

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

The Office of Public Participation)

Docket No. AD21-9-000

**THE NISKANEN CENTER'S COMMENTS
ON FERC'S CREATION OF THE OFFICE OF PUBLIC PARTICIPATION**

The Niskanen Center submits these comments in response to the Commission's March 2021 Notice of a Public Comment Period on how the Commission should establish and operate the Office of Public Participation (OPP). Niskanen is a 501(c)(3) advocacy organization that represents landowners affected by pipelines throughout the country in court and administrative proceedings, including before FERC. Niskanen has a strong interest in free markets and in protecting Americans' property rights. It is a fundamental matter of justice that government should forcibly take private property only as a measure of last resort, when truly for public use, and must compensate the property owners sufficient to render them indifferent to the taking.¹

Niskanen commends the Commission for making the creation of the OPP a top priority, and for giving affected landowners' feedback and experiences serious consideration. Landowners face something that no other stakeholder does in FERC's pipeline proceedings: the potential permanent taking of their land, home, or livelihood. Despite these incredibly high stakes, landowners face an overwhelming number of obstacles throughout the FERC process from beginning to end—often with little to no resources, guidance, or legal assistance. FERC should seize the opportunity presented by the OPP's creation to address these harms.

¹ Niskanen notes in passing that the Commission's Policy Statement appears to acknowledge that court-determined "just compensation" is insufficient to make landowners indifferent to the taking of their property: "Even though the compensation received in such a proceeding is deemed legally adequate, the dollar amount received as a result of eminent domain may not provide a satisfactory result to the landowner and this is a valid factor to consider in balancing the adverse effects of a project against the public benefits." 90 FERC ¶ 61,128, p. 19.

I. FERC Needs to Remedy its Broken Notice and Communication Methods.

It's no secret that landowners are largely left in the dark during FERC Section 7 pipeline proceedings. This is by no fault of their own—FERC's landowner notification and communication methods are broken and in dire need of an overhaul. Niskanen discusses these problems and offers solutions through the OPP below.

A. Background on FERC's Broken Landowner Notice Process.

Section 7 Certificate holders have extraordinary powers, including the ability to exercise federal eminent domain authority to take private land from unwilling sellers. 15 U.S.C. 717f(h). Although FERC is the federal agency granting this extraordinary authority to seize people's property, FERC has delegated to Certificate applicants FERC's own Fifth Amendment and Natural Gas Act ("NGA") responsibilities to provide "affected landowners"² with notice of the proceeding, the potential impact it could have on them, and their rights during FERC's administrative process. 15 U.S.C. 717f(c)(1)(B) (requiring FERC to provide notice of this proceeding to all "interested persons"); 18 CFR 157.6(d) (delegating FERC's landowner notice responsibility to Certificate applicants); 18 CFR. 157.6(d)(3) (requiring applicants to provide affected landowners with, *inter alia*, the notice of application, information on intervention, landowner rights, and FERC's administrative process).³

Nowhere in 18 C.F.R. 157.6(d)(3) is the applicant required to inform affected landowners *that they must intervene in the Certificate process in order to preserve their rights to judicial review*. In fact, the only

² "Affected landowners" include owners of property that will be directly affected (i.e., crossed or used) by the pipeline, abuts the edge of a proposed pipeline, or contains a residence within 50 feet of the proposed construction work area. CFR 157.6(d)(2).

³ The only FERC oversight mechanism in place over the pipeline sending affected landowners notice is the requirement that Certificate applicants submit a list of the names and addresses of the landowners it allegedly notified, which is all currently done 'confidentially'. 18 CFR 157.6(d)(5). These lists should be made public and readily available to any affected landowner who requests a copy.

mention of intervention in this regulation comes in subparagraph (d)(3)(vii), which provides that the landowner notice letter includes, “[a] copy of the Commission’s notice of application, specifically stating the date by which timely motions to intervene are due, together with the Commission’s information sheet on how to intervene in Commission proceedings.” (The Commission’s notice of application is referred to hereafter as “the NOA”).

1. FERC, through the Pipeline Companies, Provides Incomplete, Confusing, and Contradictory Information on Intervention Requirements.

There are three places where FERC conveys information about intervention: 1. FERC’s notice of applications (NOAs), 2. FERC’s landowner pamphlet, and 3. FERC’s information sheet. None of these provide complete and clear information for landowners on how they can intervene and why they should do so.

a. FERC’s Confusing Instructions in its Notice of Applications (NOAs).

