UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	))	Docket No. PL18-1-000

THE NISKANEN CENTER'S RESPONSE TO ENBRIDGE GAS PIPELINES' ANSWER

The Niskanen Center ("Niskanen") files this response to Enbridge Gas Pipelines' Answer[1] to comments filed regarding the Federal Energy Regulatory Commission's ("FERC" or the "Commission") February 18, 2021 Notice of Inquiry[2] seeking information and perspectives to help the Commission's consideration of revision of its policy statement on the certification of new interstate natural gas facilities ("Policy Statement")[3]. Enbridge's Answer gets numerous issues flatly wrong, including its characterization and analysis of Niskanen and Affected Landowners' previously filed comments on the NOI.[4] Niskanen addresses those deficiencies below.[5]

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[1] *Motion for Leave to Answer and Answer of Enbridge Gas Pipelines*, FERC Docket No. PL18-1-000, Accession # 20210625-5217 (June 25, 2021) (hereinafter "Enbridge Answer").

[2] *Certificate of New Interstate Natural Gas Facilities* 174 FERC ¶ 61,125 (Feb. 18, 2021) ("NOI").

[3] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified,* 92 FERC ¶ 61,094 (2000).

[4] *The Niskanen Center and Affected Landowners' Motion to Intervene and Joint Comments on the Commission's Renewed Notice of Inquiry on the Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000, Accession No. 20210526-5166 (May 26, 2021) (hereinafter, "Niskanen Comments").

[5] Rule 213(a)(2) of the Commission's Rules of Practice and Procedure "prohibits answers to a protest or an answer *unless otherwise ordered by the decisional authority.*" *See Quincy-Columbia Basin Irrigation Dist. E. Columbia Basin Irrigation Dist.*, 176 FERC ¶ 61010, P. 23 (2021) (emphasis added). Niskanen's 'answer to an answer' should be accepted by the Commission because it provides information that will assist FERC in its decision-making process. *See also* Enbridge's Answer at footnote 1 (citing to cases in support of FERC's acceptance of a responsive pleading that "will facilitate the decisional process or aid in the explication of issues and ensure that the Commission has a complete and accurate record upon which to make an informed decision.") (citations omitted).

I. RESPONSES TO AND CLARIFICATION OF SPECIFIC ARGUMENTS IN ENBRIDGE'S ANSWER.

A. Agreement and Discord on Precedent Agreements.

The courts, FERC, Niskanen, and Enbridge[6] all agree that FERC should consider precedent agreements when considering the economic need of a proposed project. But this agreement diverges on when and how FERC should conduct a more in-depth analysis of the need for a project.

Relying in part on *Spire,*[7] Enbridge proposes a hardline rule—that "[i]n all but the most extreme of circumstances — a single, affiliate precedent agreement for a pipeline with no new demand, no economic benefits to customers, and where there is proof of self-dealing — **precedent agreements remain the best evidence of need**." Enbridge Answer at 8. In other words, FERC should only conduct any serious, additional analysis of market need in a case with these *very* extreme facts—and only in such an extreme case could such an analysis potentially outweigh the evidence of a precedent agreement. This suggestion misreads *Spire*, where the D.C. Circuit explicitly rejected such blind reliance on affiliate precedent agreements:

> **Evidence of "market need" is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement.** *See Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, 61,767 (2009) (explaining that, in a different context, the Commission "will apply a higher level of scrutiny" to certain affiliate transactions "due to the absence of arms' length negotiations as a basis for the commitment, concerns that the affiliate would receive unduly preferential treatment, further concerns that a utility affiliate contract could shift costs to

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[6] Enbridge Gas Pipelines include Algonquin Gas Transmission, LLC; Big Sandy Pipeline, LLC; Bobcat Gas Storage; East Tennessee Natural Gas, LLC; Garden Banks Gas Pipeline, LLC, Market Hub Partners Holding, LLC; Mississippi Canyon Gas Pipeline, LLC; Saltville Gas Storage Company L.L.C.; and Texas Eastern Transmission, LP. The Enbridge Gas Pipelines also include natural gas companies in which affiliates of the Enbridge Gas Pipelines own a joint venture interest, including Alliance Pipeline L.P., Gulfstream Natural Gas System, L.L.C.; Maritimes & Northeast Pipeline, L.L.C.; Nautilus Pipeline Company, L.L.C., NEXUS Gas Transmission, LLC; Sabal Trail Transmission, LLC; Southeast Supply Header, LLC; and Steckman Ridge, LP (hereinafter, collectively referred to as "Enbridge").

