UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Applications for Permits to Site	)	Docket No. RM22-7-001
Interstate Electric Transmission Facilities	)	

REQUEST FOR REHEARING OF PUBLIC INTEREST ORGANIZATIONS

Pursuant to section 313(a) of the Federal Power Act ("FPA")[1] and Rule 713 of the Federal Energy Regulatory Commission's (the "Commission" or "FERC") Rules of Practice and Procedure,[2] Earthjustice, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Sustainable FERC Project, Union of Concerned Scientists, WE ACT for Environmental Justice, and the Yurok Tribe (together "Public Interest Organizations" or "PIOs")[3] together submit this request for rehearing of the Commission's May 13, 2024 rule, Order No. 1977, in the above-captioned proceeding.[4]

While PIOs generally support Order No. 1977 and believe it presents an appropriate implementation of the Commission's statutory role in permitting transmission facilities, PIOs seek rehearing on a limited set of issues where revisions can strengthen Order No. 1977 by better fulfilling the FPA and National Environmental Policy Act ("NEPA") provisions that the rule aims to implement. Fortunately, PIOs believe that the Commission can easily correct the issues on which we seek rehearing, as detailed below.

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[1] 16 U.S.C. § 8251.

[2] 18 CFR § 385.713.

[3] The organizations signing this request for rehearing differ from those that submitted comments on the draft rule. The organizations that submitted comments on the draft rule but are not joining this request for rehearing are National Wildlife Federation and NW Energy Coalition. Environmental Defense Fund is joining this request for rehearing. The Yurok Tribe submitted separate comments on the draft rule and is joining this request for rehearing.

[4] Applications for Permits to Site Interstate Electric Transmission Facilities, Order No. 1977, 187 FERC ¶ 61,069 (2024), 89 Fed. Reg. 46,682 (May 29, 2024) ("Order No. 1977").

I. STATEMENT OF ISSUES

Pursuant to Rules 203(a)(7) and 713(c),[5] the issues presented for clarification or consideration on rehearing are as follows:

1) The Commission erred by failing to extend the good faith requirement embodied in the Applicant Code of Conduct to all stakeholders or, in the alternative, it erred by not specifically requiring in its regulations a showing of good faith to other stakeholders.[6]
2) The Commission erred by failing to extend the protections in the Code of Conduct to Indian Tribes and by failing to recognize Tribes' status as landowners.
3) The Commission erred by failing to require analysis of transmission projects' climate impacts under NEPA.
4) The Commission erred by failing to require applicants for permits under FPA section 216(b) to enter into the Commission's pre-filing process all public comments regarding the applicants' transmission projects that were submitted to state permitting agencies.

II. REQUEST FOR REHEARING

A. The Commission must extend the Code of Conduct to govern interactions with all stakeholders.

1. Applying the code of conduct solely to interactions with affected landowners deprives stakeholders of protections that Congress intended when requiring good faith.

For FERC to grant a permit holder eminent domain authority, FPA section 216(e)(1) requires the Commission to determine that "the permit holder has made good faith efforts to

[5] 18 CFR §§ 385.203(a)(7), 385.713.
[6] Order No. 1977, 187 FERC ¶ 61,609 at P 73-97; 16 U.S.C. 824p(e)(1).

engage with landowners *and other stakeholders* early in the applicable permitting process."[7] In Order No. 1977, the Commission adopted a voluntary Applicant Code of Conduct as "one way to demonstrate to the Commission that such good faith efforts have been made with respect *to affected landowners*."[8] The Commission also required applicants that do not commit to comply with the Code of Conduct to show how they meet the good faith requirement. While the introductory paragraph to section 50.12 notes that the FPA requires the applicant to demonstrate good faith efforts to engage landowners "and other stakeholders," the Commission extended the Code of Conduct only to affected landowners but not to other stakeholders. Troublingly, this omission means that the Code of Conduct would not necessarily apply to engagement with environmental justice communities.[9] Further, the regulations concerning how an applicant can show compliance with the FPA's good faith requirement outside of the Code of Conduct only apply to "[a]pplicants not committing to comply with the Applicant Code of Conduct."[10] Thus, FERC's regulations do not provide any default standard for how an applicant can meet the statutory requirement to show good faith to "other stakeholders."

We seek rehearing of the Commission's implementation of this statutory provision. The most straightforward way for the Commission to comply with the FPA's good faith requirement is to apply the Applicant Code of Conduct to all landowners and other stakeholders, not just "affected landowners." Extending the Code of Conduct to all stakeholders would provide a clear path for applicants to satisfy the FPA's good faith requirement. In the alternative, FERC must make clear in its regulations that the applicant must engage in good faith with all stakeholders.

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[7] 16 U.S.C. § 824p(e)(1) (emphasis added).
[8] Order No. 1977, 187 FERC ¶ 61,069 at new 18 CFR § 50.12 (emphasis added).
[9] *See id.* at P 67 (noting that PIOs recommended extending the Code of Conduct to all stakeholders, which would "extend the duty of good faith to environmental justice communities"); *id.* at P 84 (declining to extend the Code of Conduct to stakeholders and limiting its application to affected landowners).
[10] *Id.* at new 18 CFR § 50.12(c).

The Commission must also specifically modify its regulations to require applicants that do not follow the Code of Conduct in interactions with stakeholders to show how they meet the good faith requirement to other stakeholders using the processes in section 50.12(c), regardless of whether the applicant uses the Code of Conduct to meet the good faith requirement with respect to affected landowners.

