Knowing and Protecting Your Rights When an Interstate Gas Pipeline Comes to Your Community

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A Legal and Practical Guide for States, Local Government Units, Non-Governmental Organizations and Landowners On How the FERC Pipeline Certification Process Works and How You Can Participate

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About the Author

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Legal Notice

This Primer was designed to provide information about the FERC pipeline permitting process. The information herein should be used only as general guide, and should not be relied upon as legal advice. You are encouraged to consult an attorney for specific advice regarding the facts of your particular situation.

The information you obtain in this document is not, nor is it intended to be, legal advice. Any information provided in this document is not intended to create a lawyer-client relationship.

This Primer cites to or summarizes statutes, regulations and caselaw in effect as of the date of publication. Be aware these legal sources are all subject to change and thus, you should check the current status of these resources. This Primer contains an Appendix with links to websites where current versions of these legal sources may be found.

Summary and Need for Guidance

A. The Importance of Understanding the FERC Process

The Federal Energy Regulatory Commission (FERC) is a federal agency with authority to issue companies a "certificate of necessity and convenience" for pipelines that transport gas in interstate commerce. Because FERC is headquartered in Washington D.C. and outside the communities impacted by pipeline proposals, not surprisingly, most residents and local officials have little familiarity with the FERC process. As a result, they miss out on important opportunities to participate in, and potentially influence the outcome of the certification process.

Now, more than ever, it is critical for states, counties, non-governmental organizations (NGOs) and landowners to understand how the FERC process works and to learn best practices to protect their rights:

- ***Two pipelines in Chester County, with more on the way:*** In the past two years, FERC approved certificates for two pipeline projects – the Transcontinental (Transco) Gas Company's Sentinel Project and the AES Sparrows Point LNG/Mid-Atlantic Express pipeline -- in Chester County, Pennsylvania.[1] Notwithstanding this recent activity, additional pipeline projects are under consideration.[2]

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[1] *See FERC Website*, Approved Pipeline Projects, http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp. The Transco pipeline has since gone into service, while the certificate for the AES/Mid-Atlantic Express project is being challenged at the United States Court of Appeals for the District of Columbia Circuit by several parties to the case.

[2] On May 4, 2010, a notice appeared in the Federal Register publicizing FERC's intent to conduct an environmental assessment of an application for the Eastern Shore Natural Gas Pipeline Mainline Extension Project, Docket No. CP10-76 located in Lancaster and Chester Counties, Pennsylvania. Dominion Keystone is also exploring a possible pipeline from Marcellus Shale to Chester County. *See* http://www.pipelineandgastechnology.com/Construction/ForecastsReviews/item55708.php; *also Projects on the Horizon*, FERC Website, *www.**ferc**.gov/industries/gas/gen-info/horizon-pipe.pdf.*

- ***Marcellus Shale likely to drive new development:*** Many companies are eying Marcellus Shale in Western Pennsylvania as a promising gas resource. As the gas in Marcellus Shale is tapped, additional pipelines will be required to transport it, which could necessitate new construction within Chester and surrounding counties, or expansion of existing pipelines.
- ***FERC is expediting the pipeline process:*** Though FERC makes a variety of handbooks and informational resources available to landowners at its website,[3] at the same time, FERC has "steadily decreased the time it takes to act on proposed projects such as LNG facilities and natural gas pipelines."[4] In 2009, FERC processed 100 percent of *protested* pipeline projects (with no precendential issues) within 304 days of the application filing, and processed 94.7% of protested cases with "issues of first impression" within 365 days of filing. *Id.* This time frame includes the various period for public comment, completion of an environmental assessment or environmental impact statement (which may be several hundreds of pages depending upon the size of the project) and issuance of a decision on novel issues.

Given the pending new pipeline development coupled with the pace at which FERC moves on applications, stakeholders who are unfamiliar with the process are at a significant disadvantage.

B. Contents of this Guide

This multi-part Guide is intended to familiarize affected stakeholders – state and local agencies, municipalities and landowners -- with the FERC process. The Guide will explain how the FERC process works, the relationship between the many agencies that participate in the FERC process and most importantly, what your legal rights are and what you must do to protect them.

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[3] *FERC Website*, http://www.ferc.gov/for-citizens/citizen-guides.asp (includes guides on certificate process and landowners' rights).

[4] *FERC FY 2011 Budget Request* at 59, 100, online at www.ferc.gov.

In addition, the Handbook will also dispel many of the misconceptions you may have heard about the FERC process from well meaning, but inaccurately informed friends or professional colleagues.

For your convenience, the Guide is separated into different parts so you can skip forward to the sections of most relevance to you. Below is a summary of the topics covered.

I. Overview of the FERC Process

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Part I: Overview of the FERC Process

A. Summary of FERC's Authority to Issue Certificates Under the Natural Gas Act

1. Types of Projects Subject to FERC Jurisdiction

Under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f (c), the Federal Energy Regulatory Commission (FERC) has the power to issue a "certificate of public necessity and convenience" for the construction and operation of natural gas companies pipelines used to transport gas in interstate commerce, *i.e.*, across state lines. FERC also has jurisdiction to issue certificates for liquefied natural gas (LNG) facilities under Section 3 of the Natural Gas Act, as well as for the associated LNG pipelines, which are certified under Section 7. *See, e.g., AES Sparrows Point*, 126 FERC ¶ 61,019, *reh'g denied*, 129 FERC ¶ 61,295 (2009).

FERC does not have jurisdiction over siting of local gas pipelines used for purely in intrastate commerce. Nor does FERC have jurisdiction over facilities used for production or gathering of natural gas, such as a 30 mile gathering pipeline system which would gather Marcellus Shale natural gas from wells for transport to interconnections with interstate pipelines and storage facilities.[6]

2. Factors Considered When Issuing A Certificate

In determining whether to issue a certificate for a pipeline, FERC must find that the project is in the public interest, and that overall, the benefits of the project outweigh the adverse impacts. In addition, FERC's *Policy Statement on Pipeline Certificates*, directs FERC to consider several specific factors, including (1) the enhancement of competitive transportation alternatives; (2) the possibility of overbuilding; (3) subsidization by existing customers; (4) the applicant's responsibility for unsubscribed capacity; (5) avoidance of unnecessary

[6] Laser Marcellus has also applied for status a public utility in Pennsylvania, presumably to acquire eminent domain rights for the project. In April 2010, the Pennsylvania PUC conducted a hearing to explore the implications of granting public utility status to independently owned gathering companies and other legal issues related to potential state regulation of gathering companies.

disruptions to the environment; and avoidance of the unnecessary exercise of eminent domain.[7]

In addition, under the National Environmental Policy Act (NEPA), FERC must consider project alternatives, as well as a wide range of potential impacts, including socio-economic and cumulative impacts. Cumulative impacts are impacts that result from the proposed action as well as past, present and foreseeable actions, which may be minor individually but collectively, are significant.

As for pipeline safety, FERC's role is subordinate to the Department of Transportation (DOT). Applicants for a pipeline certificate are required to certify to FERC that they will "design, install, inspect, test, construct, operate, replace and maintain" a gas pipeline facility under those standards and plans contained in the Pipeline Safety Act, 49 U.S.C. § 60104(d)(2), *also* 18 C.F.R. § 157.14(a)(9)(vi). FERC will typically consult with DOT regarding compliance with standards, however, many times, final plans are not completed until after the certificate issues. Once a pipeline is operational, safety is regulated, monitored and enforced by the Department of Transportation, and any safety violations should be reported to the Department of Transportation's Office of Pipeline Safety.[8]

B. Eight Common Misconceptions About the FERC Process

Subsequent chapters of this Guide will explain how the FERC process works and how stakeholders can participate to increase their chances of achieving their goals. But before going into further into the nuts and bolts of the certification process, we begin by dispelling some of the commonly held misconceptions about the FERC process.

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[7] *Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement)*, 88 FERC ¶ 61,227 (1999), orders clarifying policy, 90 FERC ¶ 61,128 and92 FERC ¶ 61,094 (2000).

[8] *See FERC Website*, http://www.**ferc**.gov/industries/**gas**/safety.asp with link to DOT site at http://www.phmsa.dot.gov/pipeline.

1. I've been told that if a pipeline asks to access my property to survey a possible route, my neighbors and I should put up a big fuss and make the process so costly that the pipeline will go away.

Refusing to let a pipeline come on your property for surveys won't do much to deter the project. Most pipeline companies allocate millions of dollars for the certification process and have already factored in the cost of dealing with uncooperative landowners. Moreover, by denying access, you may hurt your own interests, because the company will go ahead using the best available information and assumptions. As a result, the pipeline may choose a route that places the pipeline closer to your residence than you might have preferred or requires removal of trees because the pipeline was unable to perform an accurate survey due to lack of access.

Understandably, from a landowner's perspective, granting access to a pipeline company is the equivalent of sleeping with the enemy. And many companies are notorious for abusing the privilege of access, which is why you should memorialize any terms of access in a written agreement if you agree to deal with the company.

Nonetheless, if you feel strongly about keeping the pipeline off your property, you have the right to do so unless (1) the pipeline already has access to the property via an existing right-of-way or (2) state law empowers the pipeline to gain access. In addition, once FERC issues a certificate, your ability to object to access diminishes because the pipeline can simply go to court to condemn the necessary property.

2. Filing hundreds of landowner comments and petitions will convince FERC to reject the pipeline.

FERC is an executive agency, not a legislative body. As such, it is not influenced by hundreds of identical letters or petitions urging rejection of the pipeline. *See* Part IV of this Primer for tips and best practices for preparing persuasive comments to file at FERC.

3. The County doesn't need to intervene in the proceeding – the pipeline is located right in the community and so the County is entitled to participate in the process as a matter of right.

The county where the proposed pipeline is located has a right to participate in the FERC process. However, the right is not self-executing. Like any other participant, affected counties and local government units must file a timely motion to intervene in accordance with FERC's rules (*See* Part II.A and IV.C) in order for FERC to fully consider their comments and to preserve their ability to challenge the FERC ruling on rehearing and potentially in court.

4. The pipeline route that I saw at the pipeline's open house goes through my next-door neighbor's property, but it bypasses mine so I don't need to intervene at FERC.

Even if early maps suggest that a pipeline route will not cross your property, you should intervene to protect your interests if your home is within the vicinity of the route. Pipeline routes change frequently during the certification process (for various reasons, such as minimizing impacts to environmentally sensitive areas or residential structures) and could be re-routed through your property. Unless you intervene, you may lose the ability to challenge a new route configuration.

5. There's no point for the state or county to waste time on pipeline process because FERC is a federal agency and it can ignore or preempt state or local action.

FERC's authority to grant a certificate for pipelines is broad, but it neither preempts all state requirements nor renders state and local participation irrelevant. Generally only state and local permitting processes that duplicate the FERC process – such as siting or zoning requirements – will be deemed preempted by federal law. Where state or local agencies require environmental permits or propose conditions to protect local resources, FERC frequently makes

compliance with these requirements a condition of the certificate. In addition, some state certification programs such as issuance of a Section 401 Water Quality Certificate (WQC) or a consistency finding under the Coastal Zone Management Act (CZMA) are authorized by federal law, and are never subject to preemption.

Sometimes, FERC gives the appearance of ignoring state or local laws, since resource-strapped government agencies do not involve themselves in the FERC process until it is too late. But FERC has no obligation to consider state and local input after FERC imposed deadlines for filing comments have passed.

