Catherine, "FERC Commissioner Christie blasts 'false narrative' about state of U.S. electric grid," PolitcoPro, https://subscriber.politicopro.com/article/2022/01/ferc-commissioner-christie-blasts-false-narrative-about-state-of-us-electric-grid-3993341 (last accessed May 11, 2023).

in the grid through interregional long-term transmission planning, generation interconnection, and improving interregional transfer capability.[2] Grid operators are also addressing congestion and potential constraints in the grid through their long-range transmission planning processes and joint interregional projects.

The threat that eminent domain may be exercised for massive transmission line projects that may not be the right solutions to electrical grid constraints or congestion, at the expense of ratepayers and to the detriment to landowners, concerns the farm bureau commenters. Thus, we request that the Commission temper its involvement in these decisions and become involved only in the high priority routes designated by the applicable ISO/RTO and only when it becomes apparent that the applicable state agency is unable to process the state permit application in a timely manner.

1. **Many of the definitions in both the current rule and the proposed are vague and ambiguous and need to be updated so all affected parties, including landowners and farmers, can receive proper notice.**

In the proposed definition of "national interest electric transmission corridor," rule 50.1 does not identify the geographic areas over which FERC plans to exercise jurisdiction. The two previously designated corridors were vacated by the 4th and 9th Circuit Courts of Appeal and no other corridors have been designated.[3] The proposed definition is vague because it could be argued that most locations in the United States have some degree of capacity constraints or congestion currently or that they will have such conditions in the future. We insist that the Department of Energy complete the process of identifying the national corridors, after which FERC should reopen public comment on this proposal since this proposed rule is greatly impacted by the identification of the targeted national corridors and stakeholders should know the scope of FERC's asserted jurisdiction to enable meaningful comment.

The definition of "affected landowner" in section 50.1 does not satisfy due process requirements or achieve actual notification of the pre-filing activity or a permit application. Although FERC is not proposing to change the definition, we strongly encourage FERC to reconsider modifying the first paragraph of this definition to achieve actual notification of landowners. As currently defined, it will not achieve notification of affected landowners. For example, only one person can be listed on the county or city property tax bill, but the property often has more than one owner or it may have a farm manager or bookkeeper listed for billing purposes. The property tax bill also does not list the farm tenant who has a possessory interest in the property for the term of the lease and will be impacted by the project. Notifying the actual owner, the easement owners, and the

[2] *See* 179 FERC ¶61,194 (2022); AD23-3-000 (Oct. 6, 2022); 179 FERC ¶61,028, 87 Fed. Reg. 26,504 (May 4, 2022); AD22-8-000, 87 Fed. Reg. 80,533 (Dec. 30, 2022).
[3] *See Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009), and *Cal. Wilderness Coal. v. United States DOE*, 631 F.3d 1072 (9th Cir. 2011).

person in possession of the property is necessary for due process and for effective stakeholder involvement. We recommend the definition of "affected person" be modified to include for the first paragraph any person with a legal right or interest in the property including a landowner, a contract purchaser of record, a person possessing the property under a lease, a record lienholder, and a record encumbrancer of the property.

Before considering whether to notify additional people, the rules should achieve actual notification of the directly affected landowners and persons in possession of the property. Developers regularly hire contractors for every project to produce these lists for them from property records so notifying the actual owner rather than the person on the property tax mailing list is not an undue burden for the transmission developer. However, we do not object to notification of additional landowners whose viewshed will be impacted by the project. We also encourage notification of landowners with nearby livestock or whose cellular or satellite systems for farm or meteorological equipment will be impacted by interference from the high voltage transmission line.

2. Allowing pre-filing for a federal permit would create unnecessary delays to state siting procedures and would allow private electric companies to intentionally subvert those procedures.

Allowing pre-filing for a federal permit simultaneously or prior to the state permit application process goes beyond the intent of Section 216 of the Federal Power Act to provide backstop siting authority for priority national corridors. As proposed, the intent of pre-filing is to obtain informal federal approval for the permit components so when the federal permit application is filed, the cake has already been baked and is ready to come out of the oven. While it may be a more "efficient" process, it also results in the federal government running over impacted citizens' rights and the opportunity for their concerns to be adequately addressed.[4] The pre-filing process will create public confusion about which level of government will ultimately make the permitting decision. As proposed, the pre-filing process disrespects the state permitting processes and the affected landowners.