Niskanen reviewed NOAs FERC issued in 2018 for pipeline construction projects under section 7(c) of the Natural Gas Act, as well as NOAs for the Atlantic Coast Pipeline, LLC, PennEast Pipeline Company, LLC, and Jordan Cove Energy Project, L.P.⁴ Each one contains just a single sentence on the need for landowners to intervene in the Certificate proceeding in order to obtain judicial review of FERC’s Certificate order: “Only parties to the proceeding can ask for court review of Commission orders in the proceeding.”⁵ This sentence only offers passing reference to the fact

⁴ These NOAs are for: Cheyenne Connector, LLC (83 FR 12747; March 23, 2018); Rockies Express Pipeline LLC (83 FR 12750; March 23, 2018); Transcontinental Gas Pipe Line Company, LLC (83 FR 18836; April 30, 2018); Natural Gas Pipeline Company of America LLC (83 FR 26275; June 6, 2018); Atlantic Coast Pipeline, LLC (80 FR 60886; October 8, 2015); Atlantic Coast Pipeline, LLC (81 FR 18623; March 31, 2016); PennEast Pipeline Company, LLC (80 FR 62068; October 15, 2015); and Jordan Cove Energy Project, L.P. (82 FR 47502; October 12, 2017).

⁵ Niskanen also picked NOAs for four other section 7(c) pipeline construction projects randomly from the Federal Register. Niskanen chose the first four results using the “Relevance” option for displaying the Federal Register search results that did not include any of the 2018 NOAs. These NOAs are for: DTE Midstream Appalachia, LLC (82 FR 22537; May 16, 2017); Eastern Shore Natural Gas Company (82 FR 5564; January 18, 2017); Eastern Shore Natural Gas Company

that only “parties” can request court review of FERC orders, with no further information or clear reference to the rights forfeited should landowners fail to understand the necessity of intervention to preserve their rights.

In addition to offering vague language about landowner rights, the NOAs offer contradictory language on intervention requirements. In describing the requirements of filing, the NOAs first detail that “A party ***must submit 7 copies*** of filings made with the Commission and ***must*** mail a copy to the applicant and to every other party in the proceeding.” Just a few short paragraphs later, the NOAs state that “[t]he Commission **strongly encourages electronic filings of comments, protests, and interventions** via the internet in lieu of paper. . . Persons unable to file electronically ***should submit an original and 5 copies*** of the protest or intervention to the Federal Energy Regulatory Commission.” (Emphasis added).⁶ The first instruction *requires* seven copies mailed to FERC and every other party in the proceeding, while the second instruction then encourages electronic filing with no explanation as to how the electronic filing relates to the alleged requirement of the submission of seven copies. Then the third instruction further muddies the waters by stating that in the alternative to electronic filing, one must submit a total of six copies just

(again) (80 FR 34402; June 16, 2015); Southern Natural Gas Company LLC (79 FR 35341; June 20, 2014). Each one of these NOAs followed the exact same format—giving affected landowners only a vague hint as to how they can safeguard their Due Process rights to judicial review of the Commission’s Certificate order through a single cryptic sentence buried within a 4-page, single-spaced document. This is the form of the NOAs issued by FERC and included in the landowner notice letter, and not as the NOAs appear in the Federal Register.

⁶ Cheyenne Connector, LLC (83 FR 12747; March 23, 2018); Rockies Express Pipeline LLC (83 FR 12750; March 23, 2018); Transcontinental Gas Pipe Line Company, LLC (83 FR 18836; April 30, 2018); Natural Gas Pipeline Company of America LLC (83 FR 26275; June 6, 2018); Atlantic Coast Pipeline, LLC (80 FR 60886; October 8, 2015); Atlantic Coast Pipeline, LLC (81 FR 18623; March 31, 2016); PennEast Pipeline Company, LLC (80 FR 62068; October 15, 2015); Jordan Cove Energy Project, L.P. (82 FR 47502; October 12, 2017); and DTE Midstream Appalachia, LLC (82 FR 22537; May 16, 2017); Eastern Shore Natural Gas Company (82 FR 5564; January 18, 2017); Eastern Shore Natural Gas Company (again) (80 FR 34402; June 16, 2015); and Southern Natural Gas Company LLC (79 FR 35341; June 20, 2014).

to FERC. The only thing that is clear in these NOA instructions is the sheer confusion that they elicit.

- b. The Commission's pamphlet *An Interstate Natural Gas Facility on My Land? What do I Need to Know?* is also no help.

Unfortunately, neither of the two FERC documents that the pipeline company is required to include in its landowner notice letter remedy this problem. Niskanen believes that the required FERC “pamphlet that explains the Commission’s certificate process and addresses the basic concerns of landowners” under 18 CFR 157.6(d)(3)(ii), refers to the pamphlet titled *An Interstate Natural Gas Facility on My Land? What do I Need to Know?*⁷ Again, in this document there are only a few sentences – in a 32-page document – that describe vaguely how landowners can preserve their Due Process rights to challenge any Commission Certificate decision: “Becoming an intervenor is not complicated and gives you official rights. As an intervenor, you will receive the applicant’s filings and other Commission documents related to the case and materials filed by other interested parties. You will also be able to file briefs, appear at hearings and be heard by the courts if you choose to appeal the Commission’s final ruling.” *Id.* at p. 6. This is hardly calculated to adequately inform recipients of the need to intervene in order to preserve their rights to rehearing or judicial review. This vague yet vital legal information is also largely overshadowed by the highlighted section that immediately follows it that aims to dissuade landowners from intervening, which describes the process as overly burdensome:

However, along with these rights come responsibilities. As an intervenor, you will be obligated to provide copies of what you file with the Commission to all the other parties at the time of filing by electronic means (direct attachment of the document to an e-mail or by referencing a link to the filed document in eLibrary) or by mail. In major cases, there may be hundreds of parties.

