

Pipeline Projects Face New Questions On Landowner Rights

By **David Wochner, John Longstreth, Sandra Safro, Jamie Bryan and Jennifer Abbey**
 (November 6, 2019, 2:57 PM EST)

With the significant recent development of thousands of miles of new interstate natural gas pipeline infrastructure in the United States, landowner rights have gained increasing attention, spurred by the eminent domain authority that the Natural Gas Act confers on pipeline developers that hold certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission.

In September, these issues came to a head in two federal appellate courts, with rulings that raise significant new questions for pipeline developers. In addition, FERC recently responded to landowners, promising prompt action to address their concerns.

On Sept. 6, the U.S. Court of Appeals for the D.C. Circuit remanded a FERC order approving an interstate natural gas pipeline, in part because it sought clarification from FERC as to its reliance on transportation agreements for natural gas ultimately destined for export to Canada as part of its public use determination.

On Sept. 10, the U.S. Court of Appeals for the Third Circuit held that the NGA's eminent domain provision does not allow pipeline developers to haul a state into federal district court to condemn state-owned property. As of Sept. 23, a similar case is pending before the U.S. Court of Appeals for the Fourth Circuit after a natural gas pipeline developer appealed a decision by the federal district court dismissing a condemnation action relating to state-owned property.

At FERC's Sept. 19 open meeting, Chairman Neil Chatterjee announced that the commission is working to prioritize its review of requests for rehearing of certificate orders by landowners, and has launched a new webpage and released a reference guide for landowners affected by FERC-jurisdictional pipelines.

These developments muddle the historical clarity of the eminent domain authority conferred upon pipeline developers through certificate orders issued by FERC. Pipeline developers, therefore, should increase the attention given to landowners affected by FERC jurisdictional pipelines, and should consider the possibility that condemnation actions on state-owned property should be filed in state, rather than federal, courts.

Background

Under the NGA, Congress granted private natural gas pipeline developers eminent domain



David
Wochner



John
Longstreth



Sandra
Safro



Jamie
Bryan



Jennifer
Abbey

authority to acquire necessary rights of way for construction and installation of interstate natural gas pipelines.[1] A developer may exercise that authority if it holds a certificate order, and is unable to acquire property along the pipeline route via contract or agreement with the property owner.

One of the factors FERC considers when making its public convenience and necessity determination for a proposed project is the extent to which the developer has minimized the project's adverse impacts on landowners directly affected by the project. FERC also uses an applicant's anticipated need for exercising eminent domain power to determine the level of public benefit that the applicant must show, and then balances that need against any adverse impacts to landowners.

As set forth in FERC's Certificate Policy Statement, "[t]he strength of the benefit showing [is] ... proportional to the applicant's proposed exercise of eminent domain." [2]

Once a pipeline company holds a certificate order, it may use its eminent domain authority to file a condemnation action in federal district court (if the compensation amount claimed by the property owner is more than \$3,000) or in state court. In the recent developments discussed below, courts have analyzed the factors FERC considers when issuing a certificate order and the limits of the eminent domain authority granted to pipeline developers pursuant to the NGA.

FERC Certificate Orders and Public Use

On Sept. 6, the D.C. Circuit directed FERC to reconsider its issuance of a certificate order for the Nexus gas transmission project and clarify why, in its NGA public convenience and necessity determination, it was lawful to rely on precedent agreements, or PAs, for the transportation of natural gas that ultimately would be exported.[3]

Although the 257-mile interstate pipeline connects Hanover Township, Ohio, to Ypsilanti Township, Michigan, 29% of the pipeline's subscribed capacity was under PAs with Canadian companies serving customers in Canada, such that only 41.6% of the pipeline's total capacity was subscribed for domestic use.[4]

When making a public convenience and necessity determination, FERC balances a project's public benefits, such as meeting unserved market demand, against its adverse effects.[5] FERC typically relies heavily on PAs as evidence of public need: "If an applicant has entered into contracts or precedent agreements for the capacity ... they would constitute significant evidence of demand for the project." [6]

For Nexus, FERC found the PAs to be, in the commission's words, "the best evidence" that the project would meet unmet market demand.[7] The city of Oberlin's appeal of the certificate order for the Nexus project argued, in part, that including export agreements as evidence of public need violated the takings clause of the Fifth Amendment,[8] because "serving foreign customers does not serve the requisite 'public use'" required by the takings clause.[9]

