

features

Putting the Public Back into Public Convenience and Necessity in Natural Gas Pipeline Certificates

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In the summer of 2021, Illinois Representative Sean Casten launched a “#hotFERCsummer” social media campaign on the floor of the U.S. House of Representatives. He brought in pop culture and even “dad jokes” to boost the profile of the Federal Energy Regulatory Commission (FERC) and encourage the agency to take on a greater role in dealing with the climate crisis, amid the series of extreme weather events and heat waves of the summer of 2021. It was a hot summer for FERC on several fronts, including a continuing trend of closer scrutiny of the interstate natural gas pipelines under its jurisdiction.

The Natural Gas Act (NGA), enacted in 1938, gives FERC authority over the construction and operation of interstate natural gas pipelines. Under section 7 of the NGA, FERC will issue a certificate of public convenience and necessity (certificate) to construct a natural gas pipeline if it finds that a proposed pipeline is in the public interest. Once FERC issues the certificate, the pipeline company can exercise eminent domain to acquire property necessary to construct the pipeline, if it is unable to reach an agreement with the landowner.

This article will examine a trio of recent developments that affect FERC’s review of certificate applications that have positive implications for landowners, communities, and customers. First, FERC has been revamping the policy statement it uses to evaluate certificates. Second, landowners in the path of a pipeline have received additional legal protections. And third, 43 years after Congress ordered its creation, FERC has finally established an Office of Public Participation that should help increase public engagement with FERC.

Bringing Climate and Environmental Justice into Pipeline Reviews at FERC

Pipeline construction and operation can be disruptive to landowners and communities, as well as have broader climate impacts. Land clearing can threaten farms and historic properties, spills and erosion can cause environmental damage, and high pressure can create an explosion risk. Associated infrastructure, such as compressor stations that compress the gas to transmit it along the route, emit nitrogen oxides, volatile organic compounds, sulfur dioxides, and particulate matter—pollutants that are linked to serious health impacts. *See, e.g.,* Comments of Va. Scientist-Cmty. Interface, FERC Docket No. PL18-1 (May 27, 2021). Project construction and operation, as well as the downstream use of the transported gas, emit greenhouse gases. While potentially once thought of as a bridge fuel to cleaner energy sources, continuing to commit to natural gas infrastructure has a real climate cost. *See* Alejandra Borunda, *Natural Gas Is a Much “Dirtier” Energy Source Than We Thought*, Nat’l Geographic (Feb. 19, 2020).

Despite serious concerns about environmental, health, and climate impacts, FERC approved nearly every natural gas pipeline certificate application it considered from 1999 to 2021. In doing so, FERC relied on a 1999 policy statement, *Certification of New Interstate Natural Gas Pipeline Facilities* (1999 Policy Statement), to evaluate the need for a project, its effects on customers and competition, and adverse impacts on the environment and communities. FERC evaluated, among other things, whether adequate efforts were made to minimize

adverse effects on landowners and communities and whether the environmental impacts of a proposed project were consistent with the National Environmental Policy Act (NEPA).

In April 2018, FERC, led by Chairman Kevin McIntyre, took the first step in revising the 1999 Policy Statement. FERC focused on four areas: (1) use of precedent agreements (an agreement between the pipeline and a prospective customer) to evaluate the need for a project, (2) landowner interests and eminent domain, (3) environmental effects and alternatives, and (4) process efficiency. FERC received over 3,000 comments but took no final action (and, sadly, McIntyre died in early 2019).

Shortly after the change in presidential administrations in 2021, under new-Chairman Richard Glick, FERC issued a supplemental notice of inquiry. FERC identified two additional areas: (5) greenhouse gas emissions and impacts on climate change and (6) effects on environmental justice (EJ) communities.

The changes to the 1999 Policy Statement were noticed for public comment, and responses varied. Commenters urged FERC to expand its efforts to engage environmental justice communities in pipeline certificate proceedings. *See, e.g.*, Comments of Mass. et al., FERC Docket No. PL18-1 (May 26, 2021). Ideas included additional outreach and longer comment periods. *See, e.g.*, Comments of Council on Env't Quality, FERC Docket No. PL18-1 (May 27, 2021). Where states are engaged in attempts to protect and mitigate harm to EJ communities, FERC should work cooperatively with the states to avoid impairing these activities. *See, e.g.*, Comments of N.J. Div. of Rate Counsel, FERC Docket No. PL18-1 (May 26, 2021).