⁷ Available at: <https://www.ferc.gov/sites/default/files/2020-04/AnInterstateNaturalGasFacility.WhatYouNeedToKnow.pdf> (Last visited April 21, 2021).

Id. at pp. 6-7. This emphasis on the difficulty of intervention—offered in bold, italicized lettering—is the original formatting contained within the pamphlet. Additionally, as if the contradictory filing instructions in the NOAs were not confusing enough, this pamphlet states that “if you submit a request for intervention through the mail, ***you should include 14 copies*** of your request.” (Emphasis added) *Id.* at p. 7.

The timeline for filing as an intervenor is further misleading, “You must normally file for intervenor status within 21 days of our notice of the application in the Federal Register, although the Commission may accept late intervention if good reasons are given.” *Id.* As explained below, 21 days is not accurate, often landowners have far fewer days in which to file as intervenors. *Infra.* at p. 7 §d.

c. FERC’s “information sheet on how to intervene in Commission proceedings”.

Equally uninformative is FERC’s “information sheet on how to intervene in Commission proceedings” (<https://www.ferc.gov/ferc-online/ferc-online/how-guides>, last visited April 21, 2021), which contains the single sentence, “Intervenors becomes [*sic*] participants in a proceeding and have the right to request rehearing of Commission orders and seek relief of final agency actions in the U.S. Circuit Courts of Appeal.” Like in FERC’s pamphlet, this sentence does not even hint that intervention is the *only* means of preserving the right to administrative and judicial review.

Not only does the information sheet neglect to describe what must be included in the actual motion for intervention, it also exacerbates the confusion on filing requirements. In almost poetic fashion, the information sheet declares that “Persons unable to file electronically should send **an original and three copies** of the motion to intervene by overnight services” to FERC officials. (Emphasis added) *Id.* This is the fourth set of contradictory instructions on how to file an intervention.

d. Deadlines for Intervention are Inappropriately Short.

Unusually for federal agency proceedings, FERC has not established a regulatory deadline for intervention in the Certificate process. This means that for each Certificate proceeding, FERC simply picks a date; the only Commission description of its procedure in choosing intervention deadlines Niskanen could find comes from *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?*, p. 7: “You must normally file for intervenor status within 21 days of our notice of the application in the Federal Register[.]”

Unfortunately, this is not only incorrect, it is affirmatively misleading. Contrary to the Commission’s own statement that affected landowners “must normally file for intervenor status within 21 days of our notice of the application in the Federal Register”, with one exception it appears that FERC’s completely *ad hoc* practice is to give landowners 21 days *from the date of the NOA* to file for intervention. The actual time between Federal Register publication and the intervention deadline was between 12 and 17 days, with the one outlier of 24 days.⁸ Nor does FERC ever explain why it has chosen the particular deadline in each instance.

⁸ Of the four 2018 pipeline NOAs, the Cheyenne Connector NOA was dated March 19, appeared in the Federal Register on March 23, and had an intervention deadline of April 9, (17 days later); the Rockies Express NOA was dated March 19, appeared in the Federal Register on March 23, and had an intervention deadline of April 9 (17 days later); the Transcontinental NOA was dated April 24, appeared in the Federal Register on April 30, and had an intervention deadline of May 24 (24 days later); and the Natural Gas Pipeline Company NOA was dated May 31, 2018, appeared in the Federal Register on June 6, and had an intervention deadline of June 21 (15 days later).

Of the four random pipeline NOAs, the DTE Midstream Appalachia NOA was dated May 9, 2017, appeared in the Federal Register on May 16, and had an intervention deadline of May 30 (14 days later); the 2017 Eastern Shore Natural Gas NOA was dated January 11, 2017; appeared in the Federal Register on January 18, and had an intervention deadline of February 1 (14 days later); the 2015 Eastern Shore Natural Gas NOA was dated June 8, 2015, appeared in the Federal Register on June 16, and had an intervention deadline of June 29 (13 days later); and the Southern Natural Gas NOA was dated June 13, 2015, appeared in the Federal Register on June 20, and had an intervention deadline of July 7 (17 days later).

Further, Atlantic Coast Pipeline originally appeared in the Federal Register on October 8, 2015, and had an intervention deadline of October 23, 2015 (15 days later); Atlantic Coast Pipeline in an amended NOA, appeared in the Federal Register on March, 31, 2016, and had an intervention

The only alternative way for landowners to discover what the intervention deadline is, is via the applicant's notice letter, which must contain a copy of the NOA. 18 CFR 157.6(d)(vii). The applicant's notice letter itself must be sent "By certified or first class mail, sent within 3 business days following the date the Commission issues a notice of the application". 18 CFR 157.6(d)(1)(i). This means, that if the Commission issues the NOA on Wednesday, Thursday, or Friday, the applicant has 5 days to mail the letter. Assuming (as does Rule 6(d) of the Federal Rules of Civil Procedure) that first class mail takes up to three days for delivery, the recipient may then have just 13 days to file for intervention with FERC.