6. FERC says that the pipeline meets safety standards, but my neighbor who is pipeline engineer disagrees and can prove it at trial.

There are no court room trials, or even live hearings before an administrative law judge in a FERC pipeline certification case. Instead, FERC holds "paper hearings," where parties submit written arguments and evidence to FERC. Parties can submit testimony from experts and indeed, on matters that require special expertise such as pipeline safety or environmental impacts, an expert may bolster the case.

FERC is free to disregard expert testimony submitted by parties, and rely on its own experts or those of the pipeline. Moreover, unless FERC rejects the expert's evidence without any discussion or rationale, its decision is likely to withstand judicial review. FERC is required to support its decisions with "substantial evidence." Courts have found that even that even those FERC orders which reflect a split of opinion between experts satisfy the substantial evidence standard so long as FERC adequately explains its decision for choosing one expert's view over another.

7. If I hold out long enough on the price for the pipeline to acquire my property, I'll get more money for it.

While you may disagree with the pipeline's proposed purchase price to acquire your property, holding out will not get you a better offer. Pipelines have the power of eminent domain and therefore, they have no incentive to give in to

hold outs because they can simply go to court to condemn the property. The court process may cost the pipeline more in the short run, but by standing strong, the pipeline will save in the long run by deterring hold outs.

Nevertheless, if you have a bona-fide disagreement over the price offered for your property, don't feel compelled to settle for the offered amount. You can, either on your own or through counsel, try to negotiate a better price by submitting your own appraisal information or disputing the pipeline's assumptions. In addition, though you shouldn't hold out just for the sake of doing so, it may be prudent to put off selling any property to the pipeline until after the pipeline's route is more settled so that you have a better idea of the exact tract required for the project.

8. The pipeline hasn't satisfied all of the conditions to the permit, and that may take years, so I don't have to worry about eminent domain until that point.

Most of the conditions contained in a FERC certificate affect a pipeline's ability to commence project construction, not its ability to initiate eminent domain. The sole exception is with regard to conditions related to site specific plans, where FERC will often prohibit the pipeline from exercising eminent domain power until it provides site specific plans to landowners whose residences are 50 feet or less from the pipeline. In most other cases, federal district courts hold that a company may proceed with condemnation notwithstanding its failure to obtain necessary permits or comply with other conditions of the certificate – even if denial of the permits might necessitate reconfiguration of the project and avoidance of the property subject to condemnation.[9] This is one of the most serious drawbacks of the FERC process

[9] One exception to these rulings was the recent "Brandywine Five" matter here five landowners opposed Transco Pipeline's eminent domain action, arguing that Transco's inability to obtain a water quality permit might force a change in the pipeline route and avoid the landowners' property. Ultimately, Transco was unable to secure a permit for its desired work, and the judge directed Transco to dismiss the eminent domain proceedings. *Transcontinental*

because in the absence of permits, landowners are subject to eminent domain for a project which may never go through their property.

Pipeline, Docket No. 09-1385, 09-1396, 09-1402 (E.D. PA 2009)(disclosure – this Guide's author represented the landowners in this matter).

Part II: The Role of the Parties and Opportunities to Participate

A. Each Stakeholder's Role in the FERC Process

When a pipeline cuts through a community, it impacts different constituencies in different ways. Each affected stakeholder – from a state resource agency charged with protecting natural resources within the region to landowners, whose property may be damaged or taken during the pipeline process – represents a unique interest, and plays unique role in the process. Although participants can and should challenge all aspects of a pipeline that they find objectionable, stakeholders enjoy the most credibility when they address issues within their zone of expertise.

The table on the following page lists the categories of stakeholders common to most pipeline proceeding and the role they play in the process:

TABLE SHOWING ROLE OF STAKEHOLDERS

	Role	Intervention Required?	Waivable by FERC?	Preempted?
State agency carrying out federal program	Has authority under federal law to implement federal program (*e.g.*, Clean Water Act Section 401, CZMA consistency)	Yes, to challenge FERC Order, no to act on permits.	No, unless state fails to act on permits within deadlines required by federal statute.	No.
State agency carrying out state program	Authority under state law to ensure compliance with state programs for environmental protection or safety.	Yes to challenge FERC order, no to act on permits	No, unless state law provides for waiver.	No if obtaining state permit is condition of FERC certificate; yes, if permit duplicates or conflicts w/ FERC process and requirements.
County or municipality	Empowered by state law or constitution to carry out county or municipal provisions to protect environment or safety.	Yes to challenge FERC order, no to act on permits	No, unless state or local law provides for waiver.	No if complying with local requirements are condition of FERC certificate; yes, if permit duplicates or conflicts with FERC process and requirements.
Non-governmental organization (NGO)	Protects special interests (environment, business, etc…) that are subject of its charter	Yes. But note – some NGOs may not have standing to seek judicial review because of indirect nature of interest.	Intervention and ability to file comments waived if untimely.	N/A
Landowner w/lands directly affected	Protecting property.	Yes to preserve ability to seek rehearing and judicial review.	Intervention and ability to file comments waived if untimely.	State eminent domain preempted.

B. The Different Phases of the FERC Process

The FERC process is comprised of several phases, each offering varying levels of opportunity for participation. The FERC process also resembles a funnel: at the beginning of the process, opportunities to submit comments and seek modifications are broadest, however, they narrow as the process continues. By the time a certificate is issued and the pipeline brings landowners to federal court to condemn their land, there are very limited opportunities to challenge the taking itself. *See* Part V for additional information. The primary focus of the eminent domain proceeding is determining the value of the property.

The FERC process is essentially divided into two main phases. First, is the **pre-certificate activity**, which involves the filing of the application, public participation and intervention, environmental review FERC website contains a flowchart of the certificate process, beginning with either the pre-filing stage or formal application filing. Once the certificate issues, the **post-certificate** phase begins which includes opportunities for rehearing and judicial review of the FERC certificate, pipeline compliance with conditions, eminent domain and construction and ongoing operation.

What follows are several checklists and charts depicting the different phases of the FERC process and opportunities for input.

List of Steps in the Pre-Filing Process, from FERC Website

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EA Pre-Filing Environmental Review Process

1. Applicant assesses market need and considers project feasibility
2. Applicant requests use of FERC's Pre-Filing Process
3. FERC receives Applicant's request to conduct its review of the project within FERC's NEPA Pre-Filing Process
4. FERC formally Approves Pre-Filing Process and issues PF Docket No. to Applicant
5. Applicant studies potential site locations
6. Applicant identifies Stakeholders
7. Applicant holds open house to discuss project
8. FERC Participates in Applicant's open house
9. FERC issues Notice of Intent for Preparation of an EA opening the scoping period to seek public comments.
10. FERC may hold public scoping meeting(s) and site visits in the project area. Consults with interested stakeholders
11. Applicant conducts route studies and field surveys. Develops application.
12. Applicant files formal application with the FERC
13. FERC issues Notice of Application
14. FERC analyzes data and prepares EA
15. FERC - If no scoping comments are received, EA is placed directly into eLibrary. If substantive comments are received, EA is mailed out for public comment.
16. FERC responds to comments
17. **Commission Issues Order**
18. Parties can request FERC to rehear decision
19. Applicant submits outstanding information to satisfy conditions of Commission Order
20. FERC issues Notice to Proceed with construction.

Use of pre-filing is required for pipelines associated with LNG facilities; voluntary for other, non-LNG pipelines. FERC strongly encourages use of pre-filing process.

Post-certificate activity starts here (between 17 & 18)

List of Post-Construction Activities from FERC Website

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PROCESSES FOR NATURAL GAS CERTIFICATE

Construction Process

1. Finalize project design
2. File plans, surveys, and information required prior to construction by Commission order
3. Complete right-of-way acquisition
4. Pipeline construction
5. Right-of-way restoration
6. PROJECT IN SERVICE
7. Department of Transportation Office of Pipeline Safety

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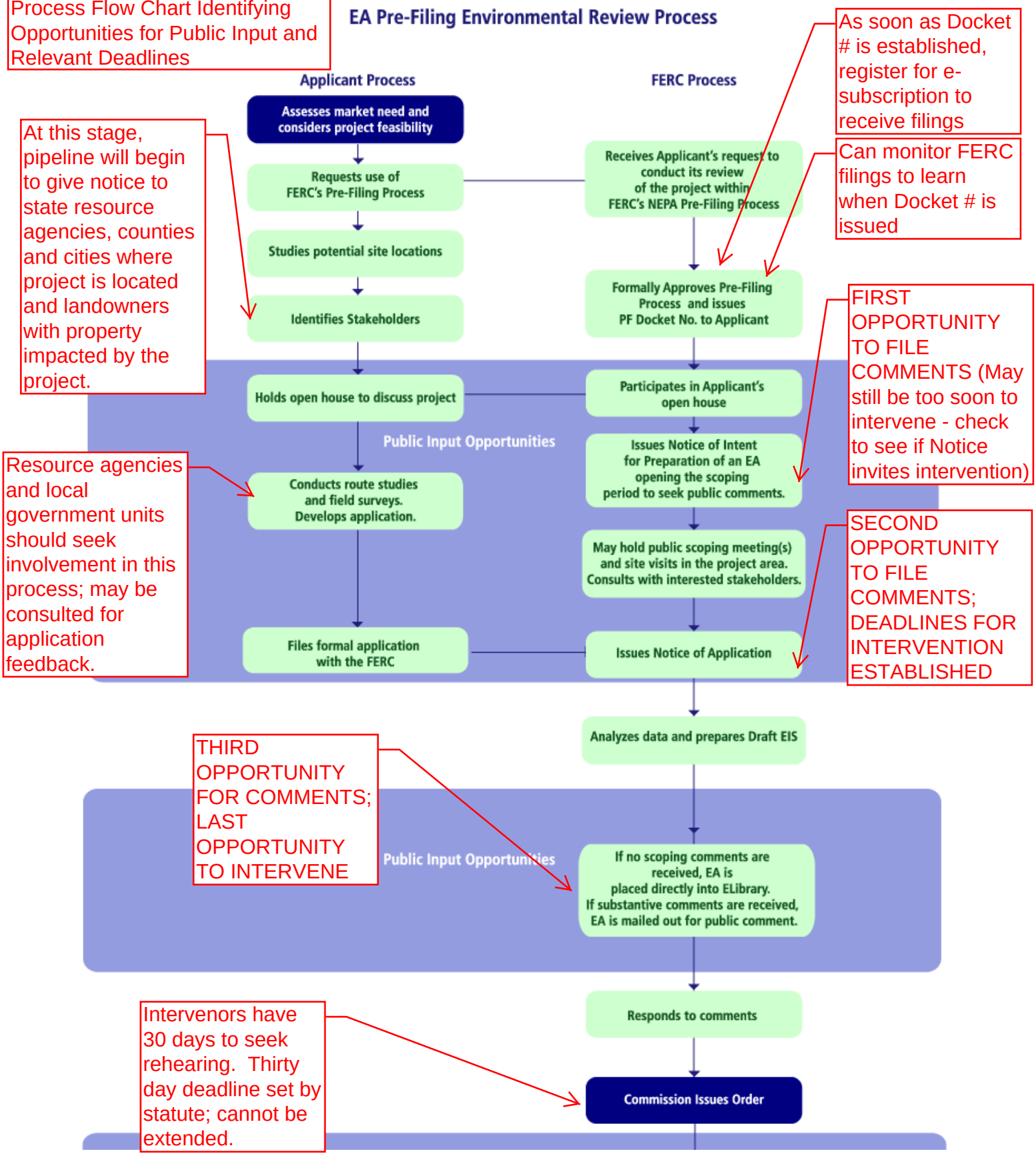
Close Window

Marked Up Version of Certificate Process Flow Chart Identifying Opportunities for Public Input and Relevant Deadlines



At this stage, pipeline will begin to give notice to state resource agencies, counties and cities where project is located and landowners with property impacted by the project.