In Order No. 1977, the Commission "agree[d] with commenters that FPA section 216(e)(1) requires an applicant to demonstrate good faith efforts to engage with 'landowners and other stakeholders.'"[11] Nevertheless, the Commission declined to extend the Code of Conduct to other stakeholders because it asserted that the Code of Conduct is "tailored to encourage productive and more sustained engagement with affected landowners regarding the use or acquisition of their property."[12]

We continue to believe that to comport with the statute's language, FERC must apply the Applicant Code of Conduct to all landowners and other stakeholders, not just "affected landowners." Section 216 of the FPA is clear: an applicant must make "good faith efforts to engage with landowners and other stakeholders" to obtain eminent domain rights.[13] As written, the regulations continue to imply that this requirement applies only to "affected landowners" and not "other stakeholders," which does not comply with the FPA's requirements. The focus on affected landowner engagement in Order No. 1977 only partially fulfills the statute's requirements because the Order provides a clear path to satisfying the prerequisites for eminent domain only with respect to affected landowners—it provides no predictable criteria for how other stakeholders can expect developers to behave, no way for developers to be sure that their

[11] *Id.* at P 84.
[12] *Id.*
[13] 16 U.S.C. § 824p(e)(1).

engagement with other stakeholders will be sufficient for the Commission to find they have acted in good faith, and no requirement for applicants to make such a showing to the Commission in their filings.

Even accepting that the Commission tailored its Applicant Code of Conduct to address how to engage affected landowners regarding the use or acquisition of their property, the FPA still requires applicants to demonstrate that they deal in good faith with other stakeholders. In our comments, we recognized that "certain provisions of the proposed Code of Conductus clearly should apply only to landowners,"[14] but that fact does not support applying the entire Code of Conduct exclusively to affected landowners. The Commission should revise its regulations to make clear that the Applicant Code of Conduct applies equally to other stakeholders, and then make any specific adjustments where necessary to reflect the needs of affected landowners.

Many parts of the Applicant Code of Conduct are equally applicable to interactions with any stakeholder. For example, for the Commission to determine that an applicant meets the good faith requirement, an applicant should keep a log of all its discussions with stakeholders.[15] Otherwise, the Commission will lack a record on which to make a reasoned determination of whether these discussions are held in good faith. This is an easy fix in the regulations. Section 50.12(a) should be modified to apply to landowners and other stakeholders. And Section 50.12(a)(1) should be modified to require the applicant to "Develop and maintain a log of discussions with <u>all</u> landowners <u>and other stakeholders. With respect to records of discussions with affected landowners, that log must be</u> organized by name and property address...." These

[14] Joint Comments of Public Interest Organizations at 20, Docket No. RM22-7 (May 17, 2023), Accession No. 20230517-5046 ("PIO Comments").
[15] The Commission may also meet this requirement by limiting such log to certain types of contacts, such as community meetings, scheduled meetings with any stakeholder, etc.

revisions ensure that the good faith requirement applies to everyone it must statutorily apply to, but maintains the additional duty that the Commission feels is owed to affected landowners.

Other provisions of the Applicant Code of Conduct should also apply equally to all stakeholders. To show good faith, applicants must be factually correct and not misrepresent themselves. They must also communicate respectfully and avoid harassing, coercive, manipulative, or intimidating communications or high-pressure tactics. However, the Commission has specifically applied these requirements only to applicants' dealings with affected landowners, and not to all stakeholders.[16] There is no reason for the Commission to permit, even implicitly, applicants to be deceptive or coercive to stakeholders where such tactics are forbidden in interactions with affected landowners. In addition, all stakeholders deserve to know "a description of the project, a description of the Commission and its role, a map of the project route,"[17] the identity of any representatives acting on an applicant's behalf, and an applicant's updated contact information.[18] These protections are especially important for engagement with environmental justice communities,[19] which the Commission recognizes are stakeholders.[20] There is simply no reason for the Commission's regulations not to require applicants to demonstrate this very basic level of good faith.

Finally, with respect to "affected landowners," the Commission should revise section 50.12(a)(10) of its regulations to ensure that the applicant "[r]efrain from discussing an affected landowner's communications or negotiations status" with any other stakeholder, rather than only with any other affected landowner. Except in limited circumstances, there is seldom any good-

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[16] *See* Order No. 1977, 187 FERC ¶ 61,069 at new 18 CFR § 50.12(a)(4)-(5), (a)(7).
[17] *Id.* at new 18 CFR § 50.12(a)(2).
[18] *Id.* at new 18 CFR § 50.12(a)(3), (a)(6).
[19] *See* PIO Comments, *supra* note 14, at 75–79 (describing the importance of equitable engagement with environmental justice communities).
[20] Order No. 1977, 187 FERC ¶ 61,069 at PP 142, 145.

faith reason for an applicant to discuss landowner negotiations with anyone other than that landowner.[21]

2. In the alternative, FERC must revise its regulations to require each applicant to demonstrate how it meets the good faith requirement.