The practical effect of pre-filing allows the private developer to create delays in the state permitting process by litigating and resisting issues waiting for the year deadline to expire. The private developer would then avoid state laws involving routing preferences, siting, construction, and landowner protection requirements in favor of inconsiderate federal permitting. Pre-filing would take away the incentive for these private companies to reach accommodation with landowners through negotiation. The

[4] For example, FERC's regulation of natural gas pipelines has allegedly resulted in permanent damage to the productivity of cropland evidenced by persistent reduced crop yields in the easement area. *See H & T Fair Hills, Ltd. v. Alliance Pipeline L.P.,* Case No. 19-cv-01095, Order granting class action status, 2021 WL 2526737 (D. Minn. June 21, 2021); *on appeal to the 8th Circuit Court of Appeals regarding separate Order involving arbitration,* 2022 WL 875285 (D. Minn. Mar. 24, 2022), Appeal Case No. 22-1817.

private developers could completely ignore localized and impacted landowner concerns and take advantage of the federal preemption the proposed rule would offer to take private property for their project.

Further, the hard one-year deadline for the state permitting process is unreasonable given the lack of an analogous federal deadline for consideration of the prefiling documents and the permit application. The federal government has competing federal priorities for changing the electric generation mix and addressing climate change with billions of federal taxpayer dollars supporting the development. The burden of implementing these federal priorities falls on state permitting authorities and landowners all at once. The demands of expanding wind and solar generation, thousands of miles of new high voltage transmission lines and thousands of miles of carbon dioxide hazardous liquid pipelines are impacting state and local governments, landowners, and local communities. In some cases, property interests in the same parcel of land are being taken for more than one of these federal priority projects. To appropriately consider and mitigate the local impacts of all of these federal priorities, a hard one-year deadline for state regulatory authorities to consider these projects is unreasonable.

States will likely adjust their permitting process as a result of this rulemaking. For example, states may institute their own pre-filing process to ensure that permit applicants file accurate and complete applications and may prohibit permit applications until RTO approval is obtained to ensure meeting the one-year deadline after the actual permit application is filed. Currently, it is a common practice to allow an applicant to amend or request a stay on their application as needed through the state review process. States will likely become less flexible in their accommodations of these requests. FERC should not entertain federal permitting when states are methodically considering, reviewing, and granting state permits. The intent of the statute was to provide a backstop, not to usurp the state permitting processes.

There are several areas where state and federal law conflict that are not addressed in the proposed rule. It is unclear whether the electric transmission developer can utilize the federal permitting process to obtain eminent domain authority where state law prohibits it, to avoid other state law requirements it does not want to follow, or to avoid the effect of a state court ruling.

The proposed rule does not address whether a state's law defining "public use" or "public purpose" applies to these federal permit proceedings. After the Kelo decision, many states enacted legislation limiting the eminent domain authority that could be granted to private companies.[5] Merchant electric transmission lines, which are privately owned transmission lines that are not common carriers, are not granted eminent domain

[5] *See Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

authority by many states because such lines do not constitute a "public purpose."[6] Federal law requires the practice and procedure to "conform as nearly as practicable to the practice and procedures in a similar action or proceeding in the courts of the state in which the property is located."[7] What is the federal statutory basis for taking property from one private person and giving it to an unrelated private electric transmission developer within FERC's authority under the Federal Power Act? Does FERC plan to grant a federal permit in order to override state eminent domain laws and grant eminent domain to these private companies? We urge FERC to include in the rule that it will respect the applicable state law with regard to whether a transmission company can be granted eminent domain authority.