As soon as Docket # is established, register for e-subscription to receive filings

Can monitor FERC filings to learn when Docket # is issued

FIRST OPPORTUNITY TO FILE COMMENTS (May still be too soon to intervene - check to see if Notice invites intervention)

Resource agencies and local government units should seek involvement in this process; may be consulted for application feedback.

SECOND OPPORTUNITY TO FILE COMMENTS; DEADLINES FOR INTERVENTION ESTABLISHED

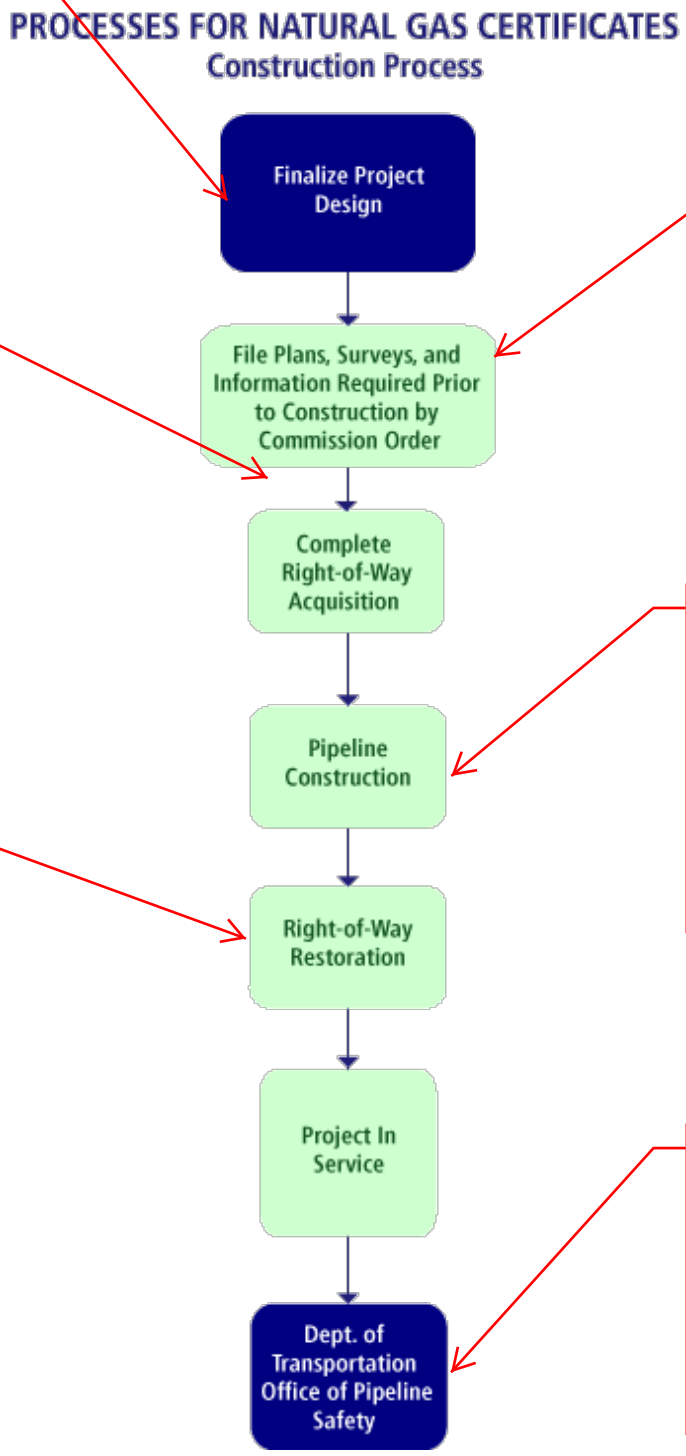
THIRD OPPORTUNITY FOR COMMENTS; LAST OPPORTUNITY TO INTERVENE

Intervenors have 30 days to seek rehearing. Thirty day deadline set by statute; cannot be extended.

Pipeline not likely to move ahead quickly with design until rehearing is resolved. Once certificate is approved on rehearing, pipeline will move ahead even if court review is filed.

Mark Up of Post-Certificate Activities (Graphic from FERC Website)

Text Only



Opportunity to review plans and provide feedback and comments. Certificate conditions may require compliance with state and local permitting requirements.

At this stage, pipeline will begin to up the pressure on ROW acquisition start condemnation proceedings (likely in federal court) if unresolved.

Stakeholders can monitor construction to make sure that pipeline complies with terms of certificate and report violations to FERC Hotline.

Stakeholders must report any failure to restore ROW (for landowners, damages may be possible if provided for as part of easement agreement)

Issues regarding pipeline compliance and/or violation with safety standards must be brought to DOT Office of Pipeline Safety.

Part III: State and Local Permitting Requirements and Preemption Issues

A. Preemption

1. Explanation of Preemption

"Preemption" refers to the result when federal law supersedes or overrides state laws or rules governing the same subject. The preemption doctrine derives from the Supremacy Clause of the Constitution, which provides that the laws of the United States "shall be the supreme law of the land…any Thing in the Constitution or laws of any state to the Contrary notwithstanding."[10]

There are several variants of preemption. **"Field preemption"** refers to a scenario where a federal statute provides a comprehensive scheme of regulation and thus, displaces state law entirely irrespective of any actual conflict.[11] A second variant is **"conflict preemption"** which may arise in cases where federal and state authorities share regulatory responsibility.[12] Under the doctrine of conflicts preemption, when federal and state authority conflict, state law must give way.

Courts hold that in enacting the Natural Gas Act, Congress intended for federal authority – FERC – to occupy the field of siting gas pipelines, to the exclusion of state law.[13] Likewise, federal authorities -- both FERC and the

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[10] U.S. Const. art. VI, §2.

[11] *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146 (1947) (finding that the Warehouse Act preempted a state statute, even where no actual conflicts existed, since Congress intended to eliminate dual state-federal regulatory system and assume jurisdiction over entire storage scheme).

[12] *La. Pub. Serv. Comm'n. v. FCC*, 476 U.S. at 368-369, 106 S. Ct. at 98 (describing conflicts preemption doctrine).

[13] *See Schneidwind v. ANR Pipeline*, 485 U.S. 293 (1988), *Northern Natural Gas Co. v. Utilities Board*, 377 F.3d 817, 821 (8th Cir. 2004).

Department of Transportation -- together regulate the field of pipeline safety and displace state regulation.[14]

2. Practical Effects of Preemption

Even though the Natural Gas Act preempts the field of pipeline regulation, state and local government units are not without authority. State and local governments can intervene in, and participate in the FERC process by working with the pipeline on routing, making environmental recommendations and preparing and submitting studies on impacts that may be relevant to FERC's public interest findings. State and local bodies that intervene in the FERC process can also seek rehearing of FERC's certificate and challenge it on judicial review. At a minimum, state and local entities should intervene in the FERC process to protect their constituencies and preserve the right to comment and challenge a decision.

In addition, FERC Commission encourages cooperation between pipelines and local authorities. FERC often makes compliance with certain state and local permits a condition of the certificate – provided that state and local recommendations are consistent with the terms of the certificate.[15] State and local actions are typically most vulnerable to preemption when they duplicate the siting process or unreasonably delay construction and operation of facilities.

Finally, and most significantly, state agencies that implement federally authorized programs, such as the Clean Water Act or Coastal Zone Management Act are not subject to preemption. These statutes "effect a federal-state partnership…so that state standards approved by the federal government become a federal standard for that state" and cannot be overridden by FERC.[16] However,

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[14] *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465 (8th Cir. 1987)(preempting Iowa statute creating environmental and safety permitting process for pipelines)

[15] *See NE Hub Partners, L.P. v. CNG Transmission Corp.* (3rd Cir. 2001).

[16] *Islander E. Pipeline Co. LLC v. McCarthy*, 525 F.3d 141 (2nd Cir 2008) (affirming Connecticut's denial of water quality certification for pipeline and holding that it is not preempted).

sometimes states waive their rights under these federal statutes by failing to act within the required time frame for making a decision (for example, Section 401 of the Clean Water Act requires states to act on an application within one year of the date that it is filed or the need for the approval is deemed waived).

The next page contains a chart showing the types of federal, state and local statutes that apply in a typical pipeline case and indicates whether these programs are subject to preemption. (NOTE – not all states will have a version of the state laws listed, nor will all these laws apply in all cases).

Table of Potentially Applicable Federal, State & Local Laws and Preemption Status

Permit/Approval	Agency	Preempted?
Section 106, National Historic Preservation Act (federal)	State Historic Preservation Offices (SHPOs) – must consult with FERC on impacts to historic structures.	No (though FERC may defer consultation until after issuance of permit but before construction can commence).
Section 7, Endangered Species Act (federal)	US Fish and Wildlife Service	No (though FERC may defer consultation until after issuance of permit but before construction can commence).
Essential Fish Habitat Clearance (federal)	National Marine Fisheries Service	No.
Water Quality Certificate, Section 401 Clean Water Act	State environmental or water quality agency	No, but if state fails to act in a year permit is deemed waived.
Section 404 Permit (dredge/fill) (federal)	U.S. Army Corps of Engineers	No.
Coastal Zone Management Act consistency determination (federal)	State office (likely a division of an environmental protection branch.	No, but adverse finding can be overturned by Secretary of Commerce.
Clean Air Act (emissions compliance – federal)	State environmental agency	No but may be deferred post-certificate
Pipeline Safety Act (federal)	Dept. of Transportation	No.
State endangered species statutes (state)	State environmental or game agencies	Preemption not likely since only consultation is required. Proposed mitigation subject to preemption (again, not likely)
Certificate of Necessity and Convenience (state)	State public utility commission	Preempted as duplicative
NPDES Discharge Permit (state)	State water quality	Issued under Section 402 of water quality act, not likely to be preempted (but may be deadlines for action to avoid waiver)
Soil erosion control plans (local)	Local agencies	FERC may require submission of plan but may preempt certain recommendations in the plan
Zoning laws (local)	State zoning board	Preempted as duplicative or obstructive

Part IV: Practical Tips

A. Getting Information About a Proposed Pipeline

Communities may learn of a proposed pipeline in a variety of ways, discussed below. As a general matter, landowners and communities that are *directly* affected (*e.g.*, pipeline crosses through the town or will be located on landowner's property) will receive some form of direct notice or contact.

