

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Applications for Permits to Site Interstate)
Electric Transmission Facilities)

Docket No. RM22-7-000

**COMMENTS OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to the Notice of Proposed Rulemaking issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) on December 15, 2022¹ and the Notice of Extension of Time issued by FERC on March 3, 2023,² the New England States Committee on Electricity (“NESCOE”) files comments on the Commission’s proposed amendments to its regulations governing applications for permits to site electric transmission facilities to ensure consistency with the Infrastructure Investment and Jobs Act’s (“IIJA”) amendments to section 216 of the Federal Power Act (“FPA”), to modernize certain regulatory requirements, and to incorporate other updates and clarifications.³

I. DESCRIPTION OF COMMENTER

NESCOE is the Regional State Committee (“RSC”) for New England. It is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont and is funded through a regional tariff that ISO New England Inc. (“ISO-NE”) administers.⁴ NESCOE’s mission is to represent the interests of the

¹ *Applications for Permits to Site Interstate Electric Transmission Facilities*, Notice of Proposed Rulemaking, 181 FERC ¶ 61,205 (2022) (“NOPR”).

² Notice of Extension of Time, Docket No. RM22-7-000 (Mar. 3, 2023).

³ NOPR at P 1.

⁴ *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007).

citizens of the New England region by advancing policies that will provide electricity at the lowest possible price over the long term, consistent with maintaining reliable service and environmental quality.⁵ These comments represent the collective view of the six New England States.

II. INTRODUCTION

NESCOE appreciates the Commission's efforts to modernize certain regulatory requirements and facilitate maximum participation from all stakeholders during its electric transmission facility siting pre-filing process.⁶ NESCOE is strongly supportive of the Commission's proposed regulatory revisions intended to ensure that all permit applicants undertake good faith efforts to engage with landowners and other stakeholders early in the permitting process as a precondition to receiving eminent domain authority and to undertake meaningful engagement with potentially-affected environmental justice communities.⁷ As the pace and scale of electric transmission infrastructure siting continues to increase, it is essential not only that applicants receive as timely a decision as possible, but also that the interplay between State siting authority and Commission siting authority be coordinated in a clear and thoughtful manner. Just as important, stakeholders and communities most likely to be burdened by this infrastructure must be able to meaningfully engage with project applicants early in the siting pre-filing process.

⁵ See Sept. 8, 2006 NESCOE Term Sheet ("Term Sheet") that was filed for information as Exhibit A to the Memorandum of Understanding among ISO-NE, the New England Power Pool ("NEPOOL"), and NESCOE (the "NESCOE MOU"). Informational Filing of the New England States Committee on Electricity, Docket No. ER07-1324-000 (filed Nov. 21, 2007). Pursuant to the NESCOE MOU, the Term Sheet is the binding obligation of ISO-NE, NEPOOL, and NESCOE.

⁶ NOPR at PP 1, 21.

⁷ *Id.* at PP 24, 30. For purposes of these comments, NESCOE uses the definition of "environmental justice community" as proposed in the NOPR at P 30, although NESCOE comments on that term in these comments, *infra* Section III.D.1.

III. COMMENTS

A. COMMENCEMENT OF PRE-FILING

Section 216(b)(1)(C) of the FPA addresses instances where a State commission or other State entity with the authority to site transmission facilities has acted, or has failed to act, thus triggering the Commission's jurisdiction.⁸ The Commission has recognized that Congress, in enacting section 216 of the FPA, adopted a statutory structure that allows State and Commission siting processes to proceed simultaneously.⁹ As explained in Order No. 689, the statute provides for this potential overlap by allowing the Commission to issue a permit one year after the State siting process has begun and by requiring an expeditious pre-application mechanism for all permit decisions under Federal law.¹⁰ However, in its preamble to Order No. 689, the Commission announced a policy that, in cases where its jurisdiction rests on section 216(b)(1)(C), the pre-filing process would not commence until one year after the relevant State applications have been filed.¹¹

The Commission reasoned that although some overlap in State and Federal proceedings is inevitable, it believed "that States which have authority to approve the siting of facilities should have one full year to consider a siting application without there being any overlapping Commission process."¹² The Commission noted that it would reconsider this issue in the future

⁸ *Id.* at P 17.

⁹ *Id.* at P 19 (citing *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 117 FERC ¶ 61,202 (2006) ("Order No. 689"), *reh'g denied*, 119 FERC ¶ 61,154 (2007)).

¹⁰ *Id.* (citing Order No. 689 at P 19).

¹¹ *Id.* at P 20 (citing Order No. 689 at P 21).

¹² Order No. 689 at P 21.

if it determined that the one-year delay in the commencement of a Commission pre-filing process was delaying projects or was not otherwise in the public interest.¹³

The Commission is now proposing to eliminate the one-year delay before the Commission's pre-filing process may commence and to allow simultaneous processing of State applications and Commission pre-filing proceedings.¹⁴ The Commission states that it intends to entertain requests to commence pre-filing, and may grant such requests, at any time after the relevant State applications have been filed.¹⁵ However, the Commission notes that, out of respect for State siting processes, it proposes to provide an additional opportunity for State input before it determines that the pre-filing process is complete and that an application may be filed.¹⁶ Specifically, the Commission proposes a 90-day window for States to provide comments on any aspect of the pre-filing process, including any information submitted by the applicant.¹⁷

The Commission is also seeking comment on the advantages or disadvantages of it entertaining requests to commence the pre-filing process before a State application has been filed.¹⁸

1. The Commission Should Retain the One-Year Waiting Period for the Commencement of the Federal Pre-Filing Process in Order to Minimize the Potential for Stakeholder Confusion and Maximize Administrative Efficiency.