Gas companies and supporters of pipeline development often point to economic and employment benefits associated with projects as a positive when evaluating effects on EJ communities. *See, e.g.*, Comments of Am. Gas Ass'n, FERC Docket No. PL18-1 (May 26, 2021). However, it is not clear whether the jobs created would be temporary or permanent, and if they are filled by local workers. *See, e.g.*, Comments of U.S. Env't Prot. Agency, FERC Docket No. PL18-1 (May 26, 2021). The potential economic benefits of a specific project should be supported by verifiable data and weighted against project costs, including health effects. *See, e.g.*, Comments of Pub. Int. Orgs., FERC Docket No. PL18-1 (May 26, 2021).

The courts have also provided FERC guidance on what its policy statement should include. For several years, the D.C. Circuit has criticized the Commission's head-in-the-sand approach to greenhouse gas emissions associated with transporting and using natural gas. In 2017, the court remanded a case to FERC, finding that its environmental impact statement did not adequately discuss the "downstream" effects of the pipelines—that is, burning the gas was not only reasonably foreseeable but a primary purpose of building the pipeline. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). The court found that FERC's environmental analysis "needed to include a discussion of the 'significance' of this indirect effect" of greenhouse gas emissions. On remand, FERC again approved the project. The D.C. Circuit has since issued similar decisions in other cases, and some FERC commissioners, including current Chairman Glick,

have dissented from orders granting certificates without meaningful consideration of the project's greenhouse gas emissions.

In a more recent case, the D.C. Circuit sided with petitioners over flaws in FERC's greenhouse gas emissions and EJ analyses and remanded to the agency. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021). In this challenge to FERC's approval of liquified natural gas facilities in Texas, the court found that FERC failed to adequately analyze the effects of the projects' greenhouse gas emissions by not responding to arguments about the methodology used to assess greenhouse gas impacts. FERC's EJ analysis was similarly lackluster, only considering impacts on EJ communities within two miles of the project sites even though it determined that environmental effects would extend "well beyond" that radius. FERC found that because all affected populations would be minority or low-income, these populations were not disproportionately affected. This is a circular and particularly disturbing conclusion because it is well-documented (by Elizabeth Thompson in *America's Natural Gas Pipeline Routes and Environmental Justice*, Eos (July 13, 2021), for example) that pipeline infrastructure and its associated harms are inequitably distributed.

In another recent case, the court took the unprecedented step of not only remanding to FERC, but also vacating the certificate. *Env't Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021). In this case, challenging FERC's approval of a pipeline in Missouri, the focus was on whether the project was truly needed—a requisite finding. The court agreed with petitioners that FERC's determination of need was based on "plausible evidence of self-dealing" where the only evidence of need was an agreement to ship gas between the pipeline and one of its affiliates. *Id.* at 975.

A particularly troublesome feature of the Missouri case is that by the time the D.C. Circuit threw out the certificate order, the pipeline was constructed with gas flowing. Affected landowners had raised concerns about the company's history of environmental compliance. Additionally, the company had taken land using the eminent domain authority conferred by the NGA, but some eminent domain proceedings remained unresolved at the time of the court's decision. *See* Landowner Update, FERC Docket No. CP17-40 (Sept. 17, 2021).

Providing Landowners Additional Procedural Protection

Until recently, FERC's practices under the judicial review provision of the NGA have created a "Kafka-esque regime" for landowners and other stakeholders challenging a pipeline certificate. *Allegheny Def. Project v. Fed. Energy Regul. Comm'n*, 932 F.3d 940, 948 (D.C. Cir. 2019) (Millett, J., concurring), *rev'd en banc*, 964 F.3d 1 (2020). The NGA requires that a party seek rehearing from FERC before seeking judicial review. 15 U.S.C. § 717r(a). If FERC fails to act on the rehearing request within 30 days, the request "may be deemed to have been denied." *Id.* However, FERC regularly used tolling orders to indefinitely extend its deadline to act, with the effect of preventing timely judicial review. In these tolling orders, FERC would grant rehearing for purposes of further consideration without issuing

a decision on the merits of the request. Under a 1969 D.C. Circuit decision, *California Co. v. Federal Power Commission*, 411 F.2d 720, 722 (D.C. Cir. 1969), FERC's tolling orders made its decisions not jurisdictionally appropriate for review under the NGA or the similarly interpreted Federal Power Act for electric cases until FERC issued an order on the merits.

FERC's use of tolling orders became routine and harmful. From 2009 to 2019, FERC issued a tolling order in 61 out of 63 proceedings in which an opponent of a gas pipeline sought rehearing of the certificate order. En Banc Brief of All. for the Shenandoah Valley et al. as Amici Curiae in Support of Petitioners at 5, *Allegheny Def.*, 964 F.3d 1 (2020) (No. 17-1098). FERC also routinely rejected requests to stay certificates and authorized construction in more than three-quarters of the 61 challenged certificates while rehearing was pending. *Id.* at 5–6. But the tolling orders postponed merits consideration of the underlying orders even as land was condemned and harmful, irreversible construction activities began.