All other entities that are indirectly affected by the pipeline (*e.g.*, recreational users of streams that may be contaminated by pipeline construction, adjacent municipalities or landowners within vicinity but not necessarily abutting the right-of-way) cannot expect a direct contact, and must rely on notices in the Federal Register and local newspaper to learn about a project. **Publication in the Federal Register and local paper suffices as notice for due process concerns. Where such publication occurs, FERC does not accept an excuse of "I did not know about the pipeline" as a justification for late intervention.**

1. Contact by pipeline

In some instances, you may first learn about a pipeline from the company itself. A company official may contact a state or local agency to obtain information about permitting requirements, or may try to acquire easements in advance of filing its application. If you learn about a proposed pipeline, try to gather as much information as you can and if possible spread the word within your community.

2. Pre-Filing

For LNG facilities and pipelines associated with LNG facilities, a pipeline must engage in FERC's pre-filing process. 18 C.F.R. § 157.21. Pre-filing is optional, but not mandatory for non-LNG related pipelines. Pre-filing process is initiated with a pre-filing application (or request to use the pre-filing process for

a non-LNG pipeline). An applicant may or may not contact state and local agencies or landowners prior to submitting the pre-filing application, nor is it required to supply notice of the pre-filing application. FERC will issue notice of filing of a pre-filing application which will be published in the Federal Register or posted on the FERC website. Once the pre-filing stage begins, the company must hold a series of open house, and must supply notice directly to affected agencies and landowners in accordance with FERC's rules (*see* notice requirements described below).

3. Notice of Application

Once a pipeline files an application at FERC, or A pipeline must written notice of a proposed pipeline application to county and local government bodies where the pipeline will be located as well as to landowners who own property within, or abutting the proposed right-of-way. The notice must include the docket number, information about the proposed route, instructions on obtaining additional information and for landowners, information regarding the FERC's resources for landowners located at the FERC website. 18 C.F.R. § 157.6.

FERC will also publish notice of a pipeline application in the Federal Register and in local news publications.

4. I've been given notice...what now?

The notice of the pipeline application is **VERY** important because it will inform you of (1) where the pipeline will be located, (2) how to get a copy of the application (usually on the FERC website), (3) upcoming scoping sessions, public meetings or open houses and (4) deadlines for comments and interventions. Below are the steps to take when you receive notice:

If the notice includes a deadline for intervening, mark it on your calendar and prepare a timely motion to intervene (*see* samples, Part C). An intervention grants you the right to receive copies of filings and to appeal a decision in court. Once you miss the application deadlines, you will lose out on important rights.

If the notice does not include a deadline yet, sign up to e-subscribe to the docket at the FERC website. By e-subscribing, you will receive all notices of deadlines that are filed, so you will not miss any deadlines.

B. Getting Information on Substantive Issues

As you read the pipeline application or attend meetings, you may not understand certain issues. Or, the pipeline representatives may explain that a procedure works one way, but you would prefer independent corroboration. Below are tools for getting substantive information about the pipeline and FERC procedures so that you can represent yourself or your organization in an informed manner:

Information Sought	Source
Information about FERC NGA Process, future pipeline development	FERC Website, www.ferc.gov - Industries (gas)
Copies of federal laws that apply to the process	U.S. Code online, www.law.**cornell**.edu/uscode/
Federal regulations	www.gpoaccess.gov/**ecfr**/
Tracking/searching the Federal Register	http://www.archives.gov/federal-register/
Learning about public hearings and site visits by FERC	FERC Website - Calendar
Check pipeline's maps	Google Maps
Researching cases or substantive information about pipelines	Google Scholar http://scholar.google.com/schhp?hl=en&tab=ws (caselaw, journal articles and academic reports)
Researching federal agency decisions	FERC websites (e-library), www.regulations.gov
Complaints about pipeline treatment of landowners	*New - per FERC Order 4/15/2010, Office of Dispute resolution now handles landowner complaints 877-337-2237 (FERC Website)
Safety related complaints and violations	Office of Pipeline Safety (DOT) http://www.phmsa.dot.gov/pipeline

B. Tips and Best Practices for FERC Filings

Below are a list of tips and best practices for the FERC pipeline process:

1. Pre-Application/Early Application Stage

- Obtain as much information about the proposed route as possible.
- Register to subscribe to assigned docket to receive information or intervene if deadlines have been established.
- Create groups (landowners) or taskforces (agencies) to stay abreast of the application process.
- For landowners, filing comments as a unified group on common issues is preferable to filing dozens of comments (though all landowners should intervene as individuals as well as part of a group).
- For municipal and county groups, sometimes intervention requires approval or authorization. Obtain approval *as early as possible!*

2. Scoping Process

- Participate in scoping process to identify issues that require study.
- File comments on completed scoping process.
- Obtain copies of studies performed and review them; if budget permits, hire experts to review and comment on studies.
- Ask FERC to make site visit and conduct siting meeting in the community.
- Propose alternative routes for review.

3. Environmental Review

- File comprehensive comments on environmental assessment (EA) or environmental impact statement (EIS). Reference specific pages of EA or EIS for comment.
- File comments within deadline provided.

- If you have not intervened by this stage, you MUST do so by deadlines set in environmental document.

- Emphasize impacts to property and specifically ask FERC to consider alternatives.

4. Certificate Issuance by FERC

- Review order and determine whether to seek rehearing.

- Time for rehearing is 30 days after order, so public bodies should seek authorization to file rehearing as soon as possible.

- If rehearing is filed, raise *all* possible issues. If issues are not raised on rehearing, they are deemed waived.

- Seek stay of order if properties are subject to eminent domain or where state and local permits have not yet been issued (unlikely that stay will issue, but ask for it anyway)

- If order is seriously problematic, contact legislators for assistance in influencing the FERC process.

- FERC order will contain multiple conditions. *Review order and determine which conditions apply to you or your constituency so that you can monitor pipeline's compliance.*

5. Post-Certificate Activities Compliance

- Monitor pipeline's compliance with conditions of certificate.

- Report any violations of certificate conditions to FERC (if FERC related – *e.g.* premature construction), state authorities (*e.g.*, violation of applicable state or local requirements) or DOT Office of Pipeline Safety (for violations of safety standards).

- For affected landowners or NGOs, stay involved in remaining state and local permit processes and intervene/participate as necessary to protect rights.

- If entitled to state specific plans, review and comment.

- Once certificate is issued, pipeline can seek access. Negotiate agreements to allow terms of access and report violations to FERC, Dispute Resolution Office.

- Document all pipeline activity on property with photos or memos to file.

6. Rehearing & Judicial Review

- Determine whether to challenge pipeline action in court (challenge goes to federal district court).

7. Easement Acquisition and Eminent Domain

- Retain an attorney to advise on easement acquisition.
- Draft terms of easement to contemplate potential changes to route and concomitant changes in terms of easement.
- Include provisions for damages and restoration in easement agreement.
- For substantial tracts of land of large value, seek independent consultant.
- Determine whether to litigate eminent domain disputes; cooperate with other landowners to share costs and possibly extract better deal (but realize that holding out will not necessarily result in substantially more dollars).

C. Sample Intervention

Sample intervention follows.

BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Name of Pipeline Company) Docket No. _____
Name of Project

SAMPLE FORM MOTION TO INTERVENE OF [LANDOWNER/PRIVATE CITIZEN/MUNICIPALITY/NGO (Non-Governmental Organization)][17]

[NAME OF POTENTIAL INTERVENOR] is a [BRIEF DESCRIPTION OF INTERVENOR, RELATIONSHIP TO MATTER AND SUMMARY OF POTENTIAL IMPACT/EFFECT ON PROPERTY].

(Example #1: John and Jane Doe live in Deer County, Pennsylvania. The Does' residence stands 25 feet from the XYZ Company's proposed new pipeline on property located within the anticipated right of way and subject to condemnation if a certificate is granted).

(Example #2: The City of Rock is a municipality incorporated under the laws of Pennsylvania. Four miles of the XYZ pipeline will cross properties located within the municipal limits of the City of Rock, including Central Park, a city owned property).

Pursuant to Commission Rules 385.214(b) and 157.10, [NAME OF INTERVENOR] move(s) to intervene [and file comments, if intervenors are also filing comments – *see* n. 1 below] in the above captioned proceeding. This intervention is timely filed. [18]

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[17] If you are filing a motion to intervene along with comments on the Draft Environmental Assessment, the above caption should read "Motion to Intervene and Comments."

[18] Note – the Commission is cracking down on interventions that are filed late. If the intervention is filed out of time, your motion MUST show good cause or

[NOTE: If intervenors landowners who are part of a group, consider adding the following language: The members of [NAME OF GROUP] file this motion jointly, as part of [NAME OF GROUP] and individually [LIST INDIVIDUAL NAMES IN A FOOTNOTE].[19]

I. CONTACT INTOFRMATION

Please enter the [NAME OF INTERVENOR] below on the official service list for [Docket No._____]. All pleadings, filings and correspondence in this proceeding should be served on the following:

[Provide contact information for intervenor, including address, phone number and email]

II. MOTION TO INTERVENE

[NAME OF INTERVENOR] seeks to intervene to [PURPOSE OF INTERVENTION].

(*Example #1: The Does are directly impacted by the proposed pipeline. The Does' residence stands 25 feet from the pipeline, and is therefore vulnerable to structural damage during construction, as well as ongoing safety hazards after the project is completed. Further, the Does' land lies within the right of way corridor for the XYZ pipeline, thus exposing the property to condemnation if the certificate is granted)*

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extraordinary circumstances for the untimely filing. The longer the delay, the more difficult it is to meet the "good cause" or "extraordinary circumstances" standard.

[19] Naming the individual members of a group is advisable in the following situations: (1) the group is newly formed to pool resources, and there is no guarantee that the group will remain intact; (2) the group members are each landowners whose property is subject to condemnation – each landowner will want to preserve an individual right to appeal or (3) there is a potential for conflicts of interest among group members.

(Example #2: The City of Rock and its residents are directly impacted by the proposed pipeline. The pipeline will cross three miles of property within city limits, impacting 26 residential homeowners and 3 business owners. The pipeline will result in a devaluation of residential property and will limit the businesses ability to expand, thus diminishing the City's tax base. Further, the pipe line, as currently proposed, will cut through the southern portion of the City-owned Central Park, which will necessitate removal of 10 acres of trees and a taking of City lands.)

(Example #3: The City of Rock Running Club is a group in the City of Rock founded in 1970 and comprised of 200 members. The City of Rock Running Club meets regularly in the City of Rock part and uses paths throughout the City which may be affected by XYZ's pipeline construction. City of Rock Running Club seeks to intervene to monitor this proceeding and address potential effects to running paths within or in the vicinity of the proposed right of way]

[NAME OF INTERVENOR] [oppose/do not oppose//do not have enough information to take a position] on the proposed project.

(Example #1: The Does do not oppose the proposed pipeline. However, they believe that the pipeline can and should be re-routed to avoid their property entirely. By intervening in this proceeding, the Does will have access to XYZ Company's filings, which will enable the Does to provide more detailed comments on alternative routing scenarios.)

(Example #2: The City of Rock opposes the proposed pipeline.. If constructed, the XYZ pipeline will be the fourth pipeline to be routed through the City in five years. None of these pipelines benefit local resident since they transport gas to XYZ's Midwest Customers, yet the City and its residents are forced to absorb the adverse environmental

and economic impacts, not to mention the intrusion on individual landowners' property. Intervention is necessary to enable the City of Rock to protect its park and natural resources and to defend its taxpaying residents and businesses and their property from encroachment by XYZ Pipeline.)