As noted above, in its preamble to Order No. 689, the Commission announced a policy that, in cases where its jurisdiction rests on section 216(b)(1)(C), the pre-filing process would not

¹³ NOPR at P 21 (citing Order No. 689 at P 21).

¹⁴ *Id.*

¹⁵ *Id.* at P 23.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

commence until one year after the relevant State applications have been filed.¹⁹ In adopting this policy, the Commission reasoned that “States which have authority to approve the siting of facilities should have one full year to consider a siting application without there being any overlapping Commission process.”²⁰ In fact, based on the comments of State agencies and other stakeholders in the Order No. 689 NOPR proceedings, the Commission opted not to adopt the parallel Commission-State process as originally proposed in the NOPR.²¹ Rather, the Commission “adopt[ed] an approach that is more fully respectful of State jurisdiction.”²² NESCOE urges the Commission to do the same here.

The Commission states that “[t]he purpose of the pre-filing process is to facilitate maximum participation from all stakeholders to provide them with an opportunity to present their views and recommendations with respect to the environmental impacts of the facilities early in the planning stages of the proposed facilities.”²³ While NESCOE applauds the Commission’s efforts to maximize stakeholders participation in the pre-filing process, this goal should be balanced with the potential challenges that may result from parallel Commission-State processes. NESCOE is concerned that the Commission’s proposal to remove the one-year delay would lead to stakeholder confusion and potentially end up reducing stakeholder participation in the Commission’s pre-filing process and/or State siting proceedings.

For example, if State siting proceedings were taking place at the same time as Commission-led siting proceedings, it is likely that there would be multiple public hearings and

¹⁹ *Id.* at P 20 (citing Order No. 689 at P 21).

²⁰ Order No. 689 at P 21.

²¹ *Id.* at P 20.

²² *Id.*

²³ NOPR at P 21.

comment deadlines during the same timeframe. This overlap in timing could lead to confusion about which dates and deadlines are associated with which proceedings amongst stakeholders unfamiliar with the two separate processes.²⁴ In some cases, stakeholders may believe that it is not necessary for them to participate in both sets of proceedings. Additionally, for all stakeholders, and potentially for State siting authorities, this overlap could present challenges in terms of devoting time and resources simultaneously to multiple processes. Some may choose to allocate their limited resources to just one forum or provide less than fulsome information to both. In either case, records would suffer. Preserving the one-year delay in the Commission pre-filing process would best ensure that stakeholders are able to meaningfully participate in both proceedings if necessary. And, of course, if the State siting authority does approve a project, stakeholders would not have had to invest unnecessary time and resources in the pre-filing process. Indeed, the Commission has considered concerns related to the parallel processes before and determined that the one-year delay “most adequately addresses State concerns.”²⁵

2. The Commission Should Retain the One-Year Delay in the Commencement of the Commission Pre-Filing Process So as Not to Undermine Public Trust in State Siting Authorities.

In both its Order No. 689 and the NOPR, the Commission expresses “respect for State siting processes.”²⁶ NESCOE emphasizes the need to respect and recognize the importance of these State processes. NESCOE is concerned that if the Commission removes the one-year delay

²⁴ NESCOE recognizes that the NOPR proposes to require that any pre-filing notices sent by mail or published in the newspaper include information clarifying that the Commission’s pre-filing and application processes are separate from any simultaneous state siting proceeding and explaining how to participate in any such state siting proceeding. NOPR at P 38. However, as explained further below, NESCOE is concerned that this proposed requirement would not reach all interested stakeholders and, as such, does not adequately alleviate concerns related to potential stakeholder confusion.

²⁵ Order No. 689 at P 21.

²⁶ NOPR at P 23. *See also* Order No. 689 at P 20.

for the commencement of its pre-filing proceedings, it may create an unhelpful perception among stakeholders and other interested parties that State siting proceedings are simply a process stepping-stone for eventual and likely FERC approval for an applicant, as the Department of Energy (“DOE”) and the Commission would have already deemed that the project would serve a “National Corridor.”²⁷ This could undermine public trust and confidence in State siting authorities.

State siting authorities are vitally important in that they are in the best position to understand and address local impacts and stakeholder concerns (*e.g.*, routing concerns, costs, environmental impacts, etc.).²⁸ Additionally, many interested local stakeholders are likely to be more familiar with State siting proceedings and processes and thus more likely to be able to meaningfully participate at the State level. State siting proceedings are also more likely to be accessible and convenient for local stakeholders.

The Commission notes that its proposal to eliminate the one-year delay before the commencement of the Commission’s pre-filing process is intended to ensure that permit applicants received as timely a decision as possible from the Commission.²⁹ NESCOE understands the importance of timely decision-making and is supportive of this goal, but urges the Commission to balance the need to minimize delays with the need to consider stakeholder interests and maximize administrative efficiency. The Commission, while recognizing the primacy of the States’ role in siting transmission infrastructure, explains that it believes that allowing for simultaneous processing could facilitate a more efficient process.³⁰ NESCOE

²⁷ *See id.* at PP 2, 3, 16; FPA, Section 216(a).

²⁸ *See Applications for Permits to Site Interstate Electric Transmission Facilities*, Notice of Proposed Rulemaking, 181 FERC ¶ 61,205 (2022) (Christie, Comm’r, *concurring*) (“Christie Concurrence”) at PP 2, 3.

²⁹ NOPR at P 21.