In the alternative, FERC's regulations must explicitly require applicants to demonstrate how they meet the good faith requirement to other stakeholders. In the Preamble to Order No. 1977, FERC acknowledges that "applicants bear the burden to demonstrate good faith efforts at engagement and should strive to incorporate best practices used in engagement with affected landowners in engagement with other stakeholders, as applicable."[22] FERC clarified that it

> will assess case-by-case an applicant's good faith efforts to engage with other stakeholders, based on the record in a proceeding. We will consider, among other things, an applicant's efforts to engage stakeholders as described in the Project Participation Plan (including engagement with environmental justice communities and Tribes), monthly status reports describing stakeholder communications during pre-filing, and compliance with Commission regulations for project notifications.[23]

However, FERC's regulations do not include a requirement that an applicant must demonstrate to the Commission how it meets the good faith requirement to other stakeholders. For example, section 50.5(c)(3)(9) of the regulations only requires applicants to provide a statement in a prefiling request indicating if the applicant intends to comply with the Applicant Code of Conduct and if not, how it will show good faith in dealings with affected landowners. Since as adopted the Code of Conduct does not apply to all stakeholders, the applicant does not need to affirmatively state how it will show good faith dealings with stakeholders who are not affected landowners. Under the FPA, FERC has a duty to determine whether the applicant meets the good faith requirement to landowners and other stakeholders in section 216(e)(1), not just affected

[21] In the limited context of a developer's negotiations regarding land on Indian Tribes' reservations, it would be appropriate for a developer to discuss such negotiations with the Tribe as well as the affected landowner.
[22] Order No. 1977, 187 FERC ¶ 61,609 at P 84.
[23] *Id.*

landowners. Therefore, the Commission must at a minimum modify its regulations to say that the applicant must also provide a statement indicating how it intends to comply with the requirement to deal in good faith with landowners and all other stakeholders.

Further, the Commission must amend section 50.12 to require the applicant to document how it has met its burden of good faith dealing with other stakeholders. The Preamble to Order No. 1977 clearly states that the Commission will make this determination "based on the record in a proceeding,"[24] but the regulations do not require the applicant to file any documentation on how it has met its burden. While we recognize that section 50.12 of the regulations is about the Applicant Code of Conduct, the easiest fix to this documentation problem would be for the Commission to grant our rehearing and apply the Code of Conduct to all stakeholders. Doing so would also ensure that if an applicant chose not to use the Code of Conduct, it would have to show compliance with the good faith requirement under section 50.12(c). However, should the Commission decide not to extend the Code of Conduct to all stakeholders, the Commission must instead modify its regulations to make clear that applicants must demonstrate compliance with the good faith requirement to other stakeholders and explain how they can do so. This will ensure that the Commission can meet its burden to determine if the applicant has met the good faith requirement.[25]

B. The Commission must apply the Code of Conduct to Indian Tribes.

The Code of Conduct's protections are uniquely important for Indian Tribes given the extensive history of deceitful tactics and trespass used to take tribal land and resources. As PIOs, the Yurok Tribe, and the Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock

[24] *Id.*
[25] Another option would be for the Commission to modify section 50.12(c) to apply to all compliance with respect to stakeholders that are not affected landowners and applicants not committing to comply with the Applicant Code of Conduct with respect to affected landowners.

Indian Tribe, and Upper Mattaponi Indian Tribe noted in comments,[26] the unique history of land disenfranchisement of Indian Tribes requires the Commission to ensure that Order No. 1977 protects Indian Tribes at least as strongly as other landowners and stakeholders. We appreciate that the Commission recognized the importance of considering case-specific histories of land taking and fragmentation,[27] but the Commission must also consider this history outside of NEPA analysis. In particular, the Commission must account for the long history of taking tribal lands—both by the government and by private entities, and often by forcible or deceptive means—when construing "good faith" engagement with Indian Tribes. Moreover, the Commission's approach must reflect that Indian Tribes are owed the protections due to both sovereign entities *and* landowners with respect to lands held in trust or within reservations. Such an approach is integral to the Commission's implementation of Section 216 and fulfillment of its trust obligation.[28] While the Tribal Engagement Plan should help guide applicants toward more appropriate engagement with Indian Tribes, that process cannot substitute for the floor of good faith conduct established in the Code of Conduct.

PIOs identify three ways in which the Commission could extend the Code of Conduct to include Indian Tribes without requiring a complicated analysis of land ownership. Most simply and as explained above, the Commission should extend the Code of Conduct to all stakeholders to provide predictable standards for evaluating applicants' "good faith." This approach would

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[26] PIO Comments, *supra* note 14 at 72; Comments of the Yurok Tribe at 30, Docket No. RM22-7 (May 17, 2023), Accession No. 20230517-5171 ("Yurok Tribe Comments") (urging FERC to "outline the minimum contours of good faith engagement with tribes, even where they are not necessarily owners of the lands directly impacted by a transmission line" but may be deeply affected, for example, on ancestral lands); Comments of the Chickahominy, Nansemond, Rappahannock, and Upper Mattaponi Tribes at 2, Docket No. RM22-7 (April 18, 2023) Accession No. 20230418-5023 ("Chickahominy, Nansemond, Rappahannock, Upper Mattaponi Tribe Comments") (noting "Tribes who are affected landowners will have different interests than other landowners, as tribal land serves governmental functions, and these distinct interests should be accounted for in the affected landowners provisions") and 3 (noting that Outreach to Tribes "must occur through separate channels than general public outreach").

[27] Order No. 1977, 187 FERC ¶ 61,609 at PP 409–410.