(Example #3: The City of Rock Running Club takes no position on the project at this time, but reserves the right to do in later comments so as more information on the right of way boundary emerges).

III. COMMENTS

[If the intervention is filed as part of comments on the DEIS, add Section III and include comments here]

WHEREFORE, for the foregoing reasons, the [NAME of INTERVENOR] requests that the Commission GRANT this motion to intervene.

Respectfully submitted,

_____

[NAME OF INTERVENOR and contact information – address, phone #, email]

DATE OF INTERVENTION

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §157.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 157.7 Abbreviated applications.

(a) *General.* When the operations sales, service, construction, extensions, acquisitions or abandonment proposed by an application do not require all the data and information specified by this part to disclose fully the nature and extent of the proposed undertaking, an abbreviated application may be filed in the manner prescribed in §385.2011 of this chapter, provided it contains all information and supporting data necessary to explain fully the proposed project, its economic justification, its effect upon applicant's present and future operations and upon the public proposed to be served, and is otherwise in conformity with the applicable requirements of this part regarding form, manner of presentation, and filing. Such an application shall (1) state that it is an abbreviated application; (2) specify which of the data and information required by this part are omitted; and (3) relate the facts relied upon to justify separately each such omission.

[Order 280, 29 FR 4876, Apr. 7, 1964]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §157.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 157.8 Acceptance for filing or rejection of applications.

Applications will be docketed when received and the applicant so advised.

(a) If an application patently fails to comply with applicable statutory requirements or with applicable Commission rules, regulations, and orders for which a waiver has not been granted, the Director of the Office of Energy Projects or the Director of the Office of Energy Market Regulation may reject the application within 10 business days of filing as provided by §385.2001(b) of this chapter. This rejection is without prejudice to an applicant's refiling a complete application. However, an application will not be rejected solely on the basis of:

(1) Environmental reports that are incomplete because the company has not been granted access by the affected landowner(s) to perform required surveys; or,

(2) Environmental reports that are incomplete, but where the minimum checklist requirements of part 380, appendix A of this chapter have been met.

(b) An application which relates to an operation, sale, service, construction, extension, acquisition, or abandonment concerning which a prior application has been filed and rejected, shall be docketed as a new application. Such new application shall state the docket number of the prior rejected application.

(c) The Director of the Office of Energy Projects or the Director of the Office of Energy Market Regulation may also reject an application after it has been noticed, at any time, if it is determined that such application does not conform to the requirements of this part.

[Order 603–A, 64 FR 54536, Oct. 7, 1999, as amended by Order 699, 72 FR 45325, Aug. 14, 2007; Order 701, 72 FR 61054, Oct. 29, 2007]

§ 157.9 Notice of application and notice of schedule for environmental review.

(a) Notice of each application filed, except when rejected in accordance with §157.8, will be issued within 10 business days of filing, and subsequently will be published in the FEDERAL REGISTER and copies of such notice sent to States affected thereby, by electronic means if practical, otherwise by mail. Persons desiring to receive a copy of the notice of every application shall so advise the Secretary.

(b) For each application that will require an environmental assessment or an environmental impact statement, notice of a schedule for the environmental review will be issued within 90 days of the notice of the application, and subsequently will be published in the FEDERAL REGISTER.

[Order 653, 70 FR 8724, Feb. 23, 2005, as amended by Order 687, 71 FR 62920, Oct. 27, 2006]

§ 157.10 Interventions and protests.

(a) Notices of applications, as provided by §157.9, will fix the time within

which any person desiring to participate in the proceeding may file a petition to intervene, and within which any interested regulatory agency, as provided by §385.214 of this chapter, desiring to intervene may file its notice of intervention.

(1) Any person filing a petition to intervene or notice of intervention shall state specifically whether he seeks formal hearing on the application.

(2) Any person may file to intervene on environmental grounds based on the draft environmental impact statement as stated at §380.10(a)(1)(i) of this chapter. In accordance with that section, such intervention will be deemed timely as long as it is filed within the comment period for the draft environmental impact statement.

(3) Failure to make timely filing will constitute grounds for denial of participation in the absence of extraordinary circumstances or good cause shown.

(4) Protests may be filed in accordance with §385.211 of this chapter within the time permitted by any person who does not seek to participate in the proceeding.

(b) A copy of each application, supplement and amendment thereto, including exhibits required by §§157.14, 157.16, and 157.18, shall upon request be promptly supplied by the applicant to anyone who has filed a petition for leave to intervene or given notice of intervention.

(1) An applicant is not required to serve voluminous or difficult to reproduce material, such as copies of certain environmental information, to all parties, as long as such material is publicly available in an accessible central location in each county throughout the project area.

(2) An applicant shall make a good faith effort to place the materials in a public location that provides maximum accessibility to the public.

(c) Complete copies of the application must be available in accessible central locations in each county throughout the project area, either in paper or electronic format, within three business days of the date a filing is issued a docket number. Within five business days of receiving a request for a complete copy from any party, the applicant must serve a full copy of any filing on the requesting party. Such copy may exclude voluminous or difficult to reproduce material that is publicly available. Pipelines must keep all voluminous material on file with the Commission and make such information available for inspection at buildings with public access preferably with evening and weekend business hours, such as libraries located in central locations in each county throughout the project area.

(d) *Critical Energy Infrastructure Information.* (1) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined in §388.113(c) of this chapter, to the public, the applicant shall omit the CEII from the information made available and insert the following in its place:

(i) A statement that CEII is being withheld;

(ii) A brief description of the omitted information that does not reveal any CEII; and

(iii) This statement: ''Procedures for obtaining access to Critical Energy Infrastructure Information (CEII) may be found at 18 CFR 388.113. Requests for access to CEII should be made to the Commission's CEII Coordinator.''

(2) The applicant, in determining whether information constitutes CEII, shall treat the information in a manner consistent with any filings that applicant has made with the Commission and shall to the extent practicable adhere to any previous determinations by the Commission or the CEII Coordinator involving the same or like information.

(3) The procedures contained in §§388.112 and 388.113 of this chapter regarding designation of, and access to, CEII, shall apply in the event of a challenge to a CEII designation or a request for access to CEII. If it is determined that information is not CEII or that a requester should be granted access to CEII, the applicant will be directed to make the information available to the requester.

(4) Nothing in this section shall be construed to prohibit any persons from voluntarily reaching arrangements or

agreements calling for the disclosure of CEII.

[Order 603–A, 64 FR 54536, Oct. 7, 1999, as amended by Order 643, 68 FR 52095, Sept. 2, 2003]

§ 157.11 Hearings.

(a) *General.* The Commission will schedule each application for public hearing at the earliest date possible giving due consideration to statutory requirements and other matters pending, with notice thereof as provided by §1.19(b) of this chapter: *Provided, however,* That when an application is filed less than fifteen days prior to the commencement of a hearing theretofore ordered on a pending application and seeks authority to serve some or all of the markets sought in such pending application or is otherwise competitive with such pending application, the Commission will not schedule the new application for hearing until it has rendered its final decision on such pending application, except when, on its own motion, or on appropriate application, it finds that the public interest requires otherwise.

(b) *Shortened procedure.* If no protest or petition to intervene raises an issue of substance, the Commission may upon request of the applicant dispose of an application in accordance with the provisions of §385.802 of this chapter.

[17 FR 7386, Aug. 14, 1952, as amended by Order 225, 47 FR 19057, May 3, 1982]

§ 157.12 Dismissal of application.

Except for good cause shown, failure of an applicant to go forward on the date set for hearing and present its full case in support of its application will constitute ground for the summary dismissal of the application and the termination of the proceedings.

[17 FR 7386, Aug. 14, 1952]

§ 157.13 Form of exhibits to be attached to applications.

Each exhibit attached to an application must conform to the following requirements:

(a) *General requirements.* Each exhibit must be submitted in the manner prescribed in §§157.6(a) and 385.2011 of this chapter and contain a title page showing applicant's name, docket number (to be left blank), title of the exhibit, the proper letter designation of the exhibit, and, if of 10 or more pages, a table of contents, citing by page, section number or subdivision, the component elements or matters therein contained.

(b) *Reference to annual reports and previous applications.* An application may refer to annual reports and previous applications filed with the Commission and shall specify the exact pages or exhibit numbers of the filing to which reference is made, including the page numbers in any exhibit to which reference is made. When reference is made to a previous application the docket number shall be stated. No part of a rejected application may be incorporated by reference.

(c) *Interdependent applications.* When an application considered alone is incomplete and depends vitally upon information in another application, it will not be accepted for filing until the supporting application has been filed. When applications are interdependent, they shall be filed concurrently.

(d) *Measurement base.* All gas volumes, including gas purchased from producers, shall be stated upon a uniform basis of measurement, and, in addition, if the uniform basis of measurement used in any application is other than 14.73 p.s.i.a., then any volume or volumes delivered to or received from any interstate natural-gas pipeline company shall also be stated upon a basis of 14.73 p.s.i.a.; similarly, total volumes on all summary sheets, as well as grand totals of volumes in any exhibit, shall also be stated upon a basis of 14.73 p.s.i.a. if the uniform basis of measurement used is other than 14.73 p.s.i.a.

[17 FR 7387, Aug. 14, 1952, as amended by Order 185, 21 FR 1486, Mar. 8, 1956; Order 280, 29 FR 4877, Apr. 7, 1964; Order 493, 53 FR 15029, Apr. 27, 1988]

§ 157.14 Exhibits.

(a) *To be attached to each application.* All exhibits specified must accompany each application when tendered for filing. Together with each exhibit applicant must provide a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions derived

days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 2002, 68 FR 51142, Aug. 25, 2003; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may be amended or modified only as provided in the regulations under this chapter. A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

(iii) If, in a proceeding, or part of a proceeding, that is set for hearing under subpart E, a written amendment is filed after the time for filing provided under paragraph (a)(3)(ii) of this section, or if an oral amendment is made to a presiding officer during a hearing or conference, the amendment becomes effective as an amendment only as provided under paragraph (d) of this section.

(b) *Answers.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may answer a written or oral amendment in accordance with Rule 213.

(c) *Motion opposing an amendment.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may file a motion opposing the acceptance of any amendment, other than an amendment under paragraph (a)(3)(i) of this section, not later than 15 days after the filing of the amendment.

(d) *Acceptance of amendments.* (1) An amendment becomes effective as an amendment at the end of 15 days from the date of filing, if no motion in opposition to the acceptance of an amendment under paragraph (a)(3)(iii) of this section is filed within the 15 day period.

(2) If a motion in opposition to the acceptance of an amendment is filed within 15 days after the filing of the amendment, the amendment becomes effective as an amendment on the twentieth day after the filing of the amendment, except to the extent that the decisional authority, before such date, issues an order rejecting the amendment, wholly or in part, for good cause.

(e) *Directed amendments.* A decisional authority, on motion or otherwise, may direct any participant, or any person seeking to be a party, to file a written amendment to amplify, clarify, or technically correct a pleading.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.216 Withdrawal of pleadings and tariff or rate filings (Rule 216).