The D.C. Circuit held that FERC did not provide sufficient explanation for its reliance on PAs for natural gas eventually bound for export, noting that: (1) a certificate order explicitly approves the transport of natural gas in interstate commerce, which does not include foreign commerce; and (2) foreign export agreements do not constitute the requisite public use for the eminent domain authority conferred upon the holder of a certificate order.[10]

The D.C. Circuit did not vacate the certificate order, instead merely remanding it for further

consideration. In so doing, the court noted, “we remand without vacatur, because we find it plausible that the Commission will be able to supply the explanations required.”[11]

The court also noted that “a pipeline may clearly be required by the public convenience and necessity independent of any of its precedent agreements for export.”[12] Therefore, the court left room for FERC to rely on PAs for domestic use, or other evidence, in its public need determination. For example, FERC could consider overall benefits to the U.S. economy such as job creation and the increased reliability of natural gas supplies.[13]

As FERC continues to consider its 1999 Certificate Policy Statement,[14] its decision on remand in the Nexus case may provide insights into potential aspects of revision to that policy statement, as well as insights for project developers whose projects will serve growing export markets.

The D.C. Circuit’s decision also has potential implications for pipeline developers that are constructing interstate pipelines in whole or in part for customers that ultimately will export gas — including, for example, LNG exports. Pipeline developers may seek to mitigate related risks by providing FERC evidence of the benefit to the U.S. economy or public more generally, in addition to filing PAs.

Eminent Domain Authority and State-Owned Property

On Sept. 10, the Third Circuit vacated a district court order condemning land owned by the state of New Jersey for the PennEast Pipeline Company project.[15] The FERC-authorized, proposed 116-mile interstate pipeline would cross 42 property interests held by various arms of the New Jersey government.[16]

The state argued that the condemnation order was invalid under the 11th Amendment to the U.S. Constitution, which protects states from suits in federal court.[17] The federal government is not subject to 11th Amendment immunity and is, therefore, able to condemn state property in federal court.[18]

The district court accepted PennEast’s argument that, by virtue of the NGA, it was “vested with the federal government’s eminent domain powers and stands in the shoes of the sovereign[,] making 11th Amendment immunity inapplicable.”[19]

On review, the Third Circuit separated the federal government’s eminent domain power from the state’s 11th Amendment immunity (also known as “state sovereign immunity”). The Third Circuit held that the NGA’s delegation of the eminent domain power did not include a delegation of the federal government’s power to override state sovereign immunity, and thus did not allow PennEast to condemn state-owned land in federal court.[20]

The Third Circuit is the first appellate court to consider this issue,[21] but the same question is pending before the Fourth Circuit. In the Fourth Circuit case, the district court dismissed an interstate natural gas pipeline’s condemnation action, holding in a one-paragraph order that it lacked jurisdiction because of the state’s sovereign immunity.[22] The issue before the Fourth Circuit will be whether to follow the Third Circuit and affirm the dismissal.[23]

The potential implications of the Third Circuit’s decision are not insignificant. As PennEast pointed out, requiring condemnation proceedings for state-owned land to take place in state court could “give States unconstrained veto power over interstate pipelines ... the precise outcome Congress sought to avoid in enacting the NGA.”[24]

In response, the court suggested that “an accountable federal official” could file the condemnation action in federal court, and subsequently transfer the property to the pipeline company.[25] However, the court’s proposed workaround[26] is untested.

FERC Seeks to Expedite Landowner Challenges to Certificate Orders

During FERC's open meeting on Sept. 19, Chatterjee announced the commission’s plan to expedite its review of requests for rehearing of certificate orders filed by landowners affected by pipeline development. Under the NGA, FERC must act upon a rehearing request within 30 days; otherwise the application may be deemed to have been denied.[27]

To avoid denying a rehearing request by operation of law, in practice, FERC frequently issues a tolling order[28] after a request for rehearing is filed, to extend indefinitely the time for its review, an approach that has been upheld by the D.C. Circuit, even though it often leads to lengthy delays on rehearing.[29] Courts have criticized FERC for this practice, claiming that it results in an unfair situation whereby landowners and other parties are not able to challenge certificate orders in appellate courts during these delays, despite potentially irreversible consequences.[30]

FERC’s updated process addresses this criticism by “prioritizing” requests for rehearing filed by landowners with the goal of issuing decisions within 30 days, thereby avoiding the use of tolling orders. This could also benefit pipeline developers by resolving appeals sooner and providing more certainty to infrastructure projects.