On June 30, 2020, Judge Millett wrote for the majority in the D.C. Circuit's en banc decision to address FERC's "Kafka-esque regime."

In an August 2019 decision, the D.C. Circuit called this practice into question. Reviewing the certificate issued for the Atlantic Sunrise Project, the court rejected a challenge from environmental groups and homeowners on the merits, but Judge Millett raised concern about the due process implications of FERC's tolling order practice in a concurrence. *Allegheny Def. Project*, 932 F.3d 940 (per curiam). FERC had granted a certificate of public convenience and necessity for the construction of 200 miles of new pipeline in Pennsylvania in February 2017. Challengers filed timely requests for rehearing and stay. FERC issued a tolling order. FERC denied the stay requests and, in September, granted the company's request for authorization to proceed with construction. The company broke ground in Pennsylvania that day. In December, FERC denied the rehearing requests—nine months after its deadline under the NGA to act on rehearing. In their challenge, petitioners raised, among other things, a due process claim stemming from FERC's allowance of construction before petitioners could secure judicial review.

This due process issue spoke to Judge Millett. She noted FERC's practice "can keep homeowners in seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop." *Id.* at 948 (Millett, J., concurring). To Judge Millett, the facts of the case illustrated the process concerns raised by FERC's practice of treating its certificate order as sufficiently final for pipeline

companies to begin construction, but insufficiently final for harmed landowners to secure judicial review of FERC's actions. Judge Millett called on the court to take a second look and put an end to the circuit's precedent that provided FERC the tools to create this "administrative quagmire." *Id.* at 950.

The D.C. Circuit agreed to rehear the case *en banc*. After oral arguments, but before the court issued its decision, FERC on June 9, 2020, issued Order No. 871, a final rule attempting, at least, to partially address the issue. 171 FERC ¶ 61,201 (2020). Specifically, Order No. 871 prohibited the issuance of construction authorizations until FERC acted on the merits of timely filed requests for rehearing or the deadline for filing rehearing requests had passed.

On June 30, 2020, Judge Millett wrote for the majority in the D.C. Circuit's en banc decision to address FERC's "Kafka-esque regime." The court reasoned that section 717r(a) of the NGA "unambiguously forecloses" FERC's use of tolling orders as had become FERC's custom. *Allegheny Def. Project*, 964 F.3d at 13. Once a party has filed a rehearing request, FERC can take one of four actions: grant rehearing, deny rehearing, abrogate the order, or modify the order. If FERC fails to take one of those four enumerated actions within 30 days, the rehearing request can be deemed denied and judicial review is available. The court overruled in relevant part its prior decisions that upheld the use of tolling orders by FERC. *Id.* at 19.

The court noted that Order No. 871 did not provide a complete remedy because it did not prevent the commencement of eminent domain proceedings. *Id.* at 10 n.2. And following several gas industry requests for rehearing of Order No. 871, FERC opened the rule for additional briefing in Order No. 871-A. 174 FERC ¶ 61,050, P 7 (2021). FERC sought comment on several questions, including these: Should FERC withhold authorizations to commence construction only for rehearing requests that raise particular arguments? When should construction ultimately be authorized? And should FERC address concerns about the use of eminent domain while rehearing requests are pending?

In May 2021, FERC issued Order No. 871-B, refining Order No. 871 in three significant ways. 175 FERC ¶ 61,098 P 8–9 (2021).

First, at the request of industry, FERC clarified that the rule announced in Order No. 871 will only apply to rehearing requests raised by project opponents; when only a project proponent, as sometimes is the case, seeks rehearing on a certificate order, a construction authorization can be issued. Thus, a construction authorization would not issue until FERC acted on the merits of an objector's timely filed request for rehearing or the expiration of the deadline for filing rehearing requests.

Second, also at the request of industry, FERC stated that the prohibition on issuing construction authorizations during the rehearing period will only apply until either a rehearing request is no longer pending or 90 days following when a request "may be deemed denied" to give objectors time to access the courts while also providing pipeline developers some predictability. *Id.* PP 20, 26.

Third, in response to the landowners' concerns about the consequences of eminent domain condemnation lawsuits,

FERC adopted a policy presumptively staying the orders during the 30-day period for seeking rehearing and while a timely filed request for rehearing by a landowner is pending. *Id.* FERC noted that it would apply the criteria for imposing a stay on a case-by-case basis. The rule became effective June 14, 2021.