(a) *Filing.* Any participant, or any person who has filed a timely motion to intervene which has not been denied,

Part V. MEMO ON ISSUES RELATED TO EMINENT DOMAIN

[attached]

MEMORANDUM OF LAW

RE: Condemnation Proceedings Under the Natural Gas Act

DATE: Prepared by Carolyn Elefant, Law Offices of Carolyn Elefant and Attorney Kimberly Alderman, January 28, 2009; Sections on Compensation (#8) updated as of May 1, 2010

Companies that transport natural gas in interstate commerce have the power of eminent domain under the Natural Gas Act to condemn landowner property necessary for construction, operation and maintenance of the pipeline. This memo briefly explains when eminent domain attaches, then subsequently addresses the specific issues below:

In which court does a pipeline company file eminent domain actions under the NGA?

1. What law applies in NGA condemnation proceedings?
2. What is the scope of the court's jurisdiction in an NGA condemnation proceeding?
3. Whether a pipeline company must negotiate with landowners in good faith prior to filing an eminent domain action under the NGA.
4. Whether a pipeline company may proceed in an eminent domain action under the NGA where a FERC certificate is pending on rehearing at FERC or on appeal at a court.

THE LAW OFFICES OF CAROLYN ELEFANT

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Carolyn@carolynelefant.com

5. Whether a pipeline company may proceed in an eminent domain action under the NGA when they have not complied with the pre-conditions in the FERC certificate (specifically, securing required permits).
6. May pipeline companies engage in "quick-takes" where they receive immediate possession of the property, prior to valuation?
7. Once property has been condemned under the NGA, how does the court determine compensation due the landowner (in Pennsylvania in particular)?
8. Under what circumstances have courts either rejected or modified a pipeline company's eminent domain action under the NGA?

OVERVIEW: The Natural Gas Act and Eminent Domain

Under the Section 717f(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), a pipeline company that receives a certificate from the Federal Energy Regulatory Commission (FERC) to construct, operate and maintain a pipeline for transportation of gas in interstate commerce may exercise the power of eminent domain to acquire lands necessary for the pipeline. To condemn property, a company must show (1) that it holds a certificate of public convenience and necessity from FERC authorizing the project; (2) the land to be taken is necessary for the project and (3) the company has been unable to acquire the property through negotiation. A company has the option of bringing a condemnation action in federal or state court if the property is valued at $3000 or more. Most companies favor the federal court procedures and choose this process, even going so far as to offer a minimum $3000 all property involved simply to qualify for the federal process.

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As discussed below, once a certificate is issued and a company files for eminent domain, a property owner's ability to challenge the underlying basis for the certificate is constrained. The appropriate time and forum for objecting to a certificate is during the FERC proceeding, as well as through an appeal of the FERC action in a federal appellate court.

ISSUE #1: In which court does a pipeline company file eminent domain actions under the NGA?

The Natural Gas Act provides for choice of forum in 15 U.S.C. ß 717f(h):

> [A FERC certificate holder] may acquire the [land necessary] by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

The pipeline company must choose between state and district court, and may not file in both concurrently.[1]

In the overwhelming majority of cases, the pipeline company files the condemnation action in district court. The exception is *Transcontinental Gas Pipe Line Corp. v. 65.47 Acres of Land,* 778 F. Supp. 239 (E.D. Pa. 1991), where the pipeline company first filed for condemnation in state court, which set a hearing date. The company then filed an identical action in district court, arguing choice of forum under the NGA. The

[1] Guardian Pipeline, L.L.C. v. 295.49 Acres of Land, 2008 U.S. Dist. LEXIS 35818, 28 (E.D. Wis. 2008), see also Transcontinental Gas Pipe Line Corp. v. 65.47 Acres of Land, 778 F. Supp. 239, 241 (E.D. Pa. 1991).

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District Court of the Eastern District of Pennsylvania held that because the company chose the state forum, the federal forum no longer had jurisdiction over the matter, and thus the federal action had to be dismissed.

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ISSUE #2: What law applies in NGA condemnation proceedings?

It is well settled that federal condemnation law applies in NGA condemnation actions.[2] All courts that have considered the issue have so held, including the Sixth and Seventh Circuit Courts of Appeal.[3] The basis for this application is that Federal Rule of Civil Procedure 71.1 on federal condemnation law, which was adopted in 1951, supercedes §717f(h) of the NGA, which was enacted in 1938.[4]

FRCP 71.1, at least in part, obviates the relevant provision of the NGA, which reads:

> The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated[.]"[5]

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[2] Guardian Pipeline L.L.C. v. 295.49 Acres of Land, 2008 U.S. Dist. LEXIS 35818 (E.D. Wis. 2008). See also N. Border Pipeline Co. v. 64.111 Acres of Land, 344 F.3d 693 (7th Cir. 2003), see also Kan. Pipeline Co. v. 200 Foot by 250 Foot Piece of Land, 210 F. Supp. 2d 1253, 1257 (D. Kan. 2002) (dismissing counterclaims on the basis that FRCP 71A (now 71.1) does not provide for them). See also Maritimes & Northeast Pipeline, L.L.C. v. Decoulos, 146 Fed. Appx. 495, 496 (1st Cir. 2005) (applying federal condemnation law to evaluate sufficiency of complaint). See also East Tennessee Natural Gas v. 1.28 Acres in Smyth County, 2006 U.S. Dist. LEXIS 24450 (W.D. Va. 2006).

[3] *Northern Border*, 344 F.3d 693 (7th Cir. 2003). See also Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992).

[4] *Northern Border*, 344 F.3d at 694. See also Steckman Ridge GP v. Exclusive Easement Beneath 11.078 Acres, 2008 U.S. Dist. LEXIS 71302, 39 (W.D. Pa. 2008). See also Williston Basin Interstate Pipeline Co. v An Exclusive Gas Storage Leasehold, 524 F3d 1090, footnote 1 (9th Cir. 2008).

[5] 15 U.S.C. §717f(h).

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It is worth noting, however, that some courts use state law to determine compensation due landowners in NGA condemnation actions (see further discussion under Issue #8).

Since FRCP 71.1 applies as to procedure, there is *no* right to a jury trial in an NGA condemnation proceeding, either under the constitution[6] or federal condemnation law.[7] FRCP 71.1(h) explains, "In an action involving eminent domain under federal law, the court tries all issues[.]" However, for jurisdictions that apply state law at the compensation stage, there may be a right to a jury to determine valuation.

ISSUE #3: What is the scope of a court's jurisdiction in an NGA condemnation proceeding?

The court's authority in Natural Gas Act eminent domain cases is limited *solely* to enforcement jurisdiction.[8] The court is to evaluate the scope of the FERC certificate and determine whether the property at hand falls within that scope and, if so, the amount of compensation due landowner.[9]

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[6] Fed. R. Civ. P. 71.1(h) note (citing to Bauman v. Ross, 167 U.S. 548, 42 L. Ed. 270, 17 S. Ct. 966 (1897)). See also Alabama Power Co. v 1354.02 Acres, 709 F2d 666 (11th Cir. 1983).

[7] Guardian Pipeline v. 295.49 Acres of Land, 2008 U.S. Dist. LEXIS 35818, 21 (E.D. Wis. 2008) (holding there is no right to jury trial under FRCP 71.1).

[8] *Kansas Pipeline*, 210 F. Supp. 2d at 1255-1256.

[9] *Steckman Ridge*, 2008 U.S. Dist. LEXIS 71302. See also Northwest Pipeline v. Franciscos, 2008 US Dist LEXIS 83566, 12 (W.D. Wa. 2008). See also *Maritimes*, 146 Fed. Appx. at 496.

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Under the approach set forth in *East Tennessee Natural Gas Co. v. Sage*, 361 F3d 808 (4th Cir. 2004), which was adopted by the District Court of Delaware in *Steckman Ridge*, 2008 U.S. Dist. LEXIS 71302, as proper, the initial issue to be examined is whether the pipeline company has a substantive right to condemn the subject properties.[10] The FERC certificate establishes the right of the pipeline company to exercise eminent domain under the Natural Gas Act in accordance with the certificate.

In order for a pipeline company to establish the right to condemn, it must show:

1. It has been issued a certificate of public convenience and necessity;
2. The subject land is within the scope of the certificate;
3. The company has been unable to acquire the needed land by contract with the defendants; and
4. The value of the subject property claimed by the owner exceeds $ 3,000.00.[11]

In the process of evaluating whether the subject land may be seized, the court looks to the certificate itself. The pipeline company may not condemn property that is not specifically described in the certificate since the land covered should be designated in map exhibits attached to the application for the certificate.[12]

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[10] *Steckman Ridge*, 2008 U.S. Dist. LEXIS 71302 at 38-39.

[11] 15 U.S.C.ß717f(h).

[12] *Williston Basin*, 524 F3d 1090. See also *Columbia Gas Transmission Corp. v Exclusive Gas Storage Easement*, 578 F Supp 930 (N.D. Ohio 1983) (holding power of eminent domain given to holder of certificate under NGA extends only to property located within geographical area designated on map or maps attached to application for certificate.)

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When considering whether condemnation for underground gas storage is covered under the NGA, courts have asked whether the condemnation is "necessary and integral" for the pipeline project. In *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 776 F.2d 125 (1985), the Sixth Circuit Court of Appeals held that although underground storage is not specifically mentioned as a reason to condemn in § 717f(h) of the Natural Gas Act, underground storage fields are "an integral part of its natural gas transmission function,"[13] and "the use of condemnation for underground facilities is within the spirit and intent of the Act."[14] The Court reasoned that underground gas storage areas are a "necessary and integral" part of the operation of pipelines and that the NGA grants eminent domain authority to "insure the operation of stations or equipment necessary to the proper operation of natural gas pipelines."[15]

Similarly, in *Northwest Pipeline G.P. v. Franciscos*, 2008 U.S. Dist. LEXIS 83566, the Western District of Washington ordered further briefing as to whether a restoration project was "necessary and integral" to the construction and maintenance of a pipeline. The court stated that, if so, condemnation for that purpose would be covered under the FERC certificate.

In *Transcontinental Gas Pipe Line Corp. v 118 Acres of Land*, 745 F Supp 366 (1990), the District Court of the Eastern District of Louisiana required that the pipeline company demonstrate necessity and public purpose of chosen site as gas storage reservoir. The court held that while the FERC certificate is presumptive evidence that

[13] *Columbia Gas*, 776 F.2d at 126.

[14] *Id.* at 128-29.

[15] *Id.* at 129.

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the taking is affected with a public purpose, it is not conclusive on the issue of the right to expropriate property. The court further held that a plaintiff must produce evidence, along with the FERC certificate, that the expropriation will further the public interest.[16]

The Northern District of Illinois criticized *Transcontinental* in *Guardian Pipeline, L.L.C. v. 529.42 Acres,* 210 F Supp 2d 971 (2002), as having incorrectly permitted a collateral attack on the validity of the FERC certificate. Specifically, the court explained:

> [*Transcontinental*] suggests that the [FERC certificate] holder must present some evidence of public necessity other than the FERC determination. *USG Pipeline Co. v. 1.74 Acres in Marion County, Tennessee, 1 F. Supp. 2d 816, 820 (E.D. Tenn. 1980)*, concludes that is just plain wrong, and we agree. The jurisdiction of this court is limited to evaluating the scope of the FERC Certificate and ordering condemnation as authorized by that certificate [citations omitted].[17]

In *USG Pipeline,* the District Court of the Eastern District of Tennessee explained:

> Defendants largely rely on *Transcontinental* in support of their argument district courts have authority to review the FERC's determination of public benefit… From the above excerpts it is clear *Tenneco* [which the *Transcontinental* court relied upon] provides no support for the

[16] *Transcontinental Gas Pipe Line Corp. v 118 Acres of Land*, 745 F Supp 366, 370 (E.D. La. 1990) (citing to *Tenneco, Inc. v. Harold Stream Inv. Trust*, 394 So. 2d 744 (La. Ct. App. 3d Cir. 1981) (affirming lower court's dismissal of action without prejudice where plaintiff pipeline company relied on 20-year-old FERC certificate and failed to present any additional evidence of entitlement to right of way)).