Additionally, eight Midcontinent Independent System Operator ("MISO") states and most Southwest Power Pool ("SPP") states have adopted right of first refusal ("ROFR") laws where incumbent electric companies have first right to construct a transmission line in an effort to counteract FERC's Order No. 1000.[8] Other state legislatures are considering similar actions.[9] Although some of these laws are being challenged in court, these state laws remain in effect. When an incumbent electric company was chosen by the ISO or RTO under the state ROFR law to construct the transmission line, will this proposed rule allow a non-incumbent company to apply for a federal permit for the same route, thereby usurping both the ISO/RTO and the state permitting process? The rule is unclear whether a non-incumbent company could apply for a federal permit at the same time as the incumbent company is obtaining a state permit. This creates a major conflict between state and federal law that the rule proposal does not address.

It also does not address how it will treat ongoing litigation over a transmission line. For example, the Cardinal-Hickory Creek 345Kv transmission line project is a MISO multi-value priority route. Litigation over the project is continuing in the federal district court for the Western District of Wisconsin and the 7th Circuit Court of Appeals.[10] It is not a regular occurrence, but it also not uncommon for aggrieved parties to challenge a permit decision, whether it is a state or a federal permit. It is unclear whether the proposed rule will allow transmission companies to apply for a federal permit from FERC if the state permit is being contested in court with a stay in place during the appeal preventing the issuance of a certificate or franchise. We suggest that a federal permitting process not be entertained by FERC when a state permit or transmission line project is in

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[6] *See for example,* Iowa Code § 6A.22(2) (2023).
[7] 16 U.S.C. § 824p(e)(3).
[8] *See States in the MISO Footprint with Right of First Refusal*, MISO (1/19/2022) found at https://cdn.misoenergy.org/State%20or%20Local%20Rights%20of%20First%20Refusal514796.pdf.
[9] [9] *See e.g.* Kan. Sen. 68 (2023), found at http://www.kslegislature.org/li/b2023_24/measures/documents/sb68_01_0000.pdf.
[10] *See National Wildlife Refuge Association v. Rural Utilities Service,* Case No. 22-01347 (7th Cir.).

litigation and unresolved. To do otherwise would raise separation of powers questions with another branch of government.

Having the federal pre-filing process simultaneous with the state permitting process allows for notice to stakeholders and requires a plan for public engagement. Because agency decisions are made during the pre-filing process, it is imperative that affected landowners and stakeholders be given the opportunity to fully participate in the process. However, concurrent federal and state processes will cause confusion and undue burden to landowners and farm tenants. The receipt of multiple notices of duplicative transmission line approval processes would likely cause landowner confusion and lead many to disregard what they perceive as duplication, when in reality, either process may result in a permit authorizing the project. If landowners are able to differentiate and track the two separate processes, their efforts to protect their interests would have to be duplicated to engage and provide public comment in each proceeding at the appropriate time. It would require that they learn and comply with two sets of substantive procedural rules and permitting requirements. Perhaps landowners would wrongfully assume that both state and federal agency approvals must be obtained in order for the transmission line to be approved, and then choose to focus their efforts with the wrong level of government. Their focused efforts could prove to be futile when the project moves forward after approval by the other agency. The pre-filing process in the proposed rule will create confusion by the public as to which agency is making the permitting decision and will require affected landowners to expend even more resources to have their concerns heard and ensure their rights are protected. We recommend that FERC not pursue a prefiling process unless it is certain that FERC will preempt the state and consider a federal permit application.

A federal permitting process, including pre-filing, is premature when a state permitting process is imminent or ongoing. Rather than the federal pre-filing and permitting process preempting the state permitting process, a federal permit should be a last resort for a few selected priority national corridors. Federal permitting should not become the preferred process for obtaining approval for a high voltage electric transmission line to avoid reasonable consideration of local concerns and compliance with state laws. FERC should not adopt a pre-filing process because it will likely result in the federal government taking over permitting, overpowering the state's role in considering routing, siting, construction, and landowner concerns. The states do a better job of considering and balancing these competing interests and accommodating local concerns. States should remain the primary permitting authority over high voltage electric transmission lines.

3. The proposed rule needlessly muddies the waters pertaining to the role of the ISOs and RTOs in the federal permitting process.