³⁰ *Id.* at P 22.

respectfully suggests that the elimination of the one-year delay may counter the Commission's goal of maximizing efficiency. NESCOE agrees with Commissioner Christie that if a project is truly necessary and its impacts are properly mitigated, the State siting authority is likely to approve the project without involvement from FERC staff, ultimately saving on administrative costs and staffing resources.³¹ The one-year delay strikes an appropriate balance between the need to ensure that permit applicants received as timely a decision as possible from the Commission and the goal of maximizing administrative efficiency and stakeholder participation.

3. The Commission Does Not Provide a Basis for Reconsidering its Decision to Allow for a One-Year Delay in the Commencement of the Commission Pre-Filing Process.

As noted above, the Commission, in its preamble to Order No. 689, announced a policy that, in cases where its jurisdiction rests on section 216(b)(1)(C), the pre-filing process would not commence until one year after the relevant State applications have been filed.³² However, the Commission noted that it would reconsider this issue if it later determined that requiring applicants to wait one year before commencing the Commission's pre-filing process was delaying projects or otherwise not in the public interest.³³ The Commission explains that it is now reconsidering that policy to ensure that permit applicants receive as timely a decision as possible from the Commission and to facilitate maximum participation from all stakeholders early in the planning stages of the proposed facility.³⁴

³¹ See Christie Concurrence at P 3.

³² NOPR at P 20 (citing Order No. 689 at P 21).

³³ *Id.*

³⁴ *Id.* at P 21.

NESCOE agrees with Commissioner Christie that the decision to adopt a one-year delay for the commencement of the Commission’s pre-filing process “was sound policy in 2006.”³⁵ The Commission has not provided any evidence or reasoning in support of its proposal that would warrant a basis for reconsidering its decision. As Commissioner Christie notes, nothing in the years since the Commission’s decision to adopt the one-year delay in 2006 suggests that “the lack of a Commission pre-filing process prior to the end of the one year is delaying projects or otherwise not in the public interest.”³⁶ As Commissioner Christie points out, it is telling that Congress declined to direct that commencement of the Commission’s pre-filing process should be accelerated when it certainly could have done so.³⁷

NESCOE appreciates the Commission’s stated goals in reconsidering this policy. However, as discussed above, the Commission’s desire to provide applicants with as timely a decision as possible is outweighed by the critical need to facilitate maximum participation from all stakeholders. The failure to preserve the one-year delay is likely to frustrate the goal of maximizing stakeholder participation. This potential unintended consequence of the reversal of the one-year policy is not justified by any apparent history of the delay of projects since the policy was adopted and could potentially undermine the public interest that it is intended to serve. Accordingly, NESCOE respectfully asks the Commission to preserve the one-year delay in the commencement of Commission pre-filing processes after relevant State applications have been filed.

³⁵ Christie Concurrence at P 9.

³⁶ *Id.* (citing Order No. 689 at P 21).

³⁷ *Id.*

4. The Proposed 90-day State Comment Period is Unlikely to Afford Adequate Protection for the States and Their Siting Processes.

In its NOPR, the Commission proposes to provide an additional opportunity for State input before it determines that the pre-filing process is complete.³⁸ Specifically, one year after the commencement of the Commission’s pre-filing process, if a State has not made a determination on an application, the Commission proposes to provide a 90-day window for the State to provide comments on any aspect of the pre-filing process, including any information submitted by the applicant.³⁹ Commissioner Christie expresses support for the NOPR in its current form because he believes that “the proposal to allow states a 90-day comment period following a year of pre-filing processes *may* afford adequate protection for the states and their processes, provided that the Commission’s pre-filing process does not begin *before* the relevant state processes have been commenced.”⁴⁰

NESCOE respectfully disagrees that the 90-day comment period as proposed would afford adequate protection for the states and their processes. Given the restrictions that likely prevent State siting authorities from commenting on open proceedings,⁴¹ it is doubtful that a State siting authority would be able to offer any meaningful commentary to the Commission on a specific application other than to offer the publicly available information contained within the open docket. Additionally, as NESCOE explains above, there is a real concern that the elimination of the one-year delay would undermine public confidence and faith in State siting proceedings. The 90-day comment period would do little to address this concern.

³⁸ NOPR at P 23.

³⁹ *Id.*

⁴⁰ Christie Concurrence at P 10.

⁴¹ *See, e.g.*, 980 Mass. Reg. 1.03(8); 3 V.S.A. § 813.

B. EMINENT DOMAIN AUTHORITY AND APPLICANT EFFORTS TO ENGAGE WITH LANDOWNERS AND OTHER STAKEHOLDERS

The IJJA amended section 216(e)(1) to require the Commission to determine, as a precondition to receiving eminent domain authority, that the permit holder has made good faith efforts to engage with landowners and stakeholders early in the permitting process.⁴² In response, the Commission proposes to supplement the existing landowner and stakeholder participation provisions in part 50⁴³ of its regulations.⁴⁴

Currently, § 50.4 of the regulations requires the applicant to develop and file a Project Participation Plan early in the pre-filing process and to distribute, by mail and newspaper publication, project participation notices early in both the pre-filing and application review process.⁴⁵ In order to address the IJJA's amendment to section 216(e)(1), the Commission proposes to supplement the regulatory requirements in § 50.4 by adding a new § 50.12.⁴⁶ Under proposed § 50.12, an applicant may demonstrate that it has met the statutory good faith efforts standard by complying with an Applicant Code of Conduct in its communications with affected landowners. The proposed Applicant Code of Conduct includes particular recordkeeping and information-sharing requirements for engagement with affected landowners, as well as more general prohibitions against certain misconduct in such engagement.⁴⁷

Applicants that choose to show good faith by complying with the proposed Applicant Code of Conduct would be required to file an affirmative statement indicating their intent to

⁴² NOPR at P 24 (citing 16 U.S.C. 824p(e)(1) (as amended by IJJA section 1221)).