[28] *See, e.g.*, 18 CFR § 2.1c, Policy Statement on Consultation with Indian Tribes in Commission Proceedings.

protect Indian Tribes.[29] However, if the Commission chooses not to extend the Code of Conduct to other stakeholders, it should still extend it to Indian Tribes. Additionally—and independent of its decision on the scope of the Code of Conduct—the Commission should reverse its exclusion of tribal trust lands as qualifying property interests under the definition of affected landowners. Finally, the Commission should prevent harmful confusion by clarifying that Indian Tribes retain the right to exclude within their reservations.

1. The Commission could revise the Code of Conduct to apply to Landowners and Indian Tribes.

Although the Commission should extend the Code of Conduct to *all* stakeholders, at a minimum the Commission should apply the Code of Conduct to engagement with Indian Tribes. As noted above, the Commission's primary reason for limiting the applicability of the Code of Conduct is to protect landowners who may have their property used or acquired.[30] But these same early-in-the-process protections of honest dealings, consent to enter lands, and documentation of engagement are also necessary to protect Tribes whose remaining resources may be affected, particularly on reservations or lands otherwise held by a Tribe, as well as on Tribes' ancestral lands.[31] Because of the cumulative impacts of the historical destruction of cultural practices and resources, additional protections and considerations of impacts to cultural resources are essential. While the Cultural and Tribal Resources Reports are a step in the right direction, those reports generally document adverse impacts rather than requiring practices to preserve tribal resources. Failing to extend the Code of Conduct to engagement with Indian

[29] Order No. 1977, 187 FERC ¶ 61,609 at P 145. PIOs support the Commission's explicit inclusion of Indian Tribes in the definition of stakeholder.

[30] *See id.* at P 84.

[31] Because of the United States' history of taking and degrading tribal Lands, critical cultural sites and resources are often on land that Tribes do not currently own, yet these resources remain critical cultural resources for which Tribes are owed protections. *See* Yurok Tribe Comments, *supra* note 26 at 9, 30.

Tribes fails to extend important substantive protections or to ensure that these reports are prepared in good faith. The historic and current impacts to tribal resources warrant the specific inclusion of Indian Tribes in the Code of Conduct as a principled way for the Commission to meet its trust obligations as well as its responsibilities under Section 216.

Clear requirements and standards for good faith engagement with Indian Tribes would also promote successful and timely transmission development. DOE's preliminary list of National Interest Electric Transmission Corridors ("NIETC"), which identifies areas where Order No. 1977 may apply, includes areas on or near lands held in trust for Indian Tribes or areas where Indian Tribes have significant cultural resources.[32] Eminent domain is not applicable to lands held in trust for Indian Tribes; instead, development on such lands requires a right-of-way that the Bureau of Indian Affairs ("BIA") may issue only if a Tribe consents.[33] Accordingly, successful development of transmission projects for which developers may seek permits under Order No. 1977 will require negotiations that build sound relationships with Indian Tribes. Good faith engagement with applicants, as required by the Code of Conduct, is a prerequisite to Tribes wishing to engage in such negotiations. Hence, the Commission should do everything it can to ensure that applicants do not mislead or otherwise disrespect Indian Tribes, including applying the basic protections of the Code of Conduct to engagement with Indian Tribes. Indeed, PIOs believe that the absence of an explicit requirement to engage Tribes in good faith, and clear

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[32] For example, the proposed Mountain-Northwest corridor crosses tribal land in Nevada and the Northern Plains corridor crosses tribal trust land in the Dakotas. *See* DOE, *Initiation of Phase 2 of National Interest Electric Transmission Corridor (NIETC) Designation Process: Preliminary List of Potential NIETCs Issued Pursuant to Section 216(a) of the Federal Power Act* at 9, 60, 72, (May 8, 2024), https://www.energy.gov/sites/default/files/2024-05/PreliminaryListPotentialNIETCsPublicRelease.pdf (depicting proposed NIETCs).

[33] 25 U.S.C. §§ 323-324; 25 CFR § 224.84 (requiring tribal consent for rights of way through trust lands); 16 U.S.C. § 824p(e)(1) (exempting lands held by the United States from the backstop permitting process); *see also* Rights-Of-Way On Indian Lands Handbook, 52 IAM 9-H (2022) (explaining approval and negotiation process for rights of way on tribal lands).

standards for how to do so, will certainly result in inconsistency in Tribal outreach and engagement across projects and applicants. PIOs are especially concerned that Order No. 1977, as currently formulated, is disrespectful to tribal beneficial owners of trust lands by indicating that their property interests in lands held in trust are somehow lesser, or less worthy of protection, than the interests of fee simple landowners, when the intention of holding (and often, converting) lands into trust is instead to provide Tribes with greater sovereignty and control over lands.