[7] *Env't Def. Fund v. Fed. Energy Regul. Comm'n,* 2 F.4th 953 (D.C. Cir. 2021) ("*Spire*").

> captive ratepayers of the affiliate and subsidize the ... project inappropriately, and the lack of transparency that would surround the arrangement").[8]

Moving forward—and as discussed at length in Niskanen's Comments—*at a minimum*, FERC should revise the Certificate Policy Statement to require the Commission to look behind affiliate precedent agreements whenever credible evidence is presented that those agreements do not represent actual market demand.

1. FERC can Absolutely Look Behind a Section 7 Pipeline's Precedent Agreements with an Affiliate LNG Terminal.

Under Enbridge's proposed precedent agreement framework, precedent agreements are all FERC needs to approve a proposed pipeline project, and even in the case where a section 7 pipeline has precedent agreements with an affiliate LNG terminal for 100% of its capacity, FERC cannot look behind those affiliate precedent agreements because it is "beyond the Commission's statutory authority."[9] FERC plainly has authority to look behind precedent agreements, and nothing in the Natural Gas Act or the Certificate Policy Statement requires FERC to treat an affiliate precedent agreement (or, indeed, any precedent agreement) as conclusive evidence of market support.[10] FERC has recognized that other factors and evidence may demonstrate that a particular precedent agreement does not constitute such evidence, especially in the context of affiliate agreements.[11]

This general authority applies even when the affiliate is an exporter authorized by the Department of Energy (DOE) under section 3 of the Natural Gas Act. Enbridge has not offered any explanation as to how or why FERC's recognition of a pipeline's total lack of market support in a case where a pipeline has subscribed 100% of its capacity to an affiliate LNG facility would intrude

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[8] *Env't Def. Fund v. Fed. Energy Regul. Comm'n*, 2 F.4th 953 (D.C. Cir. 2021) (emphasis added).

[9] Enbridge Answer at 17; *see also id.* at 21.

[10] *See* Niskanen Comments at 6-19 (discussing FERC's blind reliance on precedent agreements, and the fact that this is a routine violation of FERC's own Certificate Policy Statement).

[11] *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,403, P48 (2017) (discussing *Independence Pipeline Co.*, 89 FERC ¶ 61,283 (1999)).

on DOE's authority. Nor could Enbridge do so. Inquiring into whether a pipeline's sole customer is likely to be able to actually use gas does not intrude on any of the authority provided to DOE under section 3. It is worth noting that DOE's approval of exports to "free trade agreement" (FTA) countries under 15 U.S.C. § 717b(c) does not entail any determination as to the strength of the market for exports, or whether they are in fact likely to occur. Indeed, DOE has interpreted the statute to prohibit DOE from making such an inquiry.[12] A FERC determination that, in light of a pipeline's failure to demonstrate market support, an affiliate LNG terminal's agreement to purchase gas from that pipeline is weak evidence of need and public benefit, and thereby insufficient to outweigh the adverse effects of a pipeline or terminal, would not contradict a determination by DOE.

For example, in the case of Jordan Cove, DOE explicitly disclaimed making any market support determination of exports to non-Free Trade Agreement countries. DOE stated that "it is far from certain that all or even most of the proposed LNG export projects will ever be realized because of the time, difficulty, and expense of commercializing, financing, and constructing LNG export terminals, as well as the uncertainties inherent in the global market demand for LNG."[13] DOE explained that under section 3 of the Natural Gas Act, "under most circumstances, the market is the most efficient means of allocating natural gas supplies," and that DOE would deny an application only where "necessary to protect the public in the event there is insufficient domestic

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[12] *See, e.g.* https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2011/orders/ord3041.pdf at 9 ("The substantive issues raised by Oregon regarding alleged deficiencies in the Application (source and security of supply, adequacy of supporting gas reserves, **and national or regional need for gas**) and the claim that the Application is premature thus are not matters subject to regulatory review and they are not grounds for deferring or denying the Application.") (emphasis added) (Last accessed July 25, 2021).