The role of ISOs and RTOs in the proposed new process is not identified despite having overlapping and conflicting responsibilities. The work of identifying current priority transmission corridors has, for the most part, already been completed by each ISO or RTO and planning continues for the next phase of development. It is unclear from the rule how the yet-to-be-identified "national interest electric transmission corridors" relate to those projects already identified by the ISOs and RTOs. The ISOs and RTOs have identified multi-value priority areas for building out the electric transmission grid.[11]

It is unclear whether the Department of Energy and FERC are proposing to take over the role of managing the electric grid and determining future expansions or whether the ISOs and RTOs will retain responsibility for determining the location of expansions of the electric grid. We recommend that the ISOs and RTOs retain their authority to determine expansion corridors; however, the priority national corridors should be a subset of the priority corridors, which also consider ISO/RTO cross boundary requirements, impacts on landowners, and the cost to local ratepayers.

4. Routing and land use considerations have been and are now successfully resolved at the state level.

The proposed rule is a solution in search of a problem as it pertains to effectively siting transmission infrastructure. The current regulatory regime allows state regulators the opportunity to receive input from local landowners, farmers and residents and to design and route transmission lines in such a way as to minimize disruptions to food, fiber, and renewable fuel production while also allowing continued improvement to electrical infrastructure. A process driven by the federal government would undoubtedly not be able to match what state authorities have been doing successfully for decades with regard to routing and balancing the concerns of rural communities and landowners with the need for sufficient electrical transmission. Moreover, the proposed rule fails to provide impacted landowners the opportunity to effectively participate in the designation of NIETCs or as an intervenor in the pre-filing process before this Commission.

Transmission lines are a burden to landowners, particularly when those lines cross properties in ways that disrupt current and future land uses. This is particularly true with agricultural uses, where a transmission line going through the center of a field can prevent farmers from efficiently planting, raising, and harvesting crops and hay. Transmission lines can make it impossible to apply crop protection products or cover

[11] *See* Midcontinent Independent System Operator's *MTEP22 Report* which identifies priority routes at https://www.misoenergy.org/planning/planning/mtep22/ (last visited May 8, 2023); and, the Southwest Power Pool's *Priority Projects Phase II Final Report* at https://spp.org/engineering/transmission-planning/priority-projects/ (last visited May 8, 2023).

crop seed by air, for example, meaning that applications either cost more, cannot be made in a timely manner, or both. This often results in a decrease in efficacy of the crop protection products, a reduction in conservation practices and, ultimately, reduced crop and forage production.

State and local policymakers have long strived to reduce the burden on producers of food, fiber, and fuel by adopting sensible regulations related to land use concerns that still allow for electric infrastructure development. Below are just a few examples of state efforts to balance the need for electric infrastructure with the need to efficiently produce food.

Iowa: Iowa law requires that transmission line routes begin with routes that are parallel to roads, railroad rights-of-way, or division lines of land. Deviations for engineering reasons may be proposed and accompanied by a proper evidentiary showing.[12]

Wisconsin: Wisconsin law requires that the Department of Agriculture, Trade and Consumer Protection prepare an Agricultural Impact Statement (AIS) for new transmission lines that seek eminent domain authority when there is the potential of any interest in more than 5 acres of farm operation to be taken,[13] use existing rights-of-way to the extent practicable, and that routing minimizes environmental impacts.[14] In routing new transmission lines, developers must prioritize the use of existing utility corridors and highway and railroad corridors.[15]

Oregon: Oregon seeks to balance the burden of transmission lines on landowners with transmission exigencies. Under Oregon law, a utility must demonstrate that reasonable alternatives be considered before a transmission line is constructed on areas that have been zoned for exclusive farm use. Factors considered include technical and engineering feasibility, the directness of alternative routes, and the lack of availability of urban and non-agricultural land.[16] The owner of the facility is also responsible for restoring damaged agricultural land and improvements to their former condition.[17]

Illinois: Illinois law also balances the need for infrastructure improvements with the need to protect farmland. Illinois courts have recognized that transmission line routing should consider issues such as farm and parcel splitting, the productivity of the farms and farmland influenced by routing, and the detrimental effect of the route