2. The Commission should establish that Tribes are landowners, regardless of whether land is held in fee or in trust.

The Commission erred in distinguishing between tribal land ownership types to determine the level of protection afforded to Indian Tribes; instead, the Commission should recognize all forms of tribal lands in defining "affected landowners." The preamble to Order No. 1977 states that a Tribe "would not be an affected landowner if they occupy lands held in trust by the United States."[34] This logic is flawed. Under the regulation's actual text, the definition refers to "owners of property interests," not fee ownership.[35] As the Supreme Court has long recognized, Indian Tribes' beneficial interests in trust land are a property interest.[36]

The Supreme Court's recognition of Tribes and tribal members as beneficial owners of lands held in trust on their behalf by the federal government is consistent with the reality that Tribes or tribal members will often transfer land previously held in fee into trust status in order to gain greater sovereign control and protections over the land than would exist under fee

[34] Order No. 1977, 187 FERC ¶ 61,609 at P 156.
[35] *Id.* at new 18 CFR § 50.1.
[36] *Solem v. Bartlett*, 465 U.S. 463, 468 (1984) ("Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: *trust lands*, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians" (*emphasis added*)).

ownership.[37] The Commission's conclusion that a Tribe or tribal member would not be considered the "landowner" of trust land held by the federal government for their benefit fundamentally misunderstands the special status granted to Tribes as sovereign entities and violates the federal trust responsibility. As a reflection of this fundamental misinterpretation, the Commission's decision is also plainly inconsistent with other federal laws and regulations regarding whether a Tribe or tribal member is considered the "landowner" of lands held in trust for their benefit. For example, the Bureau of Indian Affairs ("BIA") regulations regarding land use on tribal trust lands describe Indian landowners as those who "own" trust or restricted interests in land,[38] and explain how these same Indian landowners are entitled to made decisions regarding leasing of lands.[39]

In contrast, the Commission's current definition of "owners of property interests" discriminates against Indian Tribes by requiring property interests to be "noted in the most recent county/city tax records as receiving the tax notice."[40] As PIOs' comments noted, county and city records often fail to record tribal property interests,[41] and BIA is responsible for recording interests in tribal lands held in trust, for which no local property taxes are applicable.[42] The Commission should modify this definition to avoid discrimination against Indian Tribes and tribal members. The Commission would not be alone in offering this flexibility; DOE's definition of affected landowners notes that property interests are *usually* referenced in local tax

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[37] *See, e.g.* Bureau of Indian Affairs, Land Acquisitions Final Rule, 88 Fed. Reg. 86,222 (Dec. 2023) at 86,227 (establishing the legal presumption that acquisition into trust will benefit tribal welfare and therefore should be approved); *Id.* at 86,242 ("Where a Tribe takes land into trust off-reservation, that land nearly always serves an important economic, cultural, self-determination, or sovereignty purpose that supports Tribal welfare. Tribal governments are rational actors that make acquisition decisions carefully based on available resources, planning, and purposes valued by the Tribe").
[38] 25 CFR § 162.005.
[39] *Id.* § 162.013.
[40] Order No. 1977, 187 FERC ¶ 61,609 at P 148.
[41] PIO Comments, *supra* note 14, at 27.
[42] 25 CFR § 150.102.

records.[43] This regulatory consistency with the rest of the NIETC processes would be an additional benefit of defining the term "affected landowner" in a manner that does not exclude Indian Tribes. Notably, the Commission does not suggest that *paying* county or city taxes is relevant.[44] Instead, the Commission worries that applicants may not have sufficient means to "readily identify" all affected landowners under a more inclusive definition, which would make it difficult for the applicant to meet its other regulatory obligations such as notification requirements.[45]

The Commission's concern about burdening applicants is not well supported, particularly as applied to identifying Tribes whose lands are held in trust, for several reasons. First, identifying Tribes should be relatively simple since BIA's Division of Real Estate Services maintains records of tribal and individual trust property, including title reports, making ownership easy to determine with minimal work by applicants.[46] Second, applicants must already identify affected Indian Tribes to comply with other parts of the rule, including the Tribal Engagement Plan and Resource Reports.[47] Third, tribal property interests relevant to the Commission's permitting of transmission lines should already have been identified during government-to-government consultation that both the Commission and the DOE must undertake due to their trust obligation to Tribes, regardless of their land status. Fourth, there is a finite number of Indian Tribes, as defined in the rule, in the entire United States—potentially fewer than, say, the number of renters along even a mile of a transmission line—and significantly fewer

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[43] PIO Comments, *supra* note 14, at 26.
[44] After all, other types of presumably covered "landowner" entities—such as places of worship—often enjoy state/county/city tax exemptions.
[45] Order No. 1977, 187 FERC ¶ 61,609 at P 156.
[46] 25 CFR § 150.102.
[47] We note that the Commission adds in a footnote that its trust responsibilities will afford additional outreach and consultation with the Commission, Order No. 1977, 187 FERC ¶ 61,609 at P 156 n. 251, but that this is *not* a substitute for ensuring proper outreach by the *applicant*.

Tribes along the route of any given transmission project. And fifth, many Indian Tribes hold land under a mix of legal arrangements. Due to these mixed land types, a Tribe near a proposed NIETC may very well have fee and trust land along a transmission line's route. For these reasons, the evidence does not support Commission's decision to exclude tribal trust land from the definition of "affected landowners." The potential burden to applicants is simply not significant enough to justify the exclusion of Indian Tribes from the affected landowner category.

3. The Commission must clarify that Indian Tribes retain their sovereign right to exclude non-members from reservations, regardless of the applicability the Code of Conduct.

The Commission states that "[r]egarding Tribal concerns for obtaining consent to enter Tribal lands, we clarify that the Applicant Code of Conduct would apply to land owned in fee by a Tribe or member of a Tribe, so § 50.12(a)(9) would require approval from the Tribe or member of a Tribe under those circumstances."[48] As argued above, we believe that the Commission should reverse this position on rehearing and hold that the Applicant Code of Conduct applies to all interactions with Indian Tribes. Additionally, independent from the Commission's decision on the applicability of the Code of Conduct, we fear this statement may cause confusion among developers as to Indian Tribes' sovereign right to exclude any unwanted entities from lands held in trust for Tribes, and we therefore urge the Commission to clarify its language. The Supreme Court has repeatedly held that Indian Tribes have the authority to determine who is or is not allowed onto lands held in trust for Tribes,[49] and both Tribal Governments and United States

[48] Order No. 1977, 187 FERC ¶ 61,609 at P 94.