[13] https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2014/orders/ord3413.pdf at 142 (Last accessed July 25, 2021); *see also id.* at 49 (concluding that the global market for U.S. LNG exports is likely to be limited).

natural gas for domestic use."[14] DOE did not find such an adverse effect on gas supplies, and DOE's conditional authorization did not address environmental or other factors that would weigh on the section 3 inquiry. In summary, DOE views questions of market support as largely outside its purview.

DOE's laissez-faire approach to approvals reflects the differences between Natural Gas Act sections 3 and 7 with regard to standards imposed and rights conferred. Because DOE authorization does not allow condemnation of land, or indeed construction or operation of any facility, DOE approval is less likely to directly adversely impact third parties, and as such, the Natural Gas Act creates a presumption of public benefit and does not require DOE to make affirmative findings of need or public benefit. Because FERC is authorizing condemnation of land, construction with extensive adverse environmental harm, etc., FERC cannot approve the project unless it affirmatively concludes that the project will provide benefits, and FERC cannot leave it to "the market" to weigh these benefits against adverse impacts: FERC must address this question itself.[15] In summary, the fact that a pipeline would supply exports subject to DOE jurisdiction does not limit FERC's authority to look "behind" precedent agreements to determine need. (Or whether meeting that need will actually produce public benefits.)

B. Let's Say it Again—Gas for Export is not in the Public Interest under Section 7.[16]

Niskanen responds here to Enbridge's argument that exported gas should be considered a public benefit under section 7 because "[j]obs and tax revenues are significant and public benefits."[17] Certainly, building a pipeline will provide some jobs, even if a pipeline never carries U.S. gas, or even

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14 *Id.*

15 *Compare* 15 U.S.C. §§ 717b(a) with, 717f(e); *see Earthreports*, 828 F.3d at 953 (discussing the differences between these provisions).

16 Niskanen discusses why exports clearly do not serve the public convenience and necessity under the NGA in its Comments (at 19-21), and incorporates those arguments here.

17 Enbridge Answer at 23.

any gas at all. But Congress did not enact the NGA as an employment program. By definition, building any pipeline creates jobs; if jobs were the purpose of section 7, then this alone would be a sufficient public benefit and there would be no need for a public convenience and necessity finding. Indeed, there would be no reason for a pipeline to carry any gas, since the vast majority of those jobs would be created by building a pipeline, not by operating it.[18]

No court has ever held that the NGA's goal was to create construction jobs or, indeed, that the jobs and tax benefits that result from any government infrastructure approval alone satisfies the Takings Clause.

C. Enbridge's Proposed Presumption—that a Landowner Who Enters Into an Easement Agreement While Under the Threat of Eminent Domain is *not* Adversely Affected—is Simply Incorrect.

By definition, any easement obtained from a landowner under the threat of eminent domain is the product of coercion. Enbridge's shallow analysis of easement agreements fails to acknowledge this basic fact, and proposes that any compensation paid to a landowner "zeroes out adverse effects for purposes of the balancing test."[19] Enbridge goes so far as to argue that eminent domain is a sufficient remedy when a landowner "believes that a pipeline has not offered adequate compensation".[20] Even FERC's Policy Statement acknowledges that such 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**

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[18] *See Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 848 (Iowa 2019) (noting that "[i]f economic development alone were a valid public use," then the Dakota Access pipeline could have used eminent domain to condemn land to build a palatial mansion, "which could be defended as a valid public use so long as 3100 workers were needed to build it, it employed twelve servants, and it accounted for $27 million in property taxes.").

[19] Enbridge Answer at 8.

[20] *Id.*

landowner and this is a valid factor to consider in balancing the adverse effects of a project against the public benefits."[21] Landowners not only face the threat of eminent domain during FERC proceedings when deciding whether or not to sign an easement agreement—they also routinely face abusive and fraudulent tactics from pipeline land agents, including threats to take property away from refusing to sign, false statements that all other landowners have signed, and threats to put a pipeline through or near their home.[22]

Courts have noted and accepted the simple fact that when one party holds the power of eminent domain, any resulting agreement with the other party cannot be considered "voluntary", given the inherent power disparity: "It is the fact that one party is possessed of the power of condemnation which keeps this transaction in either case from being a true arm's length bargain."[23] As the Arizona Supreme Court recently observed:

> Even a so-called "friendly" condemnation is ultimately not voluntary because Circle City has no choice but to accede to the taking of its assets pursuant to court order. *See* A.R.S. §§ 12-1114(1), -1114(6), -1116(A); *cf. United Water N.M., Inc.*, 910 P.2d at 910 ¶ 15 (stating "a contract or agreement for sale or purchase is a consensual, voluntary relationship" because "both a seller and a buyer have the right to select with whom each will contract, and neither can be forced to agree" (emphasis added) (quotation omitted)). . . . Agreeing on just compensation rather than litigating the issue makes the condemnation no less coercive.[24]

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[21] 90 FERC ¶ 61,128, p. 19 (emphasis added).