Thereafter, industry interests requested further clarification and rehearing of Order No. 871-B, which FERC largely rejected in August 2021 in Order No. 871-C. 176 FERC ¶ 61,062, P 1 (2021). Regarding its policy on stays, FERC stated that its general policy presumptively staying the orders during the 30-day period for seeking rehearing is “intended to protect those whose property would be crossed or used by the proposed pipeline project as these are the landowners whose property rights could be acquired by the eminent domain authority” conferred to certificate holders under NGA section 7. *Id.* P 41.

FERC’s Order No. 871 series and the D.C. Circuit’s en banc decision in *Allegheny Defense* provide landowners additional procedural protections in pipeline cases. Landowners and other aggrieved parties can seek prompt judicial review of pipeline certificates, and FERC’s authorization to begin construction will be delayed. However, landowner awareness and ability to engage in complex FERC proceedings will remain a challenge. For example, a landowner must formally intervene in a case to later seek judicial review—simply filing comments is not sufficient.

An Overdue Boost to Public Participation

A 1978 change to the Federal Power Act created the Office of Public Participation to “coordinate assistance to the public” in FERC matters and provide compensation to participants in certain circumstances. 16 U.S.C. § 825q-1. But for more than 40 years, FERC did not launch the office. Then, in the omnibus appropriations bill that passed at the end of 2020, Congress directed FERC to detail how it would establish this office—an issue advocates had pressed for years. Catherine Morehouse, *FERC Just Established an Office of Public Participation. Why Did It Take 40 Years?*, Util. Dive (June 30, 2021).

In spring 2021, FERC undertook a series of workshops to solicit comments from a variety of stakeholders in FERC Docket Number AD21-9. FERC held a full-day commissioner-led workshop with scheduled speakers to address a variety of topics. FERC also held listening sessions targeted at different stakeholder groups: landowners and communities affected by infrastructure development, EJ communities, tribal governments and community members, and energy consumers and consumer advocates. FERC included an evening listening session and a Spanish-language listening session. FERC received over 12 hours of spoken comment and over 100 written comments, as catalogued by M.J. Bradley & Associates. Jackie Altschuler, Sophia Hill & Grace Van Horn, M.J. Bradley & Assoc., *Establishing the Federal Energy Regulatory Commission Office of Public Participation: A Review of Stakeholder Input* (July 2021).

Fundamentally, commenters urged FERC to make itself and its processes more accessible and user friendly. Even for experienced practitioners, keeping track of deadlines and using the Commission’s document system, eLibrary, to file and search for documents can be difficult. Commenters suggested educational outreach, such as explanations in nontechnical language,

workshops and learning sessions, and engagement campaigns similar to those that some states have undertaken on energy issues and infrastructure siting. Technical assistance could help stakeholders engage in FERC proceedings; for example, the office could explain what it means to intervene in a proceeding in order to preserve rights to seek judicial review and provide a template for doing so. The office could also increase data and modeling availability to the public. Commenters noted that language and internet access may present barriers to participation for some stakeholders that FERC should address.

One survey of landowners who had a pipeline routed through their property found that 31% did not remember receiving educational material from FERC and of those who did, 63% were dissatisfied with the information received. *Id.* at 24. And 92% said they did not understand from the information received that they had to formally intervene in the FERC proceeding to preserve their right to take further legal action. *Id.*

It is worth noting that while this article is focused on gas pipelines, and the impacts of FERC’s pipeline authorizations and procedural inequities are potentially easier to discern, these issues are barriers to public participation in electric matters at FERC as well. Stakeholders face similarly difficult processes, highly technical material, complex market designs, and other hurdles. The Office of Public Participation will seek to cover these issues as well.

At the end of June 2021, FERC submitted a report to Congress detailing its plan for establishing the office (in compliance with the deadline set by Congress). *FERC Report on the Office of Public Participation* (June 24, 2021). The office will conduct outreach, provide education, provide procedural and technical assistance, make recommendations to improve public participation in FERC’s program areas, and advise on intervenor funding. The office will have an energy infrastructure group and an energy markets group within its outreach and assistance branch. FERC appointed Elin Katz as the first director of the office and will be hiring additional staff over the next few years.

Summer 2021 was indeed a hot summer for FERC. As the Commission continued to grapple with its natural gas certificate policy statement, the D.C. Circuit highlighted the inadequacy of FERC’s recent EJ, climate, and need analyses of several projects. While important legal precedent, these cases also represent communities and individuals now living along pipeline routes, and as FERC proceeds on remand, we will see what the next steps are for these projects and what harms are indeed irreparable. Going forward, equipped with this case law, as well as the procedural protections of *Allegheny Defense* and FERC’s Order No. 871 series, landowners in the path of a natural gas pipeline have more tools to challenge certificates. And the Office of Public Participation comes at a crucial time to assist these landowners, as well as others affected by FERC proceedings, in meaningfully participating in these processes. 🍃

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