[49] *Montana v. U.S.*, 450 U.S. 544, 566 (1981) (Maintaining the right of Tribes to prohibit or condition entry onto land belonging to the Tribe or held by the United States in trust for the Tribe, while creating conditions on such power in other instances). *See also Gibbons v. Ogden*, 22 U.S. 1, 67 (1824) (holding that the right to exclude originates in the inherent authority of the sovereign to police for the general welfare).

Attorneys have the ability to help enforce these authorities.[50] Tribes can also apply their right to exclude on a case-by-case basis, or to a category of individuals and entities.[51] To avoid any misunderstanding and to encourage good faith behavior of applicants, PIOs recommend that the Commission explicitly recognize the tribal right to exclude on rehearing.

C. The Commission must require more rigorous analysis of transmission projects' climate impacts under NEPA.

Order No. 1977 updated the Commission's NEPA regulations for transmission projects seeking permits under section 216(b) of the FPA.[52] Among other changes, Order No. 1977 introduced a new resource report, the Air Quality and Environmental Noise Report.[53] This new resource report requires applicants to estimate emissions from the proposed project and the corresponding impacts on air quality and the environment, but does not require analysis of how a transmission project will impact the climate by enabling changes in energy generation.

PIOs' comments explained that while Order No. 1977 will generally improve the Commission's NEPA process, it will not fully comply with NEPA unless it requires analysis of transmission projects' impacts on the climate. Hence, PIOs urged the Commission to: (1) require applicants to provide, or independently obtain, all available information about how a proposed transmission project will impact the climate by changing greenhouse gas emissions from electricity generation, and 2) analyze all available information about transmission projects' climate impacts when determining whether proposed projects meet the Federal Power Act's

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[50] *See* Wood, Jeremy (2018) "Tribal Exclusion Authority: Its Sovereign Basis with Recommendations for Federal Support," American Indian Law Journal: Vol. 6: Iss. 2, Article 5, at 236-39.
[51] *Id*. at 203-205, 208 (citing examples that range from exclusions of specific individuals who committed crimes or tried to harm Tribes, to broader measures to exclude those who exploit natural resources, trespass over cultural resources, or deal drugs).
[52] Order No. 1977, 187 FERC ¶ 61,069 at new 18 C.F.R. §§ 50-380.
[53] *Id.* at new 18 CFR §§ 50-380.

substantive requirements.[54] As PIOs explained, transmission projects will foreseeably facilitate the addition of clean energy to the power grid and the retirement of old, inefficient dirty generation, which will likely—but not necessarily—result in overall positive climate impacts.[55]

However, in Order No. 1977, the Commission "disagree[d] that upstream emissions, including GHGs, from a proposed project should always be provided by the applicant."[56] Instead, the Commission maintained that whether the agency must assess transmission projects' climate impacts under NEPA turns on a purportedly "fact-specific determination" of whether "upstream emissions" are reasonably foreseeable.[57] The Commission indicated that if it determines, on a case-by-case basis, that upstream emissions are reasonably foreseeable, "the Commission may request any needed information and assess those emissions under NEPA."[58]

Since the Commission proposed Order No. 1977, several major legal developments have buttressed PIOs' call for a rigorous assessment of transmission projects' climate impacts. These developments include: (1) the enactment of the Fiscal Responsibility Act of 2023, which included amendments to NEPA that reinforce the statutory obligation to assess climate impacts; (2) the Center for Environmental Quality's ("CEQ") issuance of new guidance and regulations, which clearly call for analysis of climate impacts; and (3) the Department of Energy's ("DOE") issuance of regulations that, like Order No. 1977, implement FPA section 216 and unambiguously require assessment of transmission projects' climate impacts. As discussed below, Order No. 1977's approach to climate analysis is out of step with these developments.

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[54] PIO's Comments, *supra* note 14, at 108.
[55] *Id.*
[56] Order No. 1977, 187 FERC ¶ 61,609 at P 383.
[57] *Id.*
[58] *Id.*

The Fiscal Responsibility Act's amendments to NEPA reinforce the statute's requirement to assess the climate impacts of federally permitted actions. For example, NEPA's plain text now makes clear that agencies must "ensure the professional integrity, including scientific integrity" of environmental analysis, use "reliable data and resources," and "recognize the worldwide and long-range character of environmental problems."[59] Climate change is exactly the type of worldwide and long-range environmental problem that NEPA requires agencies to assess, and the overwhelming scientific consensus regarding climate change is precisely the type of reliable data that agencies must incorporate into environmental analysis to demonstrate the scientific integrity the statute mandates. The Commission's failure to recognize that transmission projects will foreseeably result in changes in electricity generation, with foreseeable changes to greenhouse gas emissions, runs contrary to the statute's emphasis on scientific integrity recognizing the worldwide and long-range character of environmental issues.