[22] *See* Niskanen Comments at 36-39 (discussing routine, abusive tactics of land agents).

[23] *Nash v. D.C. Redevelopment Land Agency*, 395 F.2d 571, 577 (DC Cir. 1967) (Judge McGowan's Concurrence); *Reg'l Transp. Dist. v. Outdoor Sys., Inc.*, 34 P.3d 408, 417 (Colo. 2001) (en banc) (clarifying that the sale of land was "voluntary" because it "was not made under threat of condemnation"); *State ex rel. Missouri Highway & Transp. Comm'n v. Zeiser Motors, Inc.*, 949 S.W.2d 106, 109 (Mo. Ct. App. 1997) (finding that a sale of land was presumably "voluntary" because the party could not prove that it "was made under threat of condemnation"); *Johnston v. Sonoma Cty. Agric. Pres. & Open Space Dis*t., 100 Cal. App. 4th 973, 983 (2002), *as modified* (Aug. 22, 2002) (holding that the "credible and imminent threat of the exercise of eminent domain" means the transfer of land is "involuntary"); *Moorer v. HUD*, 561 F.2d 175, 182 (8th Cir.1977) ("The [Uniform Relocation Act] was intended to benefit those displaced by public agencies with coercive acquisition power, such as eminent domain").

[24] *City of Surprise v. Arizona Corporation Commission*, 246 Ariz. 206, 210 (2019) (emphasis added).

Courts' uniform understanding that easement agreements reached under threat of eminent domain can be described as 'voluntary' further supports FERC adopting the presumption that *any* property taken from affected landowners—whether via an easement agreement signed under the threat of eminent domain or through eminent domain proceedings—is an adverse impact.

In addition, Enbridge's incredible suggestion that somehow landowners can be better off or "beneficiaries" of a project when a pipeline pays them to take and destroy their land is absurd.[25] Notably, Enbridge cites zero instances of landowners receiving compensation above the fair market value or of landowners considering themselves "beneficiaries" when a pipeline takes their land. The fact is that courts routinely refuse to admit evidence of the value paid for land obtained under the threat of eminent domain because these transactions often do not reflect the actual market value of the land.[26]

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[25] *See* Enbridge Answer at 9 ("In those instances where landowners received compensation above the fair value of the land rights, landowners would not be adversely impacted at all, but would instead be the beneficiaries of the pipeline project by receiving more money for the land than it is worth.").

[26] *See Harris Cty. Flood Control Dist. v. Taub*, 502 S.W.3d 320, 331 (Tex. App. 2016) (quoting *State v. Vick*, 376 S.W.2d 89, 90 (Tex.Civ.App.—Houston 1964, no writ)) (agreeing that "the prices paid for property by a condemning authority are not admissible to establish market value of the property being condemned because such sales are not free and voluntary"); *Bd. of Trustees of Univ. of Illinois v. Shapiro*, 343 Ill. App. 3d 943, 951 , 799 N.E.2d 383, 389 (2003) (internal citations omitted) ("[i]t is well established that property sales made under threat of condemnation are not reliable evidence of fair market value" and are "inadmissible because the party asserting the sale evidence cannot establish that the property was 'sold freely and in the open market'"); *Kirkpatrick v. State*, 53 Wis. 2d 522, 526 , 192 N.W.2d 856, 858 (1972) (the price of land sold under threat of eminent domain "is not determined by an arms-length transaction, but rather by dealings between one who must buy and another who has no choice but to sell"); *Perlmutter v. State Roads Comm'n*, 259 Md. 253, 254 (1970) ("the price paid for comparable property acquired under threat of condemnation is not admissible as evidence of fair market value"); *In re Condemnation of Land for Controlled Access Highway Purposes*, 219 Kan. 320, 548 P.2d 756, 764 (1976) ("[s]uch a transaction is not an arm's-length sale between parties since the threat of condemnation affects the price required to be paid."); and *Brown v. Miss. Transp. Comm'n*, 98–CA–00455–SCT (¶ 29), 749 So.2d 948 (Miss.1999) ("[b]ecause they are more in the nature of a compromise and are not, therefore, fair indicators of market value, sales to an agency with condemning authority are not admissible in evidence").