⁴³ *See* 18 CFR Part 50.

⁴⁴ NOPR at P 24.

⁴⁵ *Id.* at P 25.

⁴⁶ *Id.* at P 26.

⁴⁷ *Id.*

comply with the Applicant Code of Conduct and file monthly status reports affirming compliance or explaining any instances of noncompliance and any remedial actions taken or planned.⁴⁸ Applicants would also be required to identify any known instances of non-compliance not previously disclosed and explain any remedial actions to be taken to remedy such instances of non-compliance.⁴⁹

The Commission emphasizes that voluntary compliance with the Applicant Code of Conduct is not the only way that an applicant may demonstrate that it has met the “good faith efforts” standard in section 216(e)(1).⁵⁰ Thus, the Commission proposes that an applicant that chooses not to rely on compliance with the Applicant Code of Conduct must specify its alternative method of demonstrating that it meets the good faith efforts standard.⁵¹

1. Applicants Should Be Required to Comply With the Applicant Code of Conduct, and There Should Be Clear Repercussions for Applicants That Fail to Comply.

Under proposed § 50.12, an applicant may demonstrate that it has met the statutory good faith efforts standard by complying with an Applicant Code of Conduct in its communications with affected landowners. An applicant that chooses not to rely on compliance with the Applicant Code of Conduct must specify its alternative method of demonstrating that it meets the good faith efforts standard and must explain how its alternative method is equal to or superior to compliance with the Applicant Code of Conduct.⁵² For an applicant that elects to rely on an alternative method to show good faith efforts, the Commission will first assess whether the

⁴⁸ *Id.* at P 27.

⁴⁹ *Id.*

⁵⁰ *Id.* at P 28.

⁵¹ *Id.*

⁵² *Id.*

applicant’s alternative method is equal to or superior to the Applicant Code of Conduct, then assess “good faith efforts” by evaluating whether evidence in the record shows the applicant substantially complied with the commitments of its alternative method.⁵³

NESCOE applauds the Commission for proposing measures to ensure that, as a precondition to receiving eminent domain authority, applicants take appropriate steps to meaningfully engage with landowners early in the permitting process. However, NESCOE suggests that the Commission make compliance with the Applicant Code of Conduct mandatory for all applicants seeking to acquire a right-of-way by the exercise of eminent domain. The Commission notes that it believes that the proposed Applicant Code of Conduct reflects principles that are broadly relevant to determining whether an applicant has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.⁵⁴ NESCOE agrees and suggests that the Commission could maximize transparency and efficiency for all involved parties by requiring applicants to comply with this standard.

While an applicant bears the burden of demonstrating that it has met the good faith efforts standards in a permit application proceeding,⁵⁵ it would likely be very burdensome for an affected landowner or other stakeholder to rebut any evidence provided by an applicant. A universally applicable Applicant Code of Conduct would make it easier for an affected landowner or interested stakeholder to assess whether an applicant has fallen short of its burden and would also lessen the subjectivity of potential Commission determinations related to whether an applicant has met the good faith standard.

⁵³ *Id.* at P 29.

⁵⁴ *Id.* at P 28.

⁵⁵ *Id.* at P 29.

As currently proposed, § 50.12 makes no mention of any requirement on the part of applicants to provide a copy of the proposed discussion log to affected landowners or other interested stakeholders. Affected landowners or other interested stakeholders with whom the applicants may communicate during the pre-filing process should be provided with any relevant discussion logs on a monthly basis and afforded an opportunity to provide the Commission with feedback on or corrections to those logs. Additionally, there is no mention of any penalties that would apply to applicants should they fall short of the good faith standard by failing to comply with the proposed Applicant Code of Conduct. NESCOE recommends that the Commission clearly identify repercussions that would result if an applicant failed to meet its good faith burden. Finally, as further discussed below in relation to project notification requirements, the Commission should ensure that all affected landowners and other interested stakeholders are provided with relevant information in an equitable manner.

C. ENVIRONMENTAL JUSTICE PUBLIC ENGAGEMENT PLAN

As noted above, applicants are required under § 50.4(a) to develop and file a Project Participation Plan early in the pre-filing process.⁵⁶ The Commission states that this requirement is intended to facilitate stakeholder communication and the dissemination of public information about the proposed project.⁵⁷ Consistent with this goal, the Commission explains that it believes that applicants should meaningfully engage with potentially affected environmental justice communities early in the pre-filing process.⁵⁸ The Commission notes that applicants will

⁵⁶ *Id.* at P 30.

⁵⁷ *Id.*

⁵⁸ *Id.*

identify potential environmental justice communities using the identification methods consistent with current Commission practice.⁵⁹

Accordingly, the Commission proposes to require applicants to develop and file an Environmental Justice Public Engagement Plan as part of their Project Participation Plan under § 50.4(a)(4). Under the Commission’s proposal, the Environmental Justice Public Engagement Plan must describe the applicant’s completed and planned outreach activities that are targeted to identified environmental justice communities.⁶⁰ The plan must also summarize comments received from potentially impacted environmental justice communities during any previous outreach activities, if applicable, and describe planned outreach activities during the permitting process, including efforts to identify, engage, and accommodate non-English speaking groups or linguistically isolated communities.⁶¹ The plan should also describe the manner in which the applicant will reach out to environmental justice communities about potential mitigation.⁶²

1. The Commission Has Not Exceeded its Authority in Requiring Applicants to Develop and File Environmental Justice Public Engagement Plans.

