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Pipeline Certificate Policy, FERC Authority on GHG Emissions Debated at EBA

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FERC's authority to examine greenhouse gas (GHG) emissions in natural gas pipeline applications was touched on by panelists at the Energy Bar Association Mid-Year Energy Forum, with differing views on whether FERC can use indirect environmental effects of a pipeline as a means to deny an application.

Representatives from the pipeline industry, the Natural Resources Defense Council (NRDC), and a professor of environmental science at North Carolina State University gave their views on legal authority questions and other matters in FERC's pending review of its pipeline certificate policy statement. Questions surrounding precedent agreements as an indication of need for new facilities, the review process under the National Environmental Policy Act and the increasing legal challenges and landowner concerns were addressed during two different sessions at the EBA forum October 29.

The Commission's heavy reliance on precedent agreements as an indicator of need for new pipeline projects and the proper level of review/consideration of GHG emission impacts were two key points addressed by panelists.

Pipeline project reviews are becoming longer and more expensive for companies, and environmental groups are making more substantive legal arguments in their appeals and challenges, said Christine Tezak, managing director of Clear View Energy Partners LLC. Given the number of legal appeals, FERC's approval of certificates under the Natural Gas Act (NGA) has generally held up pretty well, with the pipeline sector acknowledging a trade-off between longer reviews and certificates upheld by the courts, Tezak said.

There have been some notable exceptions, such as in August 2017 when the U.S. Court of Appeals for the District of Columbia Circuit remanded FERC's environmental review process because it did not consider GHG emissions of power plants to be fed by natural gas transported by a collection of pipelines that included Sabal Trail Transmission LLC, Tezak said.

That case brought to the fore the issue of indirect impacts from pipeline projects and how much FERC has to consider them under NEPA and NGA. A majority remanded the GHG emission review element to FERC, which FERC subsequently addressed in a revised environmental impact statement. Judge Janice Rogers Brown concurred in part and dissented in part, agreeing with the majority on most issues, but dissenting on the decision to vacate and remand the issue of GHG emissions.

In her statement that has been pointed to by pipeline industry advocates, Brown said that the majority failed to consider the role of Florida's state agencies in considering the effects of gas-fired power generation facilities to be fed by Sabal Trail and Southeast Market Project pipelines. Brown said FERC did not have to consider downstream effects because a state agency issued a permit for the plants involved in that case.

NRDC disagrees with Brown's dissent and those who maintain that FERC does not have to look at indirect effects of a pipeline project, said Gillian Giannetti, attorney with Sustainable FERC Project, which is based within NRDC.

The caselaw on FERC's authority regarding GHG emissions and indirect effects of gas pipeline projects is subject to different interpretations, said Randy Rucinski, deputy general counsel at National Fuel Gas Supply Corp. There is disagreement on the implications of that D.C. Circuit decision on Sabal Trail and the Southeast Market pipelines, added William Lavarco, senior attorney at NextEra Energy Resources LLC, whose parent is a partial owner of Sabal Trail.

People are leaning on FERC to take actions in areas where there may not be a strong policy preference or statutory authority, noted Ryan Emanuel, a member of the Lumbee Tribe of North Carolina and professor at North Carolina State.

With gas-fired generation cleaner than coal-fired power plants and the increased use of renewable resources stemming from state decisions, GHG emissions overall have declined and the transportation sector in 2017 passed the power sector as the industry with the highest GHG emissions, Lavarco said. Even so, pipelines appear to have become "the poster child" for trying to control GHG emissions, he said, mentioning the numerous appeals pending in different courts.

In some pipeline project approvals following the *Sabal Trail* decision, where most of the natural gas being used was for power generation and was thus clearly identifiable as a downstream use, FERC has declined to consider or calculate GHG emission impacts because the downstream uses are not clear, which has been a point of contention in dissents issued by Commissioners Cheryl LaFleur and Richard Glick.

The Commission appears to be wrapped up with a conclusion that if GHG emissions are challenging to detect it does not need to consider them, but "I don't think that that abdicates FERC from trying its best to do so," said Giannetti.

Much like the comments received in FERC's notice of inquiry (PL18-1) on its 1999 certificate policy statement, one of the areas of agreement among the panelists is that FERC could do a better job of public and stakeholder engagement for new facilities. A suggestion for FERC to improve its website by Lavarco was met with applause by the audience.

Early and more meaningful consultation among FERC staff, Native American tribes, and those concerned about pipeline projects should be addressed by the Commission, said Emanuel.

FERC has done a great job in its project reviews, but the pipeline sector would like to see it take a more proactive role as a lead agency and encouraging consultation with other agencies and stakeholders, said Rucinski. That could involve FERC being "a little more aggressive" to ensure that projects are approved in a timely manner, he said.

Emanuel commended NextEra for reaching out and listening to the concerns of tribes in North Carolina, and Giannetti praised the commitment to landowners from the Interstate Natural Gas Association of America, which was referenced by many parties that provided comments to FERC in its certificate policy statement review.

It is not known when FERC may address the policy statement and comments received, or if any changes will be made. A full complement of five commissioners is likely to be preferred for any major policy change – with a vacancy at FERC following the August exit of Robert Powelson -- and some of the issues raised in the comments are pending on review in the appeals court process. White House nominee Bernard McNamee is scheduled for a Senate Energy and Natural Resources Committee confirmation hearing November 15, with differing opinions on whether he may be confirmed during a lame duck session of Congress.

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