[17] *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land,* 210 F. Supp. 2d 971, 973-974 (N.D. Ill. 2002).

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> proposition a plaintiff possessing an FERC Certificate granting the power of eminent domain must prove to a federal district court the exercise of eminent domain would be in the public interest. Accordingly, the Court does not accept the cited language from *Transcontinental* as an accurate statement of federal law.[18]

It is worth noting, however, that the *Transcontinental* holding was consistent with an earlier holding from the Court of Appeal in Louisiana. In *Texas Gas Transmission Corp. v. Soileau*, 251 So 2d 104 (1971), the Court of Appeal in Louisiana affirmed the lower court's holding that the plaintiff satisfied the burden of proving the public convenience and necessity of this right-of-way by way of the certificate and expert testimony.

ISSUE #4: Whether a pipeline company must negotiate with landowners in good faith prior to filing an eminent domain action under the NGA.

For the most part, courts have held that there is no requirement under the text of FRCP 71.1(h) or the NGA that the pipeline company negotiate in good faith prior to filing for condemnation.[19] Instead, the only prerequisite for initiating a condemnation

[18] *USG Pipeline Co. v. 1.74 Acres in Marion County, Tennessee*, 1 F. Supp. 2d 816, 820-821 (E.D. Tenn. 1980).

[19] *Maritimes*, 146 Fed. Appx. at 496 (1st Cir. 2005) (holding plain language of NGA imposes no obligation to negotiate in good faith). See also *Kansas Pipeline*, 210 F. Supp.

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action is that the pipeline company is unable to acquire the land.[20] The only third circuit case on point *Steckman Ridge*, 2008 U.S. Dist. LEXIS 71302 (2008) wherein the District Court of the Western District of Pennsylvania court adopted the analysis and holding of *Kansas Pipeline Co.*, 210 F. Supp. 2d 1253 (2002), that the plain language of the NGA does not mandate good faith on the part of the pipeline company.

The District Court of the Eastern District of Louisiana, on the other hand, held in *Transcontinental*, 745 F. Supp. 366, that there is a good faith requirement, but that "a single offer to purchase the right may be sufficient to constitute good faith."[21] *Transcontinental* is the only case that holds outright there is a requirement of good faith. In defining good faith, the court stated:

> When evaluating whether a condemnor engaged in good faith negotiations, the central question is whether the condemnor make a good faith attempt to acquire the property or rights by conventional agreement before the expropriation suit was filed. When measuring good faith, the amount offered to the landowner is material only insofar as it may have

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2d at 1257 (D. Kan. 2002) (holding plain language of NGA renders no good faith requirement, only rejected offer to purchase). See also Guardian Pipeline, L.L.C. v. 529.42 Acres of Land, 210 F. Supp. 2d at 973 (N.D. Ill. 2002) (holding neither the NGA or FRCP 71.1 have a good faith requirement). See also *East Tenn. Natural Gas*, 2006 U.S. Dist. LEXIS 24450 (W.D. Va. 2006) (holding that neither the NGA nor FRCP 71A require the condemnor negotiate in good faith).

[20] *Northwest Pipeline*, 2008 US Dist LEXIS 83566, at 8 (W.D. Wa. 2008).

[21] *Transcontinental*, 745 F. Supp. at 369.

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> some bearing on the question of whether the condemnor was in good faith.[22]

When the District Court of the Northern District of Illinois considered the issue of good faith in *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971 (2002), it said of *Transcontinental:*

> [There] is a judicial gloss that the holder must engage in good faith negotiations with the landowner before it can invoke the power of eminent domain, *e.g.*, *Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land, 745 F. Supp. 366, 369 (E.D. La. 1990)*, although the statutes have no such specific requirement and we are unaware of any case in which condemnation has been denied or even delayed because of an alleged failure to engage in good faith negotiations.[23]

The *Guardian* court then went on to find *Transcontinental* "just plain wrong" for requiring the pipeline company to present evidence of public use.[24]

There are several cases that support the proposition that *some* courts impose a requirement of good faith negotiations, although none of them holds the same. *Guardian Pipeline v. 295.49 Acres of Land,* 2008 U.S. Dist. LEXIS 35818, for example, proposed that the federal courts are split on the issue of good faith. The District Court of the Eastern District of Wisconsin explained:

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[22] *Transcontinental*, 745 F. Supp. at 369.

[23] *Guardian Pipeline,* 210 F. Supp. 2d at 973-974.

[24] *Id*.

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> The first issue the Landowners' argument raises, of course, is whether the NGA includes the requirement that the condemnor negotiate in good faith as a prerequisite to exercising its eminent domain powers. On this issue, federal courts are divided. *See e.g. Guardian Pipeline, L.L.C. v. 529.42 Acres of Land, 210 F. Supp. 2d 971, 973 (N.D. Ill. 2002)… see also Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land, 745 F. Supp. 366, 369 (E.D. La. 1990); Kern River Gas Transmission Co. v. Clark County, Nev., 757 F. Supp. 1110, 1113-14 (D. Nev. 1990).* Other courts, however, have reached the opposite conclusion.[25]

The court went on to hold "that the NGA does not obligate the condemnor, **as a jurisdictional prerequisite,** to negotiate in good faith with the landowner [emphasis supplied]."[26]

In *Kern River Gas Transmission Co. v. Clark County, Nevada,* 757 F. Supp. 1110 (1990), the defendants argued there is a good faith requirement in condemnation actions under the NGA. The District Court of Nevada considered this argument, analyzed the facts of the case, and concluded, "The Court finds that negotiation attempts were sufficient to fulfill Plaintiff's statutory obligations under the Natural Gas Act."[27] As mentioned, this was construed in *Guardian v. 295.49 Acres of Land* to support a good faith requirement.[28]

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[25] *Guardian Pipeline*, 2008 U.S. Dist. LEXIS 35818, at 47-49.

[26] *Id.* at 60.

[27] *Kern River*, 757 F. Supp. at 1114.

[28] *Guardian Pipeline*, 2008 U.S. Dist. LEXIS 35818, at 47-49.

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Kansas Pipeline Company, 210 F. Supp. 2d at 1255-1256, also supports this reading of *Kern River*. The District Court of Kansas explained:

> The court, in its own research, found that some federal district courts have imposed a good faith negotiation requirement. *See, e.g., USG Pipeline Co.*, 1 F. Supp. 2d at 822 (citations omitted) ("Courts have imposed a requirement that the holder of the FERC Certificate negotiate in good faith with the owners to acquire the property."); *Transcon. Gas Pipe Line Corp., 745 F. Supp. at 369* ("In addition to satisfying the requirements of *ß 717f(h)*, federal law requires the condemnor to have conducted good faith negotiations with the landowners in order to acquire the property . . . ."); *see also Kern River Gas Transmission Co. v. Clark County, Nev., 757 F. Supp. 1110, 1113-14 (D. Nev. 1990)*. These courts gave no explanation why they adopted such a requirement. None of them refused to authorize condemnation because a holder of a FERC certificate failed to negotiate in good faith before seeking condemnation.

The District Court of Kansas went on to hold that "[t]he plain language of the NGA does not impose an obligation on a holder of a FERC certificate to negotiate in good faith before acquiring land by exercise of eminent domain[.]"[29]

[29] *Kansas Pipeline Company*, 210 F. Supp. 2d at 1257.

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ISSUE #5: Whether a pipeline company may proceed in an eminent domain action under the NGA where a FERC certificate is pending on rehearing at FERC or on appeal at a court.

Yes, a pipeline company may proceed in a taking pursuant to a FERC certificate even if that certificate is pending on rehearing at FERC or on appeal at court. The Natural Gas Act states plainly in *15 U.S.C. ß 717r(c)* the following:

> The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

In *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427 (1990), the pipeline company filed a condemnation action while requests for rehearing at FERC were still pending. The District Court of Rhode Island explained that the Natural Gas Act at *15 U.S.C. ß 717r(c)* directs that an application for a rehearing shall not operate as a stay of the Commission's order unless *specifically* ordered by FERC or by a reviewing Court of Appeals.[30] The court explained that defendants must seek a stay from FERC or the Court of Appeals, and ordered that condemnation pursuant to the certificate may proceed.[31]

[30] *Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427, 430 (D. R.I. 1990)
[31] *Id.*

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Tennessee Gas is consistent with the Fifth Circuit Court of Appeals' decision in *Ecee, Inc. v. Federal Power Commission*, 526 F.2d 1270, 1274 (1976), wherein the court held:

> A complete resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final unless and until it is stayed, modified, or reversed. This basic concept is further bolstered by the unequivocal language of § 717r(c) of the Natural Gas Act that "the commencement of proceedings [for review] shall not, unless specifically ordered by the court, operate as a stay of the Commission's order". In the absence of a stay, the [Federal Power Commission's] orders are entitled to have administrative operation and effect during the disposition of the proceedings.[32]

ISSUE #6: Whether a pipeline company may proceed in an eminent domain action under the NGA when they have not complied with the pre-conditions in the FERC certificate (specifically, securing required permits).

Yes, a pipeline company may proceed in an NGA condemnation even if they have not complied with the pre-conditions of the FERC certificate, including securing required permits. It is outside of the jurisdiction of the district court to determine whether a pipeline company has complied with the preconditions of a FERC

[32] *Ecee, Inc. v. Federal Power Comm'n*, 526 F.2d 1270, 1274 (5th Cir. 1976).

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certificate.[33] The only prerequisite to filing a condemnation action under the NGA is the pipeline company being unable to acquire the land.[34]

In *Tennessee Gas Pipeline v. 104 Acres of Land*, 749 F. Supp. 427 (1990), the District Court of Rhode Island held:

> [W]hile failure to comply with the terms of the order may delay or prevent construction of the pipeline, absent a stay of the FERC order by the Commission the lack of a required permit does not prevent condemnation of land in preparation for construction."[35]

The District Court of New Hampshire approved of the *Tennessee Gas* holding in *Portland Natural Gas Transmission System v. 4.83 Acres of Land,* 26 F. Supp. 2d 332, at 335 (1998).

Issue #7: May pipeline companies engage in "quick-takes" where they receive immediate possession of the property, prior to valuation?

Immediate possession is usually granted in condemnation actions under the NGA, prior to resolving the issue of compensation.[36] This process is known as a "quick take." In *Steckman Ridge,* 2008 U.S. Dist. LEXIS 71302 (2008), for instance, the District Court for the Western District of Pennsylvania concluded that the pipeline company

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[33] *Portland Natural Gas*, 26 F. Supp. 2d at 335. See also *Tennessee Gas*, 749 F. Supp. 427.

[34] *Northwest Pipeline*, 2008 US Dist LEXIS 83566, at 8 (W.D. Wa. 2008).

[35] *Tennessee Gas*, 749 F. Supp. at 433.