In his concurrence, Commissioner Danly states that he believes that the NOPR goes “far beyond that which is required by the [IIJA]” and solicits citations to the provisions in section 216 or any other statutory basis to support the various proposed revisions included in the NOPR.⁶³ Commissioner Danly specifically points to the proposal to require applicants to develop and file an Environmental Justice Public Engagement Plan and notes that the Commission does not cite

⁵⁹ *Id.* at P 30, n.39 (explaining how Commission staff identifies potential environmental justice communities).

⁶⁰ *Id.* at 31.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Applications for Permits to Site Interstate Electric Transmission Facilities*, Notice of Proposed Rulemaking, 181 FERC ¶ 61,205 (2022) (Danly, Comm’r, *concurring*) (“Danly Concurrence”) at P 3.

any statute that “requires or even permits us to require this Environmental Justice Public Engagement Plan....”⁶⁴

NESCOE believes that the Commission is wholly within its authority to require applicants to develop and file Environmental Justice Public Engagement Plans. In 2005, the enactment of the Energy Policy Act of 2005⁶⁵ established a limited Federal role in electric transmission siting by adding section 216 to the FPA. Section 216(b) authorizes the Commission in certain instances to issue permits for the construction or modification of electric transmission facilities in areas that the Department of Energy has designated as National Corridors.⁶⁶ Section 216(b) states:

In any proceeding before the Commission under subsection (b), the Commission shall afford each State in which a transmission facility covered by the permit is or will be located, each affected Federal agency and Indian tribe, private property owners, and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit.

Section 216(c)(2) of the FPA required the Commission to issue rules specifying the form of, and the information contained in, an application for proposed construction or modification of electric transmission facilities in National Corridors, and the manner of service of notice of the permit application on interested persons.⁶⁷ Pursuant to this statutory requirement, on November 16, 2006, the Commission issued Order No. 689, which implemented new regulations for section 216 permit applications by adding part 50

⁶⁴ *Id.* at P 4.

⁶⁵ Pub. L. 109-58, § 1221, 119 Stat. 594 (2005) (amended 2021).

⁶⁶ NOPR at P 2.

⁶⁷ *Id.* at P 9.

to the Commission’s regulations.⁶⁸ Applicants are currently required under § 50.4(a) to develop and file a Project Participation Plan early in the pre-filing process.⁶⁹ The Commission now proposes to require applicants to develop and file an Environmental Justice Public Engagement Plan as part of their Project Participation Plan under § 50.4(a)(4).⁷⁰

The Commission’s proposal aligns with its statutory authority under section 216(b) to provide stakeholders with “a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit.” While section 216 does not make any mention of Project Participation Plans, the Commission nonetheless opted to require applicants to develop and file such plans in Order No. 689, resulting in current § 50.4(a).⁷¹ The Commission, in explaining how its public participation regulations would align with the requirements of section 216(d), notes that “any interested entity or individual will have multiple opportunities to participate and express its views on the proposed project.”⁷² The Commission further explains that the “Participation Plan will be used to provide accurate and timely information, including the environmental impacts, as well as the national and local benefits, of the proposed project, to all stakeholders.”⁷³

Section 216(d) was not prescriptive in how the Commission should provide stakeholders with “a reasonable opportunity to present their views and recommendations”

⁶⁸ *Id.* (citing Order No. 689).

⁶⁹ *Id.* at P 30.

⁷⁰ *Id.* at P 31.

⁷¹ *See* Order No. 689 at PP 45-49.

⁷² *Id.* at P 46.

⁷³ *Id.*

about a specific facility. Yet the Commission used its discretion to create a Project Participation Plan requirement as part of its regulations – a requirement that has been in effect since 2006. Further, in its Order No. 689, the Commission summarizes at length the comments that it received related to its proposal for public participation in its electric transmission siting process.⁷⁴ None of those comments seem to suggest that the Commission exceeded its authority in requiring that applicants file a Project Participation Plan.⁷⁵

Just as the Commission was acting within its authority when it created the § 50.4(a) Project Participation Plan requirement, the Commission is well within its authority to require applicants to file an Environmental Justice Public Engagement Plan under § 50.4(a)(4). The Commission’s ability to propose revisions to its regulations is not limited solely to revisions connected to a new Congressional directive. Rather, the Commission is free to update its regulations based on its previously delegated authority. Thus, just because the IJJA does not specifically require an update to § 50.4(a) does not mean that the Commission has exceeded its authority in modernizing its regulations to ensure that *all* interested persons have a reasonable opportunity to present their views and recommendations pursuant to its section 216 authority.

2. The Commission’s Proposed Requirement That Applicants Include an Environmental Justice Engagement Plan in Their Applications Under § 50.4(a)(4) Will Assist the Commission in Determining Whether to Site Electric Transmission Projects.

In his Concurrence, Commissioner Danly requests that commenters “provide legal analysis and evidence whether the proposed rule constitutes good policy, such as, for example,

⁷⁴ *Id.* at P 49.

⁷⁵ *See id.* at PP 50-89.

whether it will be beneficial in determining whether to site electric transmission projects when the states have not done so, or whether the rule will tend to ensure almost nothing is ever sited.”⁷⁶

a. It is Good Public Policy to Ensure That Federal Regulations Remain Relevant and Effective.

NESCOE believes that it is generally good public policy to update Federal regulations to ensure that they remain relevant and effective as new technologies, scientific knowledge, and social norms evolve over time. The regulations that the Commission originally adopted in 2006 to govern applications for permits to site interstate electric transmission facilities (18 CFR §§ 50 and 380) have not been updated in nearly two decades. Yet the energy regulatory landscape has changed in many ways since these regulations were promulgated. Unlike the Commission’s policy to allow for a one-year waiting period before the commencement of the Federal pre-filing process adopted, there is a compelling public interest to be served in modernizing the § 50 regulations. While environmental justice issues were not necessarily a major consideration in enacting laws or promulgating regulations in 2006, they have since become a major focus of lawmakers and regulators.⁷⁷

Neither 18 CFR § 50 nor § 380 currently make any mention of environmental justice considerations, which is at odds with various recent Executive Orders and Federal policies as well as FERC’s own policies. For example, Executive Order 14008 directs agencies to develop “programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged

⁷⁶ Danly Concurrence at P 3.