At the same time, FERC added a prominent link on its homepage that directs landowners and other stakeholders to a webpage with clear guidance on their rights and the process for participating in FERC proceedings, including how to petition the commission for rehearing. With this information more easily accessible to landowners, pipeline developers may find that landowners intervene more frequently in pipeline proceedings.

While this may increase the number of rehearing requests and overall opposition to interstate natural gas infrastructure, it also will allow pipeline developers to identify those landowners that may oppose the project earlier in the FERC process, and provide a better opportunity to engage with them accordingly. Pipeline developers also should review the webpage to ensure they have complied with FERC’s requirements for stakeholder engagement.

Key Takeaways

In light of these recent developments, pipeline developers may need to consider providing to FERC additional detail about the public benefits their projects provide, and pay increasing attention to the private and public landowners adversely affected by a proposed route.

For those projects subscribed by customers that ultimately will export the natural gas, pipeline developers should pay close attention to the order on remand in *Nexus*, and continue to watch for revisions to the commission’s certificate policy statement. In addition, such projects should consider highlighting in FERC certificate applications the public need served by PAs for domestic use, and including information about the other domestic public benefits of the proposed project.

For interstate pipeline projects that cross state-owned property, developers should continue to work with the state to negotiate an agreement or receive the necessary permits to cross the land. To the extent that such efforts are unsuccessful, pipeline developers may well need to file condemnation claims against the state in state, rather than federal, courts.

It remains to be seen whether the Third Circuit’s suggested path of using a federal official to pursue condemnation claims in federal court will be tested, but if it is, the outcome will be instructive to interstate natural gas pipeline developers as well. Finally, all pipeline developers should continue actively engaging landowners affected by a proposed project, particularly as FERC improves landowners’ and other stakeholders’ ability to participate in certificate proceedings with expedited rehearing procedures.

David L. Wochner is a practice area leader at K&L Gates LLP.

John Longstreth, Sandra E. Safro and Jamie L. Bryan are partners at K&L Gates.

Jennifer B. Abbey is an associate at K&L Gates.

Abraham F. Johns, an associate at K&L Gates, also contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 15 U.S.C. § 717f(h).

[2] 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), at 21–24 (“1999 Certificate Policy Statement”).

[3] *City of Oberlin, Ohio v. Fed. Energy Regulatory Comm’n*, 937 F.3d 599 (D.C. Cir. 2019) [hereinafter *Nexus*]. The court did not vacate the certificate order, so that the pipeline may proceed while FERC considers the issue on remand.

[4] *Id.* at 603. Only 59% of the pipeline’s total capacity was subscribed.

[5] *Id.* at 602; see also 1999 Certificate Policy Statement at 21–24.

[6] *Id.* at 25.

[7] *Nexus Gas Transmission LLC*, 164 FERC ¶ 61,054, at 61,218 (July 25, 2018).

[8] U.S. Const. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”).

[9] *Nexus*, 937 F.3d at 606.

[10] *Id.* at 606–07.

[11] *Id.* at 611 (noting that vacatur would be highly disruptive because the pipeline already is operational).

[12] *Id.* at 607 n.3.

[13] *Id.* at 602; see also Order Clarifying Statement of Policy, 90 FERC ¶ 61,128, at 61,396 (Feb. 9, 2000) (“The public benefits could include, among other things, meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives”).

[14] In 2018, FERC opened a Notice of Inquiry as to the Certification of New Interstate Natural Gas Facilities in Docket No. PL18-1-000, exploring whether, and, if so, how it should revise its approach under the currently effective 1999 Certificate Policy Statement. Notice of Inquiry, Certification of New Interstate Natural Gas Facilities, 163 FERC ¶ 61,042 (2018).