2. FERC's Current Landowner Notice Practice Violates Due Process.

The Supreme Court has repeatedly dealt with the issue of what is adequate notice under the Due Process Clause. The seminal case governing this issue is *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), which held that "The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Id.* at 314 (citations omitted). It is difficult to see how the notice the Commission gives landowners telling them that they must intervene in Certificate proceedings in order to preserve their rights to judicial review, the arbitrarily short time in which they must act, and the inconsistent and confusing information provided as to how to accomplish that, either informs landowners of their choice or allows them to act on it. FERC's NOAs are a perfect example of what *Mullane* referred to as "mere gesture": "[W]hen notice is a person's due, process which is a mere gesture is not Due Process. *The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.*" *Id.* at 315 (emphasis added).

deadline of April 12, 2016 (12 days later); PennEast Pipeline appeared in the Federal Register on October 15, 2017, and had an intervention deadline of October 29, 2015 (14 days later); and Pacific Coast Pipeline appeared in the Federal Register on October 12, 2017, and had an intervention deadline of October 26, 2017 (14 days later).

Courts have also dealt with means and content of notice specifically in the context of determining what Due Process requires in eminent domain procedures. In *Brody v. Village of Port Chester*, 434 F.3d 121 (2nd Cir. 2005), the Second Circuit began its analysis by saying that notice in eminent domain cases was governed by *Mullane*: “accordingly, we hold that where, as here, a condemnor provides *an exclusive procedure for challenging a public use determination*, it must also provide notice in accordance with the rule established by *Mullane* and its progeny.” *Id.* at 129 (emphasis added).

3. Continuous Obstacles Faced by Landowners in the FERC Process.

Landowners face significant obstacles in accessing the information they need to make informed, accurate, and timely decisions. Pipelines often traverse rural areas where internet access can be spotty at best. Important information is often buried in copious amounts of papers. Physical and geographic limitations often prevent landowners from meaningfully participating in any FERC meetings or events that could (if administered correctly) provide them with essential information. Time is another limiting factor; surmounting FERC’s incredibly complex, contradictory, and highly technical process requires a time commitment that most people cannot undertake. When faced with the prospect of losing their land, their home, and their business, the mental sagacity required of landowners to effectively navigate FERC’s confusing process with no real assistance is unreasonable and unrealistic.

a. An additional snapshot of the issues.

In April 2021, Niskanen Center worked with Dr. Shannon Bell, a Sociology Professor from Virginia Tech, and pipeline-affected landowner Bill Limpert, to design an online survey to gather information about landowners’ experiences with FERC. This 109-question survey was designed with the intention of providing feedback to FERC to help inform the creation of the Office of Public Participation. As of 8 am April 22, 2021, 108 responses to this survey were received. The survey will

remain open through the end of April, when a complete analysis will then be conducted. The results will be published and submitted to FERC for public reference and review.

Out of those who had a pipeline routed through their property, 31% said that they do not remember receiving a pamphlet or other educational material regarding their rights as a property owner. From those who did remember receiving the materials, 63% said they were very dissatisfied with the information they received, while another 23% said they were somewhat dissatisfied. ***When asked if it was clear from the information the landowner received that they needed to formally intervene in the FERC proceedings to preserve their rights to take legal action, 92% answered no.***

In other words, almost all of the landowners who answered the survey did not understand from the FERC materials that the only way to preserve their legal rights was through intervention. About half of those people eventually found out about the need to intervene through a non-profit organization, a community advocate, an attorney, a neighbor, a friend, or through someone else unrelated to FERC or the pipeline, the entities that are actually legally responsible for conveying this information.

From those who did figure out that they needed to file a motion to intervene,⁹ about 45% had difficulties filing their motion. About 75% of those people gave the following reasons for their difficulties in intervening, they either a) did not understand how to intervene, b) only received the information about intervention after the FERC deadline had passed, or c) the information was difficult to find in all of the paperwork that they received from the pipeline.¹⁰ Of the landowners who submitted comments to FERC, FERC referenced 53% of their comments in an order or statement, yet 98.92% of those landowner commenters do not believe that FERC addressed their concerns.

⁹ Often through a source other than FERC.

¹⁰ One of the landowners noted that a FERC representative instructed them not to intervene, as it would involve a large amount of paperwork and time. This is one of countless examples of landowners calling FERC for information, only to be actively dissuaded from asserting their rights.