⁷⁷ For example, in 2021, states considered at least 150 bills related to environmental justice. *National Conference of State Legislatures, State and Federal Environmental Justice Efforts* (updated April 30, 2022), available at <https://www.ncsl.org/environment-and-natural-resources/state-and-federal-environmental-justice-efforts>.

communities, as well as the accompanying economic challenges of such impacts,”⁷⁸ while Executive Order 13985 requires Federal agencies to conduct Equity Assessments to identify and remove barriers to underserved communities and “to increase coordination, communication, and engagement with community-based organizations and civil rights organizations.”⁷⁹ The Environmental Protection Agency’s (“EPA’s”) Promising Practices report includes guiding principles aimed at, among other things, early and meaningful engagement with minority populations, low-income populations, and other interested individuals, communities, and organizations in the NEPA process.⁸⁰ Most recently, President Biden signed Executive Order 14096, requiring that each Federal agency shall, among other things, provide opportunities for the meaningful engagement of persons and communities with environmental justice concerns who are potentially affected by Federal activities.⁸¹ This new Executive Order emphasizes the critical importance of the right of every citizen to a healthy, sustainable, climate-resilient environment and thus requires the consideration of environmental justice concerns in Federal agency decision-making.⁸²

The Commission has also made a number of recent policy changes that allow it to better consider environmental justice issues in its decision-making. For example, it recently issued an Equity Action Plan in accordance with Executive Order 13985 that introduces a two-year overhaul to review its policies to better promote equity and remove barriers to participation by

⁷⁸ NOPR at P 31 (citing E.O. 14008, 86 FR 7619 (Jan. 27, 2021)).

⁷⁹ E.O. 13985, 86 FR 7009, 7010-11 (Jan. 25, 2021).

⁸⁰ EPA, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016), available at https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.

⁸¹ E.O. 14096, 88 FR 25251, 25251-25261 (Apr. 26, 2023).

⁸² *Id.*

environmental justice communities.⁸³ FERC has also issued a Guidance Manual for Environmental Report Preparation, which addresses policy and methodologies for conducting environmental justice analyses during its NEPA review process.⁸⁴

Perhaps most notably, pursuant to section 319 of the FPA, the Commission established the Office of Public Participation (“OPP”) in 2021. The stated mission of the OPP is “to empower, promote, and support public voices at the Federal Energy Regulatory Commission.”⁸⁵ One of the stated purposes of the OPP is “bringing FERC to people.”⁸⁶ The OPP notes that in furtherance of this goal, it conducts outreach to communities and organizations that have traditionally been under-represented or are new to FERC processes, such as Tribal members and environmental justice communities, to facilitate greater understanding of Commission processes and solicit broader participation in matters before the Commission.⁸⁷

These examples are just a smattering of the wide-ranging ways in which Federal and State governments and agencies are working to ensure that environmental justice communities are considered when decisions are being made and are able to meaningfully participate in decision-making processes. The Commission itself has acknowledged the importance of considering and involving environmental justice communities. As noted above, it is good public policy to update regulations to reflect not only current technologies and scientific understanding, but also social norms. Accordingly, NESCOE strongly supports the Commission’s proposal to

⁸³ See NOPR at P 30 (citing FERC, Equity Action Plan (2022), <https://www.ferc.gov/equity>).

⁸⁴ FERC, Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act (2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

⁸⁵ FERC OPP, Office Mission and Functions, <https://www.ferc.gov/OPP>.

⁸⁶ FERC OPP, What OPP Does, <https://www.ferc.gov/what-opp-does>.

⁸⁷ *Id.*

update its § 50 regulations to require applicants to submit Environmental Justice Plans as part of their Public Participation Plans.

b. It is Good Public Policy to Consider the Impacts of Proposed Interstate Transmission Projects on Environmental Justice Communities.

“Good policy” is not just policy that results in a certain desired end result. Rather, good policy should take into account how that end result is achieved and should weigh the need for the end result with its potential impacts. NESCOE certainly agrees with the need for expeditious Commission decisions in siting interstate transmission facilities. However, this desired result should not come at the expense of failing to adequately consider and consult environmental justice communities. Concerns raised by environmental justice communities should be incorporated into the record and addressed, therefore shaping the outcome of Commission decisions. The Commission’s regulations already require applicants to develop Public Engagement Plans,⁸⁸ and while it would be ideal if these plans were enough to ensure that all potentially affected and/or interested stakeholders were able to meaningfully participate in decisions that are likely to impact them, this is simply not how decisions related to energy siting have historically been made in this country.

For example, existing transmission grids were designed primarily to transport energy from fossil-fuel power plants, many of which are located in low-income communities and communities of color, to reach population centers throughout the country.⁸⁹ Yet historically, the environmental justice communities that are most impacted by these types of energy infrastructure

⁸⁸ 18 CFR § 50.4.

⁸⁹ See Shalanda Baker, *Anti-Resilience: A Roadmap for Transformational Justice within the Energy System*, 54 Harv. C.R.-C.L. L. Rev. 1, 12 (2019); Manider P.S. Thind et al., *Fine Particulate Air Pollution from Electricity Generation in the US: Health Impacts by Race, Income, and Geography*, 53 *Envtl. Sci. Tech.* 14,010, 14,013 (2019).

decisions have had the least access to planning and decision-making processes.⁹⁰ There are also significant barriers to participation for environmental justice communities, while sophisticated, well-financed entities, interest groups and individuals have a disproportionate ability to intervene in Commission proceedings and to influence Commission decision-making.