Similarly, after the Commission proposed Order No. 1977, CEQ issued guidance on consideration of greenhouse gas emissions and climate change, which reinforces that "[c]limate change is a fundamental environmental issue, and its effects on the human environment fall squarely within NEPA's purview."[60] Federal actions such as the approval of major transmission lines "may result in substantial [greenhouse gas] emissions or emissions reductions, so Federal leadership that is informed by sound analysis is crucial to addressing the climate crisis."[61] As CEQ further describes, assessing climate change impacts requires consideration not only of direct emissions of greenhouse gases from a facility's construction, but also net reasonably

[59] 42 U.S.C. §§ 4332(D), (E), (I).
[60] CEQ, *National Environmental Policy Act on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1197 (Jan. 9, 2023) ("Greenhouse Gas Guidance").
[61] *Id.*

foreseeable emissions—or emissions reductions—"over the projected lifetime of the action."[62] Likewise, where a project "involves use or conveyance of a commodity or resource," such as electricity, "changes relating to the production or consumption of that resource" are indirect impacts that require consideration.[63] As CEQ also explains, the "reasonably foreseeable indirect effects" generally "include effects associated with the combustion of [fossil fuels] to produce energy," and such effects "are often reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves use or conveyance of a commodity or resource, and changes relating to the production or consumption of that resource."[64]

Likewise, after the Commission proposed Order No. 1977, CEQ amended its NEPA regulations,[65] which are "binding on all Federal agencies."[66] Among other reforms, CEQ's new regulations clarify that "requiring agencies to quantify greenhouse gas emissions, where feasible, will increase the clarity of these regulations and is consistent with case law."[67] Hence, CEQ's regulations mandate that "where applicable," all agencies—including FERC—must consider "climate change-related effects, including, where feasible, quantification of greenhouse gas emissions."[68] Additionally, CEQ's regulations require all agencies to consider how an action may impact "the objectives of Federal, regional, State, Tribal, and local plans, policies and controls for the area concerned, including those addressing climate change."[69]

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[62] *Id.* at 1201.
[63] *Id.* at 1204.
[64] *Id.*
[65] CEQ, *National Environmental Policy Act Implementing Regulations Phase 2*, 89 Fed. Reg. 35,442 (May 1, 2024) ("CEQ Phase 2 Regulations").
[66] 40 CFR § 1500.3(a).
[67] CEQ Phase 2 Regulations, 89 Fed. Reg. at 35,508.
[68] 40 CFR § 1502.16(a)(6).
[69] *Id.* § 1502.16(a)(5).

Order No. 1977's provisions regarding the analysis of transmission project's climate impacts are not consistent with CEQ's regulations or guidance. CEQ's regulations require analysis of climate impacts unless an agency makes a showing that such analysis is not feasible or applicable. Order No. 1977 flips this approach on its head, instead assuming that no climate analysis will be necessary unless the Commission makes a fact-specific, case-by-case determination that climate impacts are reasonably foreseeable. But as CEQ explained, such effects "are often reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves use or conveyance of a commodity or resource, and changes relating to the production or consumption of that resource."[70] In this regard, Order No. 1977 is badly out of step with CEQ's policies, which are binding on all Federal agencies.

Better assessing transmission projects' climate impacts would also be more consistent with regulations that DOE issued after the Commission proposed Order No. 1977, which also implement section 216 of the FPA.[71] DOE's new rule shares many characteristics with Order No. 1977. Both rules implement the requirement in section 216(h) of the FPA for a "single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law."[72] Both rules require thirteen similar resource reports that aim to provide the information necessary for all relevant agency decisions on proposed transmission projects. And both rules create a process that allows DOE or FERC, as the lead agency responsible for environmental reviews, to collaborate with a project proponent to avoid delays in permitting by ensuring all necessary information is available when permitting begins.

[70] CEQ, *Greenhouse Gas Guidance*, 88 Fed. Reg. at 1204.

[71] DOE, *Coordination of Federal Authorizations for Electric Transmission Facilities*, 89 Fed. Reg. 35,312 (May 1, 2024) ("CITAP Rule").

[72] 16 U.S.C. § 824p(h)(5)(A); *see also* DOE, CITAP Rule, 89 Fed. Reg. at 35,314 (noting that the CITAP Rule implements this statutory provision); Order No. 1977, 187 FERC ¶ 61,1609 at PP 6–7 (noting that FERC's rule implements the same statutory provision under a delegation of responsibility from DOE).

However, FERC's rule differs from DOE's significantly with respect to the analysis of transmission projects' climate impacts. Order No. 1977 declined to require applicants to provide information on "upstream emissions, including GHGs, from a proposed project," because the Commission doubts that changes in greenhouse gas emissions from induced changes in the energy mix are "reasonably foreseeable."[73] In contrast, DOE's CITAP Rule requires applicants to "[e]stimate the reasonably foreseeable change in greenhouse gas emissions from the existing, proposed, and reasonably foreseeable generation resources . . . that may connect to the proposed project or interconnect as a result of the proposed project."[74] DOE explained that while it may, like FERC, determine "on a case-by-case basis" that some changes in emissions might not be reasonably foreseeable, DOE nonetheless "seeks input from project proponents to identify reasonably foreseeable generation projects that may be caused by a Federal authorization."[75] DOE further reasoned that "[e]ven when DOE determines a particular generation resource to be outside the scope of review DOE may still need to identify the resource and explain its conclusion."[76] As DOE notes, this requirement tracks its "statutory obligations, and is consistent with the Secretary of Energy's authority under section 216(h) to require the submission of all data considered necessary"—the same statutory authority that underlies Order No. 1977.[77]