Among landowners who drove to a scoping meeting, 68% had to drive more than 30 minutes to the meeting, and 20% had to drive more than an hour. 75% of landowners felt that FERC staff were dismissive of their concerns. ***Overall, 80% of landowners were “very dissatisfied” and 15% “somewhat dissatisfied” with FERC’s opportunities for public participation in decision-making on pipeline projects.*** In other words, FERC—through the OPP—has a lot of work to do with affected landowners.

II. Remedies to FERC’s Broken Notice and Communication Methods.

The importance of meaningful and informative communication with landowners in FERC proceedings cannot be overstated. For example, as noted in greater detail above, if FERC (or the Certificate applicant to whom FERC has delegated this responsibility) fails to provide notice, landowners may lose their right to intervene as a party to FERC’s administrative process, and with it the right to seek rehearing by FERC (a precondition to judicial review), and judicial review of FERC’s decision. 15 U.S.C. 717r(a), (b). FERC can remedy these significant issues through OPP by adopting the proposed solutions outlined below.

A. OPP Should Facilitate the Automatic *Party* Status for Affected Landowners.

While the NGA requires a person to be a “party” to the proceeding in order to request rehearing or seek judicial review (15 USC §717r(a), (b)), the intervention process in order to become a “party” is entirely FERC-created and FERC-controlled. *See* 18 C.F.R. § 385.214 (Rule 214). For example, under the NGA FERC “may classify persons and matters within its jurisdiction and *prescribe different requirements for different classes of persons or matters.*” 15 USC §717o (emphasis added). In addition, landowners’ participation in Section 7 pipeline proceedings wherein private companies seek to take their land most certainly is in the public interest, and FERC “*may admit as a party [...] any other person whose participation in the proceeding may be in the public interest.*” 15 USC §717n(e) (emphasis added). Accordingly, it is well within the Commission’s discretionary powers to deem affected landowners

automatically ‘parties’ to a relevant proceeding, thereby eliminating the confusing and overly burdensome intervention process, all while protecting landowners’ ability to properly assert their Due Process rights.¹¹

OPP would of course give every landowner proper notice of the proceeding, their automatic party status, and their rights as a party (to request rehearing and seek judicial review). FERC should also provide an easy mechanism in which any landowner could ‘opt-out’ of automatic party status/intervention; for example, by having the landowner file a simple form noting that they are ‘opting-out’ of being a party, or by having a simple ‘opt-out’ call-in service available within OPP.¹² After any ‘opt-out’, FERC could send a standard ‘opt-out’ confirmation letter to the affected landowner.

B. OPP Needs to Take Ownership and Establish Accountability Over Providing Notice to and Communications with Landowners.

As noted above (*supra* at 2-11), FERC’s current method of attempting to communicate with affected landowners is failing. FERC, through OPP, needs to meet landowners where they are, and not where FERC or a pipeline company wants them to be. Niskanen outlines below several steps that OPP can take to ensure that affected landowners at the very least understand 1. who is trying to take their land and why, 2. what their rights are in the relevant FERC proceeding and how to assert those rights, and 3. how to properly communicate with FERC and obtain accurate and relevant information.

¹¹ FERC should further eliminate the overly burdensome service requirements for affected landowner parties, and make the process similar to rulemaking, administrative, or policy proceedings (RM, AD, and PL Dockets), wherein there are no service requirements.

¹² Niskanen does not foresee many landowners using this service to forfeit their rights, and it should not prove to be an overly burdensome task. If anything, it will detract from all of the work and resources FERC currently has to pour into managing landowner intervention and party status.

1. The OPP Should Take Over Notice to Landowners.

Assuming that intervention remains a requirement, OPP should first take complete ownership of notice to landowners. Pipeline companies—the entities with *the least* incentive to make sure notice is received or understood by landowners—should not be involved with the initial notice sent to landowners. The OPP should be the entity responsible for ensuring that every affected landowner is properly accounted for and sent notice, and that their information is correct and systematically updated.¹³

Second, OPP should ensure that notice to landowners is easy to understand and accessible.

OPP could do this by including in each NOA a simple statement along the following lines:

If the Commission grants the requested Certificate of Convenience and Public Necessity for the applicant's proposed pipeline, then the applicant will have the right, subject to paying just compensation, to take your property for its pipeline project.

The only way you can have a court review the Commission's decision to grant the Certificate is by intervening now as a party in this proceeding. ***If you do not intervene now, you will not be able to ask FERC or a court to review the Commission's decision to approve the pipeline project.***

You have 90 days from the date of this Notice of Application to intervene in this proceeding, until [insert deadline]. There are two ways for you to intervene:

1. File your request to intervene electronically by using the "efile" link at <http://www.ferc.gov>. The Commission strongly encourages the use of electronic filing. Attached to this notice is step-by-step instructions on how to create a FERC Online Account and intervene in this proceeding.
2. File paper copies of your request to intervene. To do so, you must send a signed

¹³ In contrast with the current 'system', wherein landowners' addresses are perpetually labeled as 'unavailable', resulting in some landowners not even being aware there is a pipeline seeking to take their land until after FERC grants a Certificate. *See, e.g.* FERC's Final EIS in ACP [issued July 21, 2017] 77 landowners are identified wherein the requested right of way would be within 50 feet of their home. Of those 77 landowners, there are at least 13 homes listed with "unavailable physical addresses." If FERC or ACP could not even figure out their addresses over a period of years, those 13 landowners certainly did not receive adequate notice of the project or of ACP's intent to take their land.

original and 3 copies to FERC by regular mail (at Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426), and one copy to the applicant at its principal place of business, listed in the first sentence of this notice. Be aware that if you choose to use paper filing, in the future you will have to send a copy of any comments or other documents you wish to file not only to FERC and the applicant, but also to every other party in the proceeding, and the number of parties can become very large.