Further, it is well established that "all land is unique."[27] Land, being unique, cannot simply be replaced with money.[28] It naturally follows from this that the taking of a landowner's property alone, even with 'just compensation' or payment to the landowner, is an irreparable injury. "As a result of the Commission's orders, [petitioner] . . . must either sell its land to [the pipeline] or allow [the pipeline] to take its property through eminent domain . . . . That [the pipeline] ultimately will compensate [petitioner] for its property does nothing to erase [petitioner's] legally cognizable injury."[29] "As a general rule, interference with the enjoyment or possession of land is considered 'irreparable' since land is viewed as a unique commodity."[30] The taking of land – whether by condemnation or by the threat of it – is an adverse impact, and FERC must recognize it as such.

D. On Enbridge's Argument that More Information is a Bad Thing.

Enbridge claims that quantifying the impacts on landowners is somehow a bad thing, that FERC should absolutely not do it and, indeed, be scared of trying to do it, and that such a task is

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[27] *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 938 F.2d 846, 851 (8th Cir. 1991); *Milens of California v. Richmond Redevelopment Agency*, 665 F.2d 906, 909 (9th Cir. 1982) (applying "the old rule that each parcel of land is unique"); *and First Nat'l Bank of Oneida, N.A. v. Brandt*, 851 F. App'x 904 (11th Cir. 2021) (citing generally *Nancy Perkins Spyke, What's Land Got to Do with It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 Buff. L. Rev. 387, 387 (2004) (discussing the pervasiveness of the "land is unique" principle in a wide variety of legal settings from contracts, eminent domain, nuisance, class actions, partition, and lease assignments, and antitrust); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 7 (1958) (finding market power based on the uniqueness of the owned land); Restatement (Second) of Contracts § 360 (1981) ("A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money")).

[28] *See, generally, Carpenter v. Folkerts*, 29 Wash. App. 73, 76 (1981) (citing 71 Am.Jur.2d Specific Performance s 112 (1973)) ("[n]o piece of land has its counterpart anywhere else and it is impossible to duplicate by the expenditure of any amount of money"); *Real Est. Analytics, LLC v. Vallas*, 160 Cal. App. 4th 463, 466 (2008) ("[t]he law generally presumes real property is unique and that the breach of an agreement to transfer property cannot be adequately relieved by pecuniary compensation"); *Pardee v. Jolly*, 163 Wash. 2d 558, 568–69 (2008) ("land is unique and difficult to value"); and *Flack v. Laster*, 417 A.2d 393, 400 (D.C. 1980) ("[w]hen land is the subject matter of the agreement, the legal remedy [i.e. monetary damages] is assumed to be inadequate, since each parcel of land is unique").

[29] *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004) (emphasis added)).

[30] *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1090 (7th Cir. 2008); *see* Niskanen Comments from 47-49 (discussing irreparable injuries to landowners because of FERC's authorization of projects).

"essentially impossible."[31] As discussed in detail in Niskanen's Comments, the metrics that FERC currently uses to measure 'adverse impacts' are useless.[32] FERC cannot properly conduct a balancing test that involves adverse impacts without even accounting for those adverse impacts. Quantifications of adverse impacts on landowners are viable and completely within the capability of FERC. *At the very least*, when an adverse impact is quantified and filed before FERC, FERC must be required to take that information into consideration when deciding whether or not to approve a project. For example, the number of landowners subject to eminent domain, the total amount of property at issue, soil erosion, deforestation, and potential water quality degradation are all quantifiable, and are quantified regularly in a variety of contexts.