[12] Iowa Code § 478.18 (2023); Iowa Admin. Code r. 199-11.3 (4/6/22).
[13] W.S.A. 32.035.
[14] W.S.A. 196.491(3)(d)(3r).
[15] W.S.A. 1.12(6).
[16] O.R.S. § 215.275(2).
[17] O.R.S. § 215.275(4).

on highly-productive farmland.[18] The Illinois Commerce Commission generally requires public utilities to sign Agricultural Impact Mitigation Agreements ("AIMA") with the Illinois Department of Agriculture, wherein the utilities agree to construct and operate the line in a manner that will reduce impacts to agricultural land. The AIMA specifies certain construction parameters, such as when construction can occur during periods of wet weather and how to properly remediate compaction and rutting that might have occurred.[19] FERC has conditioned certificates issued to natural gas pipelines upon compliance with AIMA's.[20] The AIMA includes the following items related to transmission line construction which are helpful to landowners but that have never impeded Illinois electrical infrastructure improvements:

- a prohibition on construction during wet weather
- restoration of soil compaction and rutted land post-construction
- restoration of damaged drain tile to original or better condition
- restoration of field entrances or temporary roads
- repair of damaged terraces, waterways and other erosion control structures and restoration of land slope and contour
- an advance notice of access to private property for construction, maintenance, and repair activities with a minimum of 24 hours prior notice before accessing private property for the purpose of construction
- mutually agreed upon ingress and egress routes prior to construction
- an exclusive use of monopole structures on agricultural or horticultural land
- preferential placement of support structures near existing right of way(s)
- minimal construction of aboveground facilities and placement of guy wires and anchors on agricultural and horticultural land

As stated above, the proposed rule would effectively preempt these and other state regulatory regimes that have successfully developed transmission infrastructure for decades. In doing so, states have learned important lessons in ways to reduce the negative effects of transmission lines on farmers and landowners.

5. The Proposed "Landowner Bill of Rights" and "Applicant Code of Conduct" are inadequate.

While the proposed rules seek to assuage concerns that the federal government can immediately and successfully replicate the processes that states have developed over the

[18] *See Ness v. Illinois Com. Commn.,* 367 N.E.2d 672, 674 (Ill. 1977).
[19] The template draft AIMA can be obtained at https://agr.illinois.gov/content/dam/soi/en/web/agr/resources/aima/documents/idoaelectriclineaima.docx (last reviewed May 5, 2023).
[20] *See* Spire STL Pipeline LLC, Order Issuing Certificates ¶ 241, Dkt. CP17-40-000, 001, 164 FERC ¶ 61,085; Rockies Express Pipeline LLC, Order Issuing Certificate ¶ 72, Dkt. CP07-208-000, 001, 123 FERC ¶ 61,234.

course of decades, which have resulted in significant yet reasonable landowner protections, it does so in a way that is superficial and lacking in substance.

First, the notice requirements that the Bill of Rights proposes are inadequate. As presented, the Bill of Rights does not require a transmission developer to provide any information, but instead requires the "right to access" information. Any Bill of Rights should instead require the applicant to actually provide information rather than burden landowners with seeking it out themselves. As it stands, the Bill of Rights essentially tells landowners that project developers will make information available somewhere, but, in essence, "good luck finding it." On the other hand, many states require applicants to provide not only notice but substantive information, conduct in-person and virtual prefiling public meetings for landowners, provide hard-copy maps depicting the proposed routes; and allow landowners and other stakeholders to comment and ask questions of company representatives about the proposed projects and routes.

In that same vein, the draft Bill of Rights informs landowners that they have the right to comment, but only have the right to participate as an intervenor after a project application is filed. Once again, this "right" is superficial. The right to comment in a user-friendly manner on specific projects already exists at the state level. Many states have a website for project-specific public comments, or they require applicants maintain project-specific websites where stakeholders can comment on the project and proposed routes. Because the intent of the pre-filing process is for FERC to provide feedback to the developer and for the developer to make changes to satisfy FERC, meaningful participation by affected persons includes the right to intervene.