If you are a landowner, your request to intervene should just say that you have received this notice, that your land may be taken or affected by the pipeline company, and include your name, affected property information, and the docket number(s) listed at the top of the first page of this notice.

Niskanen does not believe there is any imaginable impediment to including such notice about the consequences to affected landowners of not intervening, and to giving clear, non-contradictory instructions about the mechanics of intervention.

Nor does Niskanen believe that there is any valid reason for not setting a standard period of time to intervene, and believes that a 90-day period for affected landowners to file to intervene is justified. Given the potential impacts to landowners, allowing them a reasonable amount of time to secure their Due Process rights to judicial review of FERC's decision is justified, especially in Certificate proceedings that can last for years.

In fact, in *other* pipeline intervention situations, FERC gives 60 days' notice for intervention in proceedings for blanket certificates:

[T]he Secretary of the Commission shall issue a notice of the request within 10 days of the date of the filing, which will then be published in the FEDERAL REGISTER. The notice shall designate a deadline for filing protests, or interventions to the request. The deadline shall be 60 days after the date of issuance of the notice of the request.

18 CFR 157.205(d). Moreover, FERC requires pipeline companies to include specific text in these blanket certification landowner notifications:

This project is being proposed under the prior notice requirements of the blanket certificate program administered by the Federal Energy Regulatory Commission. Under the Commission's regulations, you have the right to protest this project within 60 days of the date the Commission issues a notice of the pipeline's filing.

If you file a protest, you should include the docket number listed in this letter and provide the specific reasons for your protest. The protest should be mailed to the Secretary of the Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426. A copy of the protest should be mailed to the pipeline at [pipeline address]. If you have any questions concerning these procedures you can call the Commission's Office of External Affairs at (202) 208-1088.

157.203(d)(2)(vi). If FERC can do this for one type of pipeline certificate process, then there is no reason why OPP cannot do so here. Given that each of its Certificate pipeline decisions means that eminent domain will be used against dozens, or even hundreds, of landowners, it is the least FERC can do to satisfy its constitutional and statutory obligations.

When dealing with the sufficiency of notice when a state seized someone's house for delinquent taxes while aware that the homeowner had not received notice, the Supreme Court stated:

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner--taking and selling a house he owns. *It is not too much to insist that the State do a bit more to attempt to let him know about it* when the notice letter addressed to him is returned unclaimed.

Jones v. Flowers, 547 U.S. 220, 239 (2006) (emphasis added).

Here, FERC is exerting extraordinary power against property owners, and it is not too much to insist that FERC do a bit more to let landowners know about it.

2. OPP Should Provide Meaningful Landowner Guidance, Communication, and Accessibility.

OPP also needs to fulfill the need for real and continuous guidance and accessibility to landowners throughout the FERC process, something that does not exist right now. *See supra* at 2-

11. The OPP can fulfill this mandate in a number of ways, including by:

- a. having a landowner ‘hotline’, vastly different from the one that exists now, in that landowners should be able to speak or receive a callback from a knowledgeable OPP staff member:
 - i. within a given period of time (say, 3 business days);
 - ii. with real answers or information responsive to the landowner’s inquiry, including information about the project relevant to landowners (such as the number of easements obtained and reported to FERC); and
 - iii. with the option to speak to OPP on the condition of anonymity, as many landowners are justifiably intimidated by or fearful of pipeline companies, and do not report things they otherwise could or would if they could do so anonymously.
- b. designating specific leads and points of contact within OPP for each pipeline project, who will be responsible for gathering, saving, and analyzing data on a given project—i.e., an OPP staff member who will know the issues, has access to relevant data, and can readily provide informed answers to landowners’ inquiries, also enabling the OPP staff member(s) to identify and flag any significant issues with a given project and provide formal recommendations to FERC (such as recommending an investigation after repeated reports of fraudulent behavior by land agents, *see, infra* at 18-19);
- c. improving and updating landowner information materials so they make sense and actually inform landowners clearly of the process and of their rights, including by:
 - i. mailing a guide to every affected landowner explaining landowner rights¹⁴—including their right to counsel and relevant survey and eminent domain provisions—before a pipeline company is permitted to begin contacting landowners to negotiate an easement;

¹⁴ This would be in addition to the revised NOA described above, *supra* at 14-15, and