The Commission's (and Enbridge's) preference of discussing a pipeline project's mitigation efforts or other useless metrics over conducting an actual analysis or providing data on adverse impacts is flatly bizarre, and must be remedied.[33]

E. Enbridge's Support of FERC's Complete Failure to Examine "Residual Adverse Impacts."

Enbridge states without any citations or support that "the Commission regularly examines a number of factors to account for residual adverse impacts on landowners, including some of the factors suggested by Niskanen Center."[34] Niskanen discusses in detail FERC's complete failure to actually examine "residual adverse impacts" in its Comments[35], but needs to make two points abundantly clear: (1) Despite Enbridge's assertion that FERC considers the "the location of water wells in proximity to a project, as well as whether those wells are concentrated in environmental

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31 Enbridge Answer at 10.
32 Niskanen Comments at 13-19.
33 *See* Niskanen Comments at 13-19.
34 Enbridge Answer at 15.
35 Niskanen Comments at 13-19.

justice areas"[36] in examining residual adverse impacts, FERC routinely fails to take into account the detrimental impacts of a pipeline on landowners' water sources[37], or to even account for *the mere existence* of a fraction of those water sources[38]; and (2) The contention that the taking and/or devaluation of property is something that FERC can simply ignore or should not take into account as a residual adverse impact because landowners will eventually receive some money[39] is a farce, as discussed above and in Niskanen's previously filed Comments.[40] In addition, the Commission without question can know the "number of landowners subject to eminent domain" when it issues the certificate. It's simple math and minimal effort. FERC already requires pipeline companies to submit lists of all "affected landowners"[41] along a pipeline route.

F. Enbridge Misses the Mark on Landowner Rights.

Niskanen certainly agrees with Enbridge that Niskanen's suggestions to make the FERC process more fair and just for affected landowners are "reasonable" and that "these ideas may be worthwhile to consider"[42], but does not agree with Enbridge that all of the suggestions require a formal rulemaking, or with Enbridge's misconstrued framing of the issues generally.

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36 Enbridge Answer at 15.

37 *See* Niskanen Comments at 14-15

38 *Id.*

39 Enbridge Answer at 15-16.

40 *See* Niskanen Comments at 14-18; *supra* at 6-10.

41 "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). FERC requires pipeline companies to "make a good faith effort to notify all affected landowners and towns, communities, and local, state, and federal governments and agencies involved in the project" (18 CFR 157.6(d)(1)) and then to submit to FERC "an updated list of affected landowners, including information concerning notices that were returned as undeliverable." 18 CFR 157.6(d)(6). The separate significant issues with this process as-is were discussed in Niskanen's Comments previously filed in this docket (Niskanen Comments at 24-31), as well as its OPP Comments. *Niskanen Center's Comments on FERC's Creation of the Office of Public Participation*, at 3-11, Accession No. 20210423-5052, Docket No. AD21-9-000 (April 23, 2021) (hereinafter, "Niskanen OPP Comments").

42 Enbridge Answer at 61.

As previously noted[43], Niskanen discussed these issues with FERC's notice and communication methods in its comments on FERC's Creation of the Office of Public Participation, and reiterated those comments in this docket—as it remains unclear how FERC plans to fix these issues, and the Policy Statement could play a significant role.[44] If FERC opts not to remedy these issues via the creation of the OPP or revisions to the Certificate Policy Statement, FERC could do so with some general administrative tweaks. For example, FERC could do the following without any formal rulemaking:

- Create a tracking and accountability mechanism for landowner lists and ensure that all affected landowners are identified and informed of their rights;[45]
- Ensure that notice to landowners is easy to understand and accessible by doing a number of things, including editing each NOA;[46]
- Implement a mandatory minimum 90-day period for affected landowners to intervene in proceedings—without any of the additional restrictions to 'late interventions' as suggested by Enbridge (Enbridge Answer at 61-62), as any such restrictions would serve no purpose other than making it more difficult for landowners to meaningfully participate[47] in the FERC process;[48]

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43 *See* Niskanen Comments at footnote 21.

44 *See The Niskanen Center's Comments on FERC's Creation of the Office of Public Participation*, Accession No. 20210423-5052, Docket No. AD21-9 (April 23, 2021) (hereinafter "Niskanen OPP Comments")

45 *See, e.g.* Niskanen's OPP Comments at 13 ("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. [FERC] 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.").

46 *Id.* at 13-14, and Niskanen Comments at 33-34.