Similar to what various states require, the Bill of Rights should include a summary of the permitting process that actually informs landowners how and when they may participate as opposed to merely providing the contact information for the Commission's Office of Public Participation.

When it comes to condemnation proceedings, the proposed Bill of Rights again falls short in that it proposes little in the way of specifics and substance. At minimum, the Bill of Rights should give landowners the right to be notified that an electric transmission developer intends to condemn their property. The right to receive a good faith offer before condemnation proceedings commence is also critical. The rule should require that landowners be provided with a written appraisal from a certified appraiser detailing adequate compensation owed to them. FERC should also establish a simple, reliable, and easily accessible complaint process for landowners to report misconduct on the part of applicants or their agents.

The proposed rule is also devoid of any standards to determine when an applicant has negotiated in good faith. When determining whether a party has made reasonable attempts to acquire property, the Illinois Commerce Commission reviews various factors

that FERC should consider adopting: (i) the number and extent of contacts with the landowners; (ii) whether the utility has explained its offers of compensation; (iii) whether the offers of compensation are comparable to offers made to similarly situated landowners; (iv) whether the utility has made an effort to address landowners' concerns; and (v) whether further negotiations will likely prove fruitful.[21]

Lastly, the Bill of Rights makes no mention of situations where a right of way or other interest in land is condemned but the transmission line is subsequently never built or is later abandoned. Various states require that condemned property interests will revert back to the landowner if the transmission line is either abandoned or is never built. For example, Iowa law requires reversion of the condemned interest if the property is not used after a five-year period.[22] Missouri law also allows for a reversion when a project is not built due to financing issues.[23] The proposed rule would do well to emulate what the states have done to protect landowners by creating a process where landowners can have their land returned to them in these types of situations.

The proposed rule includes an Applicant Code of Conduct with which an applicant *may choose* to comply to demonstrate that it has made a good faith effort to engage with landowners and other stakeholders early in the permitting process. The voluntary nature of the Applicant Code of Conduct renders it useless. Rather than set concrete, minimum standards establishing what landowners could expect, the Code of Conduct is not mandatory and leaves room for other conduct to supplant landowner and stakeholder engagement requirements.

Even beyond the fatal flaw that is the voluntary nature of the Code, the provisions of the Code of Conduct could and should go further in protecting landowners. Paragraph 9 of the Applicant Code of Conduct, for example, requires that applicants choosing to comply with the Applicant Code of Conduct must obtain an affected landowner's permission prior to entering the property, including for survey or environmental assessment, and leave the property without argument or delay if the affected landowner revokes permission.[24] However, this protection does not apply when it is not provided by state or local law.

Consequently, this requirement provides no protections for landowners who live in states or localities with laws that allow access to private property for this type of project due diligence without landowner permission. Indeed, it is ironic that the rule seeks to

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[21] ILLINOIS LANDOWNERS ALLIANCE, NFP, et al., Respondents-Appellees, v. ILLINOIS COMMERCE COMMISSION, et al., Petitioners-Appellants., 2017 WL 4314189 (Ill.), 22

[22] Iowa Code § 478.15(4) (2023).

[23] V.A.M.S 523.025.

[24] Applications for Permits to Site Interstate Electric Transmission Facilities, 88 F.R. 2770, 2786 (Jan. 17, 2023) (revising 18 C.F.R. Part 50).

preempt state law when it protects landowners, but when state or local laws contain blind spots to the detriment of landowners, the proposed rule implicitly embraces them.

To further illustrate the lack of teeth in the Code of Conduct, one need look no further than paragraph 7, where applicants are admonished to "avoid harassing, coercive, manipulative, or intimidating communications or high-pressure tactics."[25] Rather than explicitly prohibit tactics that, by any measure, are repulsive and have no place in good-faith negotiations, the Code of Conduct simply asks that applicants "avoid" those tactics, like a doctor might advise her patient to avoid fried foods.

Lastly, in order to help affected landowners, a requirement should be added to the Code of Conduct that compels that all feasible due diligence be done in and through the public domain (e.g., GIS mapping, endangered species registries, etc.) before the applicant is allowed to seek access to private property.