- ii. mailing and posting on FERC’s website with embedded links clear, step-by-step ‘how to’ guide on intervention, which explicitly states that **IF YOU DO NOT INTERVENE YOU WILL LOSE YOUR RIGHT TO CHALLENGE ANY FERC DECISION APPROVING A PROJECT BEFORE FERC OR A COURT;**¹⁵
- d. making filing comments more accessible to landowners by creating an OPP email address for comment submission (including for DEIS comments), so affected landowners do not have to navigate FERC’s website or filing process;
- e. providing a glossary guide with embedded links for a clear explanation of relevant terms and concepts;
- f. improving the website for increased user-friendliness;
- g. making all affected landowner lists public and readily available to any affected landowner who requests them;
- h. improving and having more community-based meetings, including by:
 - i. having OPP field officers who are the appointed ‘on the ground’ person for a specific project to engage with landowners in their respective communities on a regular basis;
 - ii. hosting more community-based meetings in more locations with various hours, enabling more attendance of working people and landowners who often live very far from any town or city center;
 - iii. changing FERC’s current public meeting format (where individuals are separated into small groups) so as to allow community members to hear from each other; and
 - iv. automatically recording, transcribing, and filing comments made at the community meetings, unless the landowner commenter opts out of an auto-file system.

¹⁵ The current ‘How To Intervene’ guide on the website does not make this explicit, and cites to a confusing regulation—18 CFR §385.214—without providing guidance in simple terms on how to intervene, and from what Niskanen could find, there is no simple step-by-step guide to assist a layperson.

C. OPP needs to streamline a system for landowners' legitimate complaints.

The OPP is the appropriate place for landowners to go with their complaints about pipeline company behavior, specifically in two areas: abuse and threats by pipeline land agents to intimidate landowners into signing easements, and pipelines' routine violation of environmental conditions in certificate orders that, on paper, were intended to protect landowners. At best, FERC's practice is to ignore this behavior; at worst, to tacitly encourage it.

1. Pipelines' land agents routinely utilize abusive and fraudulent tactics in order to get landowners to sign "voluntary" easements.

Land agents acting for pipeline companies are notorious for their intimidation tactics, especially against the elderly. "If you don't sign, we're going to take your property anyway, and you won't get as much for it." "Every one of your neighbors has signed, why are you the only one causing a problem?" "If you sign, we'll move the pipeline to a more remote part of your property, otherwise we're going to run it right through your house or front yard."

Niskanen has heard it all. This happens all the time, on every pipeline. Just one week ago, Niskanen and affected landowners filed comments on the proposed abandonment of the ACP pipeline, including the following paragraph:

ACP used intimidation tactics to quickly obtain access to the land for their own advantage. Prior to the Ravinas signing an easement, ACP sent the sheriff to their home at 8:30pm one evening. Once at the home, the sheriff, at ACP's behest, demanded that the Ravinas allow ACP on their land the next day to conduct extensive surveys to prepare pipeline plans for their land. ACP continued to intimidate the Ravinas during easement negotiations, when ACP sent three attorneys to negotiate on their behalf with this older couple in an effort to make them feel under threat. They were allotted one day for negotiations and were told that if they did not sign by a certain time the next morning, then the deal was off. The Ravinas were only given one night to review the easement before signing.

The Niskanen Center, et al., Motion to Intervene and Comments on the Atlantic Coast Pipeline's Project

Disposition and Restoration Plan at 10, Docket No. CP15-554, FERC Accession No. 202104166-5358

(April 16, 2021). FERC has done absolutely nothing to curb this sort of behavior, and the OPP is an

opportunity for the Commission to create a means by which landowners can protect themselves from the abuse they suffer as a result of FERC's process and decision-making.

To begin with, OPP should develop an informal code of conduct for land agents and encourage certificate holders to agree to abide by it. (Nighttime visits from the sheriff are among the practices that the code should discourage.) OPP should also inform landowners of their basic rights in eminent domain proceedings, including explaining the process under Rule 71.1 of the Federal Rules of Civil Procedure, which governs condemnation in federal courts. The specific OPP staffer designated to be responsible for landowner relations for each pipeline should take note of landowner complaints about land agent abuse, and report those complaints to the certificate holder, the Office of Energy Projects, the Office of Enforcement, and the Commissioners, as well as make formal recommendations for accountability measures and consequences.¹⁶

2. Enforcement of Certificate Conditions.

Certificates contain dozens of conditions governing the pipeline's behavior on people's property during construction and operation. And when pipelines violate those conditions, FERC's practice is to ignore landowner complaints to this effect, or refer the landowner back to the perpetrator of the harm—the pipeline company itself. Unfortunately, federal courts have not allowed landowners to enforce the certificate conditions meant to protect them, leaving this entirely to FERC. Even more unfortunately, FERC has proved to be utterly indifferent to complaints about condition violations.