[15] *In re PennEast Pipeline Co. LLC*, 938 F.3d 96 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019) [hereinafter *PennEast*]. Following the Third Circuit’s decision, the D.C. Circuit stayed the appeal of *PennEast*’s certificate order that currently is before it, postponing the oral argument that had been scheduled until any appeals to the Third Circuit decision occur. Until the final disposition of the case, including a possible U.S. Supreme Court appeal, the D.C. Circuit will hold the case in abeyance.

[16] The appeal was filed on behalf of the state, the New Jersey Department of Environmental Protection, the State Agriculture Development Committee, the Delaware & Raritan Canal Commission, the New Jersey Department of the Treasury, the New Jersey Department of Transportation, the New Jersey Water Supply Authority and the New Jersey Motor Vehicle Commission. *Id.* at 100.

[17] U.S. Const. amend. XI.

[18] As the court notes, no other federal courts of appeals nor the Supreme Court have ruled on the precise issue of “whether condemnation actions under the NGA are barred by the Eleventh Amendment immunity.” The court pointed to a district court opinion that first noted that the government’s delegation of one power (i.e., eminent domain) does not delegate the other (i.e., ability to sue the states). *Id.* at 106 (citing to *Sabine Pipe Line LLC v. Orange, County, Texas*, 327 F.R.D. 131 (E.D. Texas, 2018)); see also *Sabine Pipe Line*, 327 F.R.D. at 138 (“Absent waiver by the state of sovereign immunity or a valid congressional override, the Eleventh Amendment bars the institution of a damages action in federal court against a state or state instrumentality”).

[19] *PennEast*, 938 F.3d at 101 (quotations omitted).

[20] *Id.* at 112.

[21] Since the Third Circuit’s ruling, *PennEast* has taken two actions. On Oct. 4, *PennEast* filed with FERC a petition for declaratory order stating that the NGA’s eminent domain provision is a congressional delegation of “the federal government’s eminent domain authority” and of the “exemption from claims of state sovereign immunity,” and applies to state property. *PennEast Pipeline Company LLC, Petition for Declaratory Order and Request for Expedited Action on PennEast Pipeline Company LLC*, FERC Docket No. RP20-41-000 (filed Oct. 4, 2019). On Oct. 22, *PennEast* filed with the Third Circuit a petition for a hearing before the same panel of judges or rehearing en banc. Appellee *PennEast Pipeline Company LLC’s Petition for Panel Rehearing or Rehearing En Banc, In re PennEast Pipeline Co.*, 938 F.3d 96 (3d Cir. 2019) (No. 19-1191, filed Oct. 22, 2019). On Nov. 5, the Third Circuit denied both requests.

[22] *Columbia Gas Transmission LLC v. .12 Acres of Land*, 1:19-cv-01444-GLR (D. Md., Aug. 22, 2019). The appeal is docketed at *Columbia Gas Transmission v. 0.12 Acres of Land*, No. 19-2040 (4th Cir.).

[23] We note that Maryland is a quick-take state, meaning that a party can condemn and acquire a property prior to providing compensation for the property. While it does not appear that the validity of quick-take statutes will be an issue in the Columbia Gas Transmission case, landowners have challenged quick-take statutes in various states. The Supreme Court recently denied certiorari to hear *Givens v. Mountain Valley Pipeline*, in which Virginian landowners challenged a pipeline developer's taking of private property via "quick take." *Givens, Karolyn, et al. v. Mountain Valley Pipeline LLC*, No. 19-54, 2019 WL 4923505 (U.S. Oct. 7, 2019) (denying the petition for writ of certiorari).

[24] *PennEast*, 938 F.3d at 113.

[25] *Id.*

[26] *Id.*

[27] 15 U.S.C. § 717r(a).

[28] Typically, a tolling order is issued on or before the 30th day from when the request for rehearing is filed.

[29] See, e.g., *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018).

[30] For example, in a recent concurrence, Judge Patricia Ann Millett, of the D.C. Circuit, described this result as an "administrative quagmire for those who seek to challenge [FERC's] decisions," noting that "[a] scheme that walls homeowners off from timely judicial review of the Commission's public-use determination, while allowing eminent domain and functionally irreversible construction to go forward, is in substantial tension with statutory text and runs roughshod over basic principles of fair process." *Allegheny Def. Project v. Fed. Energy Regulatory Comm'n*, 932 F.3d 940, 950 (D.C. Cir. 2019).