In order to make the Code of Conduct meaningful in any way, it should 1) be mandatory, and 2) be wholly revised to add some semblance of seriousness and enforceability. If these steps are not taken, the Code as written in the proposed rule does nothing but provide a false sense of security to landowners who are told that it exists but are unaware of its numerous limitations.

6. The environmental justice provisions of the proposed rule lack specificity and fail to address the genuine issues that many disadvantaged communities actually face.

This Commission seeks comment on the meaning of "environmental justice community," which it proposes defining as "any disadvantaged community that has been historically marginalized and overburdened by pollution, including, but not limited to, minority populations, low-income populations, or indigenous peoples."

According to the proposed rule and its accompanying notice, FERC staff currently use U.S. census data for the race, ethnicity, and poverty data at the state, county, and block group level.[26] The legality of such an approach has been questioned by various parties, including by FERC commissioners themselves.[27]

Environmental justice ("EJ") has been designated as a priority of the Biden Administration with a whole-of-government approach to the issue. Even with that

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[25] Applications for Permits to Site Interstate Electric Transmission Facilities, 88 F.R. 2770, 2786 (Jan. 17, 2023) (revising 18 C.F.R. Part 50).
[26] *See* Fed Reg Vol. 88, No. 10, p. 2774, FN39 (Jan. 17, 2023).
[27] Roberts, Richard L., *et al.*, "FERC Proposes NOPR on Backstop Citing Authority," https://www.steptoe.com/en/news-publications/ferc-proposes-nopr-on-backstop-siting-authority.html Dec. 19, 2022 (last reviewed May 11, 2023).

prioritization, at the federal level there is still no clear definition of EJ communities, what extra action is needed to protect EJ communities, and what triggers such action. FERC itself, in the NOPR, acknowledges the issue is still evolving. In addition, across the country, state legislatures are in the process of debating and, in some cases, enacting new laws to guide the environmental justice activities within their boundaries. In the absence of new state law, many state environmental protection agencies are currently operating under policies without clear authority. To state simply, this issue is continuing to evolve at multiple levels of government, but clear authority to define or implement it remains elusive.

At the core of most EJ discussions is a focus on public participation. EJ public participation ensures that communities are not disproportionately impacted by a degradation of the environment or receive a less than equitable share of environmental protection and benefits, and it strengthens the public's involvement in environmental permitting. Many rural areas through which interstate transmission lines run are also the same communities in which the Biden Administration is still in the process of deploying broadband internet, meaning internet in those areas is less than robust.

In rural areas, print newspapers are also struggling to stay in business. Therefore, the burden of outreach has fallen on the shoulders of state agencies and the regulated community. If done inadequately, rural EJ communities are unaware of projects that would impact them, and therefore shut out of the conversation to understand projects and voice their concerns. Certain communities in the path of interstate transmission lines may suffer disproportionately from environmental hazards when permits are approved by state or federal agencies. The environmental hazards can cause long-term environmental and health effects.

7. Conclusion

The proposed rule fashions itself as a workaround to an obstruction that does not exist. The processes that states have refined over the course of decades to examine and approve applications and to route transmission infrastructure are technically sound and well-balanced. They provide landowners with real protections while also giving transmission developers ample opportunity to develop needed transmission. Moreover, the proposed rule essentially ignores the technical expertise that the ISOs and RTOs have cultivated, particularly in the areas of forward long-term planning for future needs, and the ways in which those needs can be met efficiently.

But even if the workaround were needed, as it currently stands, the proposed rule is too vague and ambiguous and lacks the clarity and substance needed to provide this country's landowners with anything but illusory protections. Parts of the proposed rule that sound nice, like the "Code of Conduct" and "Bill of Rights," are Potemkin villages that provide a pleasant façade but that are, at their core, devoid of substance.

For these reasons we request that the Commission abandon this proposed rule, wait until the National Corridors are designated and then propose a rule that provides real and meaningful protections to landowners as state laws and regulations have done for decades. Thank you for your consideration of these comments.

Thank you for your time and consideration of these comments.

Sincerely,

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