Commissioner Danly requests that commenters weigh in on whether the proposed rule constitutes good policy, such as, for example, whether it will be beneficial in determining whether to site electric transmission projects when the states have not done so, or whether the rule will tend to ensure almost nothing is ever sited. The proposed Environmental Justice Engagement Plan falls squarely into the former category; moreover, there is nothing to suggest it will likely prevent facilities from ever being sited. Rather, it will enable the Commission to make decisions about where such facilities should be sited based on a full and comprehensive record. Input from a wide range of parties, especially those most likely to be negatively impacted by the Commission's siting decisions, is essential in determining whether and where to site electric transmission projects. The Commission's charge, after all, is to afford interested persons with a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a proposed interstate transmission facility.⁹¹ This should include *all* interested persons. NESCOE urges the Commission to recognize that the measures necessary to offer all parties a reasonable opportunity to participate will not be the same across the board. There is no basis for assuming that requiring reasonable extra steps to ensure that environmental justice populations are meaningfully able to participate in the Commission decision-making process will result in the Commission's inability to site transmission facilities. Rather, the

⁹⁰ See, e.g., Baker, *supra* note 89, at 7, 9; Sanya Carley & David M. Konisky, *The Justice and Equity Implications of the Clean Energy Transition*, 5 *Nature Energy* 569, 572 (2020).

⁹¹ FPA Section 216(d).

Commission will be better situated to make fully informed decisions with the information collected via the Environmental Justice Engagement Plan. Better-informed decision-making is good policy.

3. As Currently Proposed, the Environmental Justice Public Engagement Plan Does Not Adequately Ensure That Applicants Will Meaningfully Engage with Environmental Justice Communities.

NESCOE commends the Commission on its efforts to ensure that applicants meaningfully engage with potentially affected environmental justice communities early in the pre-filing process.⁹² NESCOE also appreciates the need to prevent permit application requirements from being so overly burdensome that they stymie the pre-filing process and make things more confusing for stakeholders. Recognizing the need to balance these two goals, NESCOE is concerned that the Environmental Justice Public Engagement Plan, as proposed, may end up being a “check the box” exercise for applicants instead of an opportunity for applicants to meaningfully engage with environmental justice communities and incorporate their considerations.

For both State and Federal agencies, ensuring that environmental justice communities are able to meaningfully participate in transmission siting proceedings is a multi-faceted and challenging task.⁹³ Indeed, the need for, and work of, the OPP underscores that fact. NESCOE views efforts to more meaningfully engage environmental justice communities as an ongoing

⁹² NOPR at P 30.

⁹³ For example, due to a variety of factors such as differing resources, policies and practices, some of which may be grounded in statute or regulation, some state agencies may not be positioned to implement the full suite of recommendations suggested here at this time. Indeed, not all states have, or will have, a uniform approach to addressing environmental justice issues in state siting proceedings. Nevertheless, NESCOE encourages FERC to consider these recommendations now and going forward in order to work toward its objective of ensuring that applicants meaningfully engage with potentially affected environmental justice communities early in the pre-filing process. *See id.*

process that State and Federal officials will likely need to develop, revisit and adjust over time. Thus, NESCOE recommends that FERC consider making certain adjustments to its proposed Environmental Justice Engagement Plan to work toward the ultimate objective of enhancing meaningful engagement with, and participation by, environmental justice communities in such proceedings.

The proposed Environmental Justice Public Engagement Plan requires applicants to: (1) summarize comments received from potentially impacted environmental justice communities during any previous outreach; (2) describe planned targeted outreach activities with such communities; (3) describe efforts to identify, engage, and accommodate non-English speaking groups or linguistically isolated communities; and (4) describe how the applicant will conduct outreach to environmental justice communities about any potential mitigation.⁹⁴ In other words, applicants are required to undertake a descriptive exercise, but are not required to comply with any actual standards for engaging with environmental justice communities. It does not appear as though Commission's proposal requires any documentation of or accountability for ongoing community outreach or engagement, nor does it appear that there would be any consequences for applicants that do a lackluster job engaging with environmental justice communities.

NESCOE recommends that the Commission consider working with OPP to identify historical barriers to participation in FERC proceedings by environmental justice communities.⁹⁵ Meaningful engagement strategies included in the Environmental Justice Public Engagement Plan should be aimed at overcoming such historical barriers, including but not limited to

⁹⁴ *Id.* at P 31.

⁹⁵ *See, e.g.*, FERC, Roundtable on Environmental Justice and Equity in Infrastructure Permitting Transcript (April 5, 2023), available at <https://www.ferc.gov/media/transcript-roundtable-environmental-justice-and-equity-infrastructure-permitting>; *see generally* The Office of Public Participation, Docket No. AD21-9-000.

language barriers, lack of access to information, economic barriers, power imbalances, and historical trauma.

The Commission should require applicants to submit Environmental Justice Engagement Plans that address these and other barriers to participation to ensure that applicants can meaningfully engage with environmental justice communities. Potential updates to the Environmental Justice Engagement Plans could include the following: a requirement that communications and basic filing information be provided in languages other than English (additional languages should be based on census data for the geographic locations in question); a requirement that applicants provide guidance on how to locate filing information; a requirement that, where in-person hearings or meetings are necessary, they are held in locations that are accessible by public transportation where possible, at times that would allow working individuals to attend, and include childcare so parents and caregivers can participate; a requirement that applicants designate one or more community liaisons with the appropriate language skills so that community members can contact someone with whom they are familiar; and a requirement that applicants provide communities with non-technical information that explains how a siting decision might impact their lives and those of their neighbors and community. This list is certainly not exhaustive and NESCOE encourages the Commission to consider input from environmental justice communities or other community-based organizations that have firsthand experience with these issues.