Order No. 1977's inconsistency with CEQ's policies and DOE's regulations sets the stage for case-by-case disputes before the Commission as well as legal challenges. The requirement for case-by-case determinations about changes in the generation mix and associated changes in greenhouse gas emissions will invite controversy during any FERC-led permitting process, as

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[73] Order No. 1977, 187 FERC ¶ 61,1609 at P 383.
[74] DOE CITAP Rule, 89 Fed. Reg. at 35,378.
[75] *Id.* at 35,327.
[76] *Id.*
[77] *Id.*

well as subsequent litigation if FERC determines that changes in the energy mix are not reasonably foreseeable. PIOs are concerned that by inviting such disputes, Order No. 1977 will fail to promote the timely and successful development of transmission that is needed to maintain reliability, improve affordability, and address the climate crisis. Instead, PIOs believe it would be a far more efficient and effective process—and more consistent with NEPA's text and implementing regulations—for the Commission to require applicants to submit, or for the Commission to independently obtain, all available information about how a transmission project will induce changes in the energy mix, and to factor that information into its analysis of the environmental consequences of permitting a transmission project.

Fortunately, the Commission has an easy way to correct this problem. On rehearing, the Commission should adopt the relevant language from DOE's regulations and require applicants to "[e]stimate the reasonably foreseeable change in greenhouse gas emissions from the existing, proposed, and reasonably foreseeable generation resources . . . that may connect to the proposed project or interconnect as a result of the proposed project."[78] We acknowledge that the Commission has stated its intent to review CEQ's regulations and potentially amend its NEPA regulations in response.[79] However, Order No. 1977 makes no mention of DOE's rule or the discrepancy between the two regulations. Adopting this requirement from DOE's rule would provide greater clarity to transmission developers by bringing FERC's permitting process into alignment with DOE's process, and would reduce legal vulnerabilities by aligning Order No. 1977 with requirements in CEQ's regulations.

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[78] *Id*. at 35,378.
[79] Order No. 1977, 187 FERC ¶ 61,1609 at P 284.

D. The Commission should incorporate all public comments in a state permitting docket into the administrative record for any subsequent federal permitting for a transmission project.

In Order No. 1977, the Commission "decline[d] to require that an applicant file with the Commission the comments submitted in a State-level proceeding."[80] The Commission reasoned that commenters in state proceedings may not "intend to have their comment filed" at FERC "without their permission."[81] PIOs respectfully request rehearing on this issue for two reasons.

First, declining to require public comments from state proceedings to be posted into the Commission's docket without commenters' explicit permission will more likely harm commenters than protect them. PIOs believe that anyone sufficiently motivated to make comments in a permitting proceeding will want the final permitting decision-maker to consider their input—whether that decision-maker is a state agency or FERC. Additionally, comments in state permitting processes are generally public, meaning that commenters are unlikely to have any interest in keeping comments out of a subsequent FERC proceeding. As such, we do not believe that incorporating comments from state dockets—even absent commenters' explicit permission—will harm commenters' interests.[82] If FERC is concerned that a party to a state proceeding may have filed non-public comments it does not wish to be made public, FERC could limit the requirement only to public comments in the proceeding. To the extent the Commission feels it is critical to obtain commenters' permission for the incorporation of comments from state

[80] *Id.* at P 216. The Commission also declined to require comments posted in the Commission's proceedings to be posted in subsequent or concurrent state proceedings. Because the Commission decided not to start its pre-filing process until a year after state processes get underway, PIOs do not believe it is likely that any comments will be submitted to the Commission before a state has a chance to act on a proposed project. As such, PIOs do not request rehearing on the Commission's decision not to require posting of comments from the Commission's docket into state permitting dockets.

[81] *Id.*

[82] To the extent that comments in state dockets are submitted as confidential, the Commission can incorporate them with the same protections (such as redactions) that states use in their public dockets.

dockets, the Commission should direct the Office of Public Participation to seek out that permission.

In contrast, failing to incorporate comments from state dockets—and thus requiring commenters to re-submit any input to FERC—creates a procedural trap for members of the public who may not be familiar with how the same project reviewed at the state level may then be reviewed at the federal level a year later. PIOs believe it is inappropriate for FERC to require members of the public to re-submit comments to FERC a year after they submit such comments to state permitting authorities. PIOs are concerned that Order No. 1977 may result in members of the public having their input inappropriately disregarded at the federal level.

Second, incorporating comments from state permitting processes into the Commission's docket can help insulate the Commission's determinations against legal challenge. Order No. 1977 must equip the Commission to make legally durable decisions under all the circumstances that Congress contemplated in section 216(b) of the FPA, including the Commission issuing a permit for a transmission project after a state denies a permit. If the Commission does so, it will be critical for the Commission to consider all the input that may have served as a basis for the state's permit denial. Incorporating all the public comments from the state docket into the Commission's docket would help ensure that the Commission has a full administrative record that contains all information relevant to the state's decision and can help guard against litigation contending that the Commission wrongly ignored a relevant factor in making a permit decision that differs from the outcome at the state level. Hence, PIOs believe that incorporating comments from state permitting proceedings would benefit both commenters and the Commission.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. § 385.2010 upon each party designated in the official service list complied by the Secretary in this proceeding, by email.

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