47 FERC routinely allows a majority of late landowner interventions as it causes no harm to other parties and increases participation in a proceeding, and FERC does deny late interventions when such interventions are filed so late that permitting such a late intervention would cause actual harm to a party (such as allowing an intervention after a Certificate has been issued). *See, e.g.*, Order on Rehearing, Jordan Cove Energy Project, Accession No. 20200522-3018, Docket Nos. CP17-495-001 and CP17-494-001, at ¶ 12 (May 22, 2020) (denying a late motion to intervene as "it is Commission policy to deny late intervention at the hearing stage" because such interventions "would delay, prejudice, and place additional burdens on the Commission and the certificate holder.").

48 Niskanen OPP Comments at 13-14; and Niskanen Comments at 33-34.

- Provide meaningful landowner guidance, communication, and accessibility;[49]
- Streamline a system for landowners' legitimate complaints;[50] and
- Clearly define construction.[51]

Enbridge's note on automatic party status of landowners putting "additional pressure on either the pipeline or the Commission (if FERC were to take responsibility for identifying landowners as suggested by Niskanen Center) to **correctly identify all of the landowner**s"[52] is *exactly the point*—every effort should be *required* to be made to correctly identify and notify all affected landowners in a FERC pipeline proceeding.[53] However, given the logistical hurdles (such as figuring out how service should be mandated for landowner parties to a proceeding) and existing rules (*see, e.g.* 18 CFR 157.10(a)), Niskanen does agree that a formal rulemaking may be necessary to automatically provide party status to landowners, and would support any such effort.

As mentioned in part above (*supra* at 12-13), the Commission ensuring that all landowners are correctly identified and notified of their rights would not "present significant challenges for the Commission" as alleged by Enbridge.[54] FERC already requires pipeline companies to submit lists of all "affected landowners"[55] along a pipeline route, but as discussed previously,[56] pipeline companies have every incentive to get this process wrong. FERC is exerting extraordinary power against property owners, and it's not too much to ask that FERC do a bit more to actually let landowners know about it.

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49 Niskanen OPP Comments at 15-17; and Niskanen Comments at 36-39.
50 Niskanen OPP Comments at 18-20; and Niskanen Comments at 38-40.
51 Niskanen Comments at 40-44. Notably, Enbridge does not contest the fact that FERC needs to clearly define 'construction.'
52 Enbridge Answer at 62 (emphasis added).
53 *See* Niskanen's OPP Comments at 3-9, 12-15.
54 Enbridge Answer at 62.
55 *See supra* at footnote 40.
56 *See* Niskanen Comments at 24-25, 33; Niskanen OPP Comments at 2-8, 13-15.

1. Enbridge Misunderstands *Ex Parte* Communications, and FERC needs to Properly Communicate Eminent Domain Rights to Landowners.

Enbridge further proffers that the Commission would risk violating *ex parte* rules if FERC provided factual information regarding eminent domain procedures to affected landowners.[57] The fact is that (1) FERC's distribution of basic eminent domain and right to counsel information to affected landowners[58] is perfectly lawful and immensely helpful to not only landowners, but to FERC (as FERC staff can redirect landowners to materials distributed when they inevitably receive a call on eminent domain from an affected landowner); and (2) FERC already does this to a certain extent.

To be clear, any information provided to landowners could easily be filed on the record and made available to the public, and it would not be tailored to any individual case. The purpose is to help inform landowners of their basic rights in eminent domain proceedings, as currently landowners remain incredibly misinformed as to what their basic rights are and what exactly will happen in an eminent domain proceeding.[59] Niskanen agrees that if any landowner asks FERC for eminent domain advice or information specific to their case beyond what their general rights are leading up to and in an eminent domain proceeding, they should be informed of their right to counsel, or even directed to a specialized attorney for further assistance.

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[57] Enbridge Answer at 63.

[58] As suggested in Niskanen's Comments, at 37 (FERC should mail "a guide to every affected landowner explaining landowner rights—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")(citation omitted); *id.* at 39 ("FERC 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.").

[59] Niskanen Comments at 39.