Finally, NESCOE suggests that in the interest of maximizing efficiency and minimizing stakeholder confusion, where possible, FERC should ensure that its public engagement and environmental justice review practices are generally consistent with applicable state policies and practices used during any related state permitting/siting procedures.

D. OTHER PROPOSED REVISIONS TO 18 CFR PART 50

1. The Commission Should Work with Other Federal Agencies to Develop a Consistent “Environmental Justice Community” Definition.

The Commission proposes to define the term “environmental justice community” 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.⁹⁶ NESCOE echoes the comments of the American Chemistry Council on the limited issue of this definition⁹⁷ and encourages the Commission to work with the EPA, DOE, and other Federal agencies to develop one consistent definition for environmental justice communities. NESCOE agrees that the lack of consistent terminology and definitions across government programs creates confusion and uncertainty for all stakeholders—including affected populations, applicants and State and Federal staff. NESCOE also notes that Executive Order 14096 includes in its definition of “environmental justice” the just treatment of individuals with disabilities⁹⁸ and encourages the Commission to consider this population when developing a consistent definition for environmental justice communities.

2. The Commission Should Adopt Certain Additional Project Notification Requirements

Proposed section 50.4(c)(1) would require applicants to distribute, by mail and newspaper publication, project participation notices within a specified time following notice that the pre-filing process has commenced and notice that an application has been filed.⁹⁹ Proposed section 50.4(c)(1) would direct an applicant to notify, among others, all affected landowners and

⁹⁶ NOPR at P 32.

⁹⁷ Comments of the American Chemistry Council, Docket No. RM22-7-000 (filed Apr. 17, 2023).

⁹⁸ E.O. 14096, 88 FR 25251, 25253.

⁹⁹ NOPR at P 36.

landowners with a residence within a quarter mile from the edge of the construction right-of-way for the proposed project.¹⁰⁰ NESCOE notes that residents surrounding a proposed project may not own the property in which they reside. As these individuals would be among the most impacted by a proposed project, NESCOE recommends that the Commission require applicants to provide project notifications by mail not just to affected landowners and landowners with a residence within a quarter mile of the proposed project right-of-way, but also to the residents of the affected properties.

As noted above, and as recognized by the Commission,¹⁰¹ many environmental justice communities have a large percentage of non-English speakers. As such, applicants should be required to provide project participation notices in languages other than English as part of their Environmental Justice Engagement Plans. NESCOE suggests that FERC work with OPP to determine how to best identify, using census or other such relevant data, the concentration of and languages spoken by limited English proficiency individuals in relevant geographic locations and to require applicants to provide notices accordingly.¹⁰² Additionally, community members in environmental justice communities may not consult English newspapers as their primary source of information. For example, environmental justice community members may primarily utilize radio stations, places of worship, non-English newspapers, community centers or social media as their primary means of gathering information about their communities. In many communities, it would likely be most effective to partner with trusted community groups and to disseminate information in places where community members already gather. Again, NESCOE recommends

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at P 39.

¹⁰² As noted, not all states have a uniform approach to addressing language barriers, and NESCOE appreciates the OPPs' expertise and leadership in advancing this important issue. *See supra* note 93.

that the Commission consult with OPP and consider any input from environmental justice communities and/or community groups that have firsthand experience comment on this issue in order to determine where and how environmental justice communities most commonly get information and adjust its notice requirements as necessary.

a. The Commission Should Require That the Proposed Landowner Bill of Rights Include Transparent Information About Federal Eminent Domain Proceedings.

The Commission proposes to add a project notification requirement that any pre-filing notice mailed to an affected landowner also include a copy of a Commission document titled “*Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings*” (“Landowner Bill of Rights”).¹⁰³ The Commission notes that its intent in requiring the applicant to provide this information at the outset of the permitting process is to help ensure that affected landowners are informed of their rights in dealings with the applicant, in Commission proceedings, and in eminent domain proceedings.¹⁰⁴ The Commission also proposes to require that any pre-filing notice sent by mail or published in the newspaper include information clarifying that the Commission’s pre-filing application processes are separate from any simultaneous State siting proceedings and explaining how to participate in any such proceedings.¹⁰⁵

NESCOE is supportive of the Commission’s efforts to ensure that affected landowners are informed of their rights in dealings with the applicant, in Commission proceedings, and in eminent domain proceedings. NESCOE agrees that it is important to clarify for affected

¹⁰³ NOPR at P 38.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

landowners that the Commission’s pre-filing application processes are separate from any simultaneous State siting proceeding. However, NESCOE recommends that the proposed Landowner Bill of Rights be more informative and transparent as to how the Federal eminent domain process works. In many cases, the Federal eminent domain process varies significantly from State eminent domain processes with which applicants may be more familiar. In some cases, the Federal eminent domain process may offer fewer protections for landowners than applicable state processes.¹⁰⁶ NESCOE is concerned that if landowners are not aware of these more limited protections or are generally unfamiliar with how the Federal process works, they may not effectively participate in the eminent domain process. Thus, NESCOE recommends that the Commission include with the Landowner Bill of Rights a guide to the Federal eminent domain process and a guide as to how landowners can most effectively participate in this process.

IV. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission afford due consideration to these Comments.

Respectfully Submitted,

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¹⁰⁶ See Fed.R.Civ.P. 71.1.