[36] *Guardian Pipeline v. 295.49 Acres of Land 2008 U.S. Dist. LEXIS 35818, at 70-77 (E.D. Wis. 2008),* see also *Kern River Gas Transmission Company v. Clark County, Nevada, 757 F. Supp. 1110 (D. Nev. 1990), at 1115*, see also *Portland Natural Gas Transmission System v. 4.83 Acres of Land, 26 F. Supp. 2d 332 (D. N.H. 1998).*

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established equitable interest in the properties via the FERC certificate, and then used the injunction standard to determine that immediate possession was justified.[37]

The Fourth Circuit Court of Appeals held in *East Tennessee Natural Gas Co. v. Sage*, 361 F3d 808 (2004), that although there was no provision for immediate possession under the NGA or federal condemnation law, the district court properly granted the pipeline company's motion for preliminary injunction for immediate possession by way its equitable power.[38] The Court of Appeals approved of the district court's determination that the pipeline company has a substantive right to condemn, that it would have caused substantial harm to the pipeline company to delay possession, and that expeditious completion of pipeline was in the public interest.

Compare the case of *Transwestern Pipeline Co. v. Various Tracks of Land*, 544 F Supp 2d 939 (2008), wherein the District Court of Arizona denied the plaintiff pipeline company's motion for immediate possession. The court reasoned that the NGA included no explicit provision stating that a FERC certificate holder had a right to immediate possession of property, and that FRCP 71.1 was a procedural rule that could not be used to enlarge substantive rights. The case of *Transwestern* is an anomaly, however, and it is unclear whether the case represents an upcoming shift in policy or whether the court just "got it wrong."[39]

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[37] *Steckman Ridge*, 2008 U.S. Dist. LEXIS 71302, at 43.

[38] *Sage*, 361 F3d at 828.

[39] Lela M. Hollabaugh, *Has a court stopped pipeline construction?*, Pipeline & Gas Journal, July 2008, http://findarticles.com/p/articles/mi_m3251/is_/ai_n27984493. ("This is one of the first courts to take this position despite a long line of cases led by the U.S. Court of Appeals for the Fourth Circuit's decision in Sage v. East Tennessee Natural Gas. Does this signal a change in the law or is this simply one court that got it wrong?")

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In immediate possession cases, the pipeline company is required to put down a deposit with the court for the value of the property. If the deposit proves insufficient, the company must pay the difference or else they become trespassers and are liable as such. If the project is abandoned, then the company is liable to the landowner for damages to the land.[40]

Issue #8: Once property is condemned under the NGA, how does the court determine compensation due the landowner (in Pennsylvania in particular)?

The circuits are split as to whether federal condemnation law or state condemnation law applies for determining compensation due the landowners under the NGA. The Seventh and Eleventh Circuit Courts of Appeals have applied FRCP 71.1 in determining compensation, while the First, Fifth, and Sixth Circuit Courts of Appeals have applied state law, as did a district court in the Tenth Circuit. Moreover, recently in a federal district court case in the Eastern District of Pennsylvania, the court concluded that federal standards for compensation apply. *See Transcontinental Pipeline*, Docket No. 2:09 cv-1044 (January 19, 2010).

Section 717f(h) of the Natural Gas Act provides:

> The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated.

[40] *Steckman Ridge*, 2008 U.S. Dist. LEXIS 71302, at 35.

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The issue is whether this clause was superceded by FRCP 71.1 as to the procedure to determine compensation.

In *Northern Border Pipeline Company v. 64.111 Acres of Land in Will County,* 344 F.3d 693 (2003), the Seventh Circuit Court of Appeals applied federal condemnation law to determine whether the landowner was entitled to a jury or a commission as to the valuation of seized property.

In *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368 (1999), the Eleventh Circuit Court of Appeals held that the district court judge did not abuse his discretion when he denied defendants request for a jury and instead applied FRCP 71.1 and appointed a commission.

Those cases do not analyze and address the issue squarely, however, and more courts have held the opposite to be true: that state condemnation law applies as to valuation of seized property.

In *Portland Natural Gas Transmission Systems v. 19.2 Acres of Land,* 318 F.3d 279 (2003*),* the First Circuit Court of Appeals affirmed the district court's decision as to just compensation, wherein the judge applied Massachusetts law. The Court of Appeals did state that, since neither party was contesting that state law applied, it was "accept[ing] this premise without necessarily endorsing it."[41]

In *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (1980), the Fifth Circuit Court of Appeals applied state substantive law under "materially identical" language in the Federal Power Act, *16 U.S.C. ß 814*, i.e., that the proceeding shall conform to the practice

[41] *Portland Natural Gas*, 318 F.3d at 282.

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and procedure of the state where the property is situated.[42] In *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662 (1985), the Fifth Circuit Court of Appeals summarily applied state substantive law as to compensation due in a Natural Gas Act condemnation proceeding.

The Sixth Circuit Court of Appeals held in *Columbia Gas Transmission Company v. Easement Beneath 264.12 Acre Parcel*, 962 F.2d 1192 (1992), that "although condemnation under the Natural Gas Act is a matter of federal law, § 717f(h) incorporates the law of the state in which the condemned property is located in determining the amount of compensation due."[43]

In the Tenth Circuit, when the District Court of Kansas was faced with the issue in *Julius Spears v. Williams Natural Gas Company*, 932 F. Supp. 259 (1996), the court applied the rationale from *Columbia Gas* and *Georgia Power*, and held that the state post-judgment interest rate would apply. The court explained it did not think Congress intended to create a situation that would encourage gas companies to "forum shop," by taking condemnation actions to federal court in order to take advantage of lower interest rates.[44]

There is no Third Circuit Court of Appeals ruling on this issue. The District Court of Delaware did approve of and apply the Sixth Circuit's *Columbia Gas* rationale in an analogous, non-condemnation case.[45] However, more recently, Judge Timothy

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[42] *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1115-24 (5th Cir. 1980).

[43] *Columbia Gas Trans. Co.*, 962 F.2d at 1199.

[44] *Julius Spears v. Williams Natural Gas Company*, 932 F. Supp. 259, 261 (D. Kan. 1996)

[45] *In re Columbia Gas Sys.*, 1992 U.S. Dist. LEXIS 9460 (D. Del. 1992) (reversed in part on other grounds).

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Savage concluded that federal standards govern compensation for eminent domain in federal court. Order, Docket No. 2:09 cv-1044 (January 19, 2010).

Judge Savage's order is not precedential, but will most likely influence other federal district courts. Thus, even without Third Circuit precedent, it is likely that Pennsylvania federal district courts will apply federal common law practices rather than Pennsylvania law to determine compensation due landowners.

In the event that Pennsylvania law does apply (or where a pipeline chooses to file condemnation in state court, as it may do under the NGA), Pennsylvania's Eminent Domain Code, 26 P.S. § 1-101 et seq. applies to valuation of the condemned property. Pennsylvania is one of the 23 states[46] that determines just compensation in condemnation cases by commission with a right to appeal to and trial de novo before a jury.[47] In Pennsylvania, this commission is called a "Board of Viewers."

As to just compensation, the code provides in 26 Pa. § 702:

> Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected by the condemnation and the fair market

[46] Fed. R. Civ. P. 71.1(h) notes.

[47] *Lauxmont Holdings v. County of York*, 2008 U.S. Dist. LEXIS 45932 (D. M.Pa. 2008). See also *In re Property of Fox*, 234 F. Supp. 241, footnote 1 (D. E.D. Pa. 1964), wherein it is explained:

> The Pennsylvania statute involved is the third-class city code, which provides, 53 P.S. §§ 37819 and 37842, that to have a determination of the amount of damages for the taking, either the property owner or the city may petition the state court to appoint three viewers. After the viewers have made their award either party has the right to appeal to the local state court to have the issue of the amount of damages determined in a jury trial [citations omitted].

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value of the property interest remaining immediately after the condemnation and as affected by the condemnation.

Of the fair market value, the code provides in 26 Pa. § 703:

> Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration but not limited to the following factors:
>
> (1) The present use of the property and its value for that use.
>
> (2) The highest and best reasonably available use of the property and its value for that use.
>
> (3) The machinery, equipment and fixtures forming part of the real estate taken.
>
> (4) Other factors as to which evidence may be offered as provided by
>
> (5) Chapter 11 (relating to evidence).

On the other hand, if the court finds that FRCP 71.1 has supercedes Section 717f(h) entirely, then federal condemnation law will apply. FRCP 71.1(h)(2)(A) provides:

> If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

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In the two circuit cases where federal condemnation law was applied at the compensation stage, each district court appointed a commission despite the demand for a jury trial, and those decisions were upheld on appeal.[48] However, in the *Transcontinental* matter in the Eastern District Court for Pennsylvania (Docket No. 2:09-cv-1044), Judge Savage allowed a jury trial on damages in accordance with the landowner's demand.

In *Guardian Pipeline v. 295.49 Acres of Land*, 2008 U.S. Dist. LEXIS 35818, the District Court for the Eastern District of Wisconsin noted that FRCP 71.1 has no fee-shifting provision that would allow the owner to recover his expenses, including attorney's fees, from the condemnor.[49]

ISSUE #9: Under what circumstances have courts either rejected or modified a pipeline company's eminent domain action?

Courts routinely grant requests to condemn made pursuant to the NGA. They most often grant immediate possession, leaving the issue of compensation open.

In the case of *Williston Basin Interstate Pipeline Co. v An Exclusive Gas Storage Leasehold*, 524 F3d 1090 (2008), the Ninth Circuit Court of Appeals upheld the district court's dismissal of a pipeline company's eminent domain action for lack of a FERC certificate authorizing the condemnation. The pipeline company did not allege that the land was covered under the FERC certificate, nor did they submit any maps to show which land they were entitled to condemn. Instead, the pipeline company merely

[48] *Northern Border Pipeline Co.*, 344 F.3d 693 (7th Cir. 2003). See also *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368 (11th Cir. 1999)

[49] *Guardian Pipeline, L.L.C.*, 2008 U.S. Dist. LEXIS 35818, at 21.

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alleged that they were losing gas due to the subject wells. The court found this insufficient for a taking.

In *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427 (1990), the District Court of Rhode Island modified the pipeline company's requested easement. The court held that the pipeline company requested the easement include two rights that were outside of the scope of the FERC certificate: (1) to increase the size of the pipeline in the future, and (2) to transport petroleum products through the pipeline.[50] The court granted the easement, but without these requested rights.

Finally, in *Kern River Gas Transmission Company v. Clark County, Nevada*, 757 F. Supp. 1110 (1990), the District Court of Nevada abstained from ruling on the pipeline company's request for condemnation because the subject properties were not named as parties to the suit. Instead, the court granted plaintiffs leave to amend complaint.

Most recently, in a *Transcontinental Pipeline* involving a group of five landowners (the Brandywine Five) represented by Carolyn Elefant (Dockets No. 9-CV-1385, 1396 and 1402), on the day of the condemnation hearing, the parties reached a settlement whereby the pipeline agreed to refrain from condemning the Brandywine Five's property until it received a permit authorizing open cut construction of the pipeline. The permit never issued, and the court required Transco to dismiss its condemnation action. The parties filed a motion for attorneys fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970), as amended, 42 U.S.C. § 4601 *et seq.* (2009), which remains pending before the court.

[50] *Tennessee Gas*, 749 F. Supp. at 431-432.

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