FERC currently requires pipeline companies to include "[a] brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state."[60] The problem with this is that landowners rarely, if ever, understand what rights they have before the commission and in eminent domain proceedings after receiving documents from a pipeline company, hence the need for FERC to take responsibility for the development and distribution of it. FERC itself does have a webpage titled "Landowner Topics of Interest", wherein FERC explains that

> If the Commission approves a proposed natural gas project, but the natural gas company cannot reach an agreement with a landowner, the Natural Gas Act, enacted by Congress, gives the natural gas company authority to obtain the easement by the exercise of the right of eminent domain. In such circumstances, eminent domain proceedings are initiated by the natural gas company in the federal district or state courts, and the court determines just compensation to the landowner.[61]

The problem is that the average landowner will not fully understand what 'eminent domain' or 'just compensation' means in practice and what exactly their rights are. This same webpage links to a brochure that provides some additional information, including on eminent domain.[62] The brochure provides vague information about how companies obtain a right-of-way through eminent domain,[63] how a certificate granted by FERC will only allow for eminent domain by that proposed pipeline and for the specified related facilities[64], and what laws authorize a pipeline's use of eminent domain[65]. However, as-written, none of the information provided to landowners clearly indicates a number of basic things that landowners should know, including (1) that they do *not have to sign or agree*

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60 18 CFR 157.6(d)(3)(v).

61 *Landowner Topics of Interest*, FERC.GOV, https://www.ferc.gov/industries-data/natural-gas/landowner-topics-interest (Last accessed July 26, 2021).

62 *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?*, FERC.GOV, https://www.ferc.gov/sites/default/files/2020-04/AnInterstateNatualGasFacility.WhatYouNeedToKnow.pdf (Last accessed July 26, 2021).

63 *Id.* at 8.

64 *Id.* at 23.

65 *Id.* at 24-25

to an easement, (2) right to counsel in easement negotiations, (3) that a pipeline cannot take their land until they have formal authorization from FERC, and (4) any easement signed may give a pipeline permanent possession of their land, even if a project is *never built*. The clear communication of this information is absolutely essential if FERC is genuinely concerned with landowner rights and ensuring a more fair and just process.

G. Enbridge Misinterprets the Commission's Stay Power under NGA Section 19(c).

Enbridge is flatly incorrect in its contention that either a presumptive stay or mandatory stay of a Certificate Order pending resolution of a landowner's request for rehearing is "contrary to both Section 19 and Section 7 of the NGA."[66] Section 19 of the NGA explicitly gives the Commission discretionary powers to stay Certificates through an order, such as through Order 871-B[67] (emphasis added): "[t]he filing of an application for rehearing . . . shall not, **unless specifically ordered by the Commission**, operate as a stay of the Commission's order."[68]As stated by the Commission in its Order No. 871-B:

> [T]he Commission unquestionably may determine the effective date of and stay its own orders, and courts have specifically contemplated that a stay would be operative to withhold the eminent domain authority otherwise afforded by NGA section 7(g). The Commission also has the 'power to . . . issue . . such orders . . . as it may find necessary or appropriate to carry out the provisions of the Act.' [69]

And as discussed in Niskanen's Comments, while a 'presumptive' stay is a step in the right direction, an automatic stay (under the appropriate circumstances, i.e. when a landowner requests rehearing) will ensure that landowners will be kept out of the potential "endless administrative limbo," where their property is taken and their land permanently destroyed for projects that may

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66 Enbridge Answer at 64.

67 *Order No, 871-B, Addressing Arguments Raised on Rehearing and Clarification, and Setting Aside, In Part, Prior Order,* Docket No. RM20-15-001 (May 4, 2021).

68 15 USC 717r(c); *see also* Order 871-B, P. 41 ("section 19(c) on its face contemplates the Commission's issuance of stays of its orders") (citations omitted).

69 *Id.* at 46 (citations omitted).

never be built, and industry will have clarity on if and when to begin expending resources on condemnation hearings, and on what exactly comprises the approved route.[70]

CONCLUSION

Enbridge fails to accurately reflect and analyze the serious issues with the Commission's current Certificate Policy Statement and the solutions suggested thereto. The Niskanen Center applauds the Commission's initiative and willingness to fix its broken Certificate Policy Statement, and by incorporating Niskanen and Landowners' recommendations into a new Certificate Policy Statement, the Commission will ensure a more fair and transparent process for landowners, consumers, and industry.

Respectfully submitted,

/s/ Megan C. Gibson

Megan C. Gibson
David Bookbinder
Ciara Malone
Tiferet Unterman
Shanna Fricklas
Niskanen Center
820 1st Street, NE Suite 675
Washington, DC 20002
(202) 810-9260
mgibson@niskanencenter.org

[70] Niskanen Comments at 45-50.

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