FERC has a telephone number that landowners can call with complaints called the 'FERC Landowner Hotline.' (1-877-337-2237). FERC currently advises landowners to 1. call the gas

¹⁶ The fact that pipeline companies often employ these land agents as 'independent contractors' and use this status to repeatedly disclaim any responsibility for their actions is further evidence that more robust record keeping and monitoring of land agent actions are essential FERC functions to ensure more fair and just proceedings.

company point of contact, 2. call the gas company hotline, and 3. *then* call the FERC Landowner hotline, in that order.¹⁷ The typical “response” from FERC is silence, no matter how many messages a landowner leaves. If they’re “lucky”, FERC responds . . . and tells them that they “need to work things out with the pipeline company”.

The OPP should take this problem seriously. The staff member assigned to oversee landowner relations for each pipeline should receive landowner complaints about certificate compliance and report them to OEP and OE, which *must* be tasked with investigating and, if a condition is being violated, *order all activity on that landowner’s property and related properties halted until it is remedied*. If OEP and/or OE determine that there is no violation, they should immediately report this to OPP and the landowner. There must also be a means by which a landowner can appeal any determination that there is no condition violation.

D. FERC needs to allocate funding in intervenors’ compensation fund solely for landowners.

Lastly, in order to level the playing field, it is an absolute necessity for FERC to allocate funding in the intervenors’ compensation fund solely for landowners, including for legal representation and the hiring of experts. After consultation with several lawyers and experts, Niskanen provides a model landowner budget and justification below for FERC’s consideration. This budget is an overly conservative estimate of the time that lawyers and experts put into meaningfully contributing and representing landowner interests in complex FERC proceedings.¹⁸

¹⁷ See <https://www.ferc.gov/industries-data/natural-gas/landowner-topics-interest>, 8th subheading down from top, ‘What is the FERC Landowner Helpline and How Can it Help me?’ (Last visited April 22, 2021).

¹⁸ The \$200 hourly rate is also quite conservative and based on rates accepted under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1)(A) (2012), which are significantly lower than rates generally accepted under the Laffey Matrix. See, e.g. <http://www.laffeymatrix.com/see.html> (2021 hourly rate for attorney with 8-10 years of experience is \$672/hour) (Last visited April 21, 2021). In 2016, \$190/ hour was accepted by the DC Circuit in *SecurityPoint Holdings, Inc., v. Trans. Sec. Admin.* No. 13-1068 (DC Cir. Sept. 2, 2016), Doc. No. 1633546 (Order on Motion for Attorneys' Fees

Intervenor Compensation Fund
Model Affected Landowner Participation Budget

<i>Task</i>	<i>Resource</i>	<i>Hour explanation</i>	<i>Hours</i>	<i>Cost</i>
DEIS Comments	Lawyer - 1	At least 4 weeks of work for each attorney, and at least 3 attorneys required for a typical Section 7 pipeline proceeding to represent landowners and landowner groups. Reading and analyzing DEIS, which often is thousands of pages long, drafting and filing comments with any relevant exhibits, consulting and enlisting necessary experts..	160	\$32,000.00
	Lawyer - 2		160	\$32,000.00
	Lawyer - 3		160	\$32,000.00
DEIS Comments Total			480	\$96,000.00
Expert	Expert - Appraisal 1	Independent Land Appraisal for first group of representative landowners and properties along a given pipeline.	0	\$15,000.00
	Expert - Appraisal 2	Independent Land Appraisal for second group of representative landowners and properties along a given pipeline.	0	\$15,000.00
	Expert - Need Determination	Full analysis of market need for an interstate gas pipeline supplying a domestic market that landowners will need in a typical section 7 proceeding.	0	\$15,000.00
	Expert - Safety Evaluation	Expert review and report of pipeline safety issues for a small group of landowners, which would ultimately be applicable to all landowners along the given pipeline, assuming nothing structurally is different in different parts of the same pipeline	0	\$20,000.00
	Expert - Water	Writing report on potential groundwater contamination from pipeline installation and operation, impacts on water sources, agricultural drainage, irrigation, and water surfaces and wetlands would require at least 3 weeks of work to review DEIS, review and gather data on relevant land and water, and conduct analysis and draft and finalize report.	0	\$25,000.00
Expert Total			0	\$80,000.00
Request for Rehearing	Lawyer - 1	At least 2 weeks of work for each attorney. Landowner attorneys have 30 days from the date of a FERC Certificate Order to file their Request for Rehearing on behalf of landowners, which involves complex legal and factual issues, and is the basis for any subsequent court challenge to FERC's decision.	80	\$16,000.00
	Lawyer - 2		80	\$16,000.00
	Lawyer - 3		80	\$16,000.00
Request for Rehearing Total			240	\$48,000.00
Grand Total			720	\$234,000.00

under EAJA accepting uncontested \$190 hourly rate in 2016); *See also the Ninth Circuit's Statutory Maximum Rates Under the Equal Access to Justice Act*, with hourly rate for 2020 set at \$207.78, available at: https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (Last visited April 21, 2021).

Respectfully submitted,

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