

Looking Beyond COVID-19 to Pipeline Certificate and FERC Procedural Issues

By Kevin Adler, April 16, 2020



While the attention of the natural gas industry right now is on COVID-19 response, the industry and FERC have major regulatory issues to grapple with that are likely to have a bigger long-term impact. Those issues were the subject of a panel discussion on April 15 at the Energy Bar Association's virtual spring conference.

Moderator Alex Oehler, the interim president of the Interstate Natural Gas Association of America (INGAA), talked with David Bookbinder, chief counsel of the Niskanen Center, and Cate Stetson, a partner with Hogan and Lovells, about issues related to FERC's notice and certificate procedures, major federal litigation and other matters.

The Niskanen Center has been raising the volume on its criticisms of FERC's gas pipeline certificate process, including an appearance by Bookbinder before the House Energy and Commerce Committee's Subcommittee on Energy on February 6 (see related article). In the Energy Bar Association panel, he repeated much of his critique, including:

- "We discovered a huge number of problems with the structure of the Natural Gas Act, FERC's regulatory system and FERC's policies and practices, and the practices of natural gas companies. This goes from the beginning to the end of the process."
- "At beginning, it's the notice that landowners get.... FERC has delegated its Fifth Amendment

responsibility to inform landowners that their property might be taken to the pipeline developers, and washed their hands entirely.... In fact, we FOIA'd them to ask what policies and procedures they have in-place to ensure they are doing [their oversight about notification], and their response is they have no documentation.”

- “Landowners will get documents a half-inch thick.... They will have to discern they have to intervene, or they can't go to court to challenge a certificate. And it's extremely obscure how to intervene—it's in three places in the document, and they are mutually contradictory.” In a review of notifications in 2018, the Center found project after project making the following two statements, often on the same page:1. “A party must submit 7 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party”; and then 2. “The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link.” So, “must” hard copies be filed with FERC, or not?
- The amount of time landowners have to intervene is inadequate, and FERC does not even have a standard schedule for intervening. “This is remarkable” he said. “It does [have timelines] on other proceedings, but not on pipeline Section 7 proceedings. Frequently, the Commission gives people as little as 13 days to file interventions.... This is not a formula for providing a constitutional right to intervene.”
- Problems of sequencing. A pipeline developer can cut trees and dig a trench without having final permits for construction. “But what if you don't get all those other permits, or you decide not to build? Constitution Pipeline threw in the towel recently, but people's land has been cut up, trees cut down...and Constitution says too bad.”
- Lengthy tolling arrangements. Bookbinder credited Neal Chatterjee, FERC chair, with now trying to adhere to the statutory 30-day period to issue a rehearing decision, but he said tolling arrangements have been a longstanding problem. (More on that below.)
- Quick take. “Pipelines can get preliminary injunctions and take possession...and cut and dig...but not pay compensation until years later,” he said. He predicted that this will be overturned by the US Supreme Court.
- “And there are cases, like Constitution Pipeline, when a pipeline takes property legitimately but decides not to build a project, but landowners do not have the right to repurchase their property. Only four or five states have the statutory right to repurchase.”

Problems and solutions

Handed that list of complaints, Stetson agreed that “many problems are coming to a head right now. We see questions of FERC's procedures, statutory matters, and issues of constitutional consequence.”

But while saying she wasn't trying to wipe away the Bookbinder's comments, Stetson said that many of FERC's policies come from a perfectly understandable Congressional objective embedded in the Natural Gas Act: it's designed to speed and streamline the pipeline permitting process.

“The most salient component is the provision to permit pipelines to submit a petition to seek review of inaction by a state to the DC Circuit Court,” Stetson said. “The reason it was implemented and the NGA gave FERC condemnation authority is the problem of certain states that are slow to accept pipelines in their communities. This is not a new problem; it dates to the 1940s.... The NGA has an eye towards supporting pipelines for the public good...and the NGA provides an overlay that we can't litigate or change policy around.”

Nonetheless, as an attorney who represents pipelines, Stetson said she agrees with Bookbinder that FERC's processes could be improved, particularly on clarity in notice. But she also observed that by the time a condemnation notice has been issued, the pipeline developer, FERC, state officials, landowners and other stakeholders have likely been involved in years of proceedings, during which interventions can be pursued. “To say that FERC has washed its hands [of notice requirements] doesn't recognize the work that FERC has done to get to that place,” she said.

Oehler, the moderator, added that one study of pipeline certificates in the last 10 years found that only 1.6% of

tracts for projects of 10 miles or more were obtained through eminent domain proceedings, which indicates that compromise is overwhelmingly the solution.

What can FERC do better?

From the Niskanen Center's perspective, FERC could start by creating a one-page notice that clearly explains to landowners their obligations and rights. It also favors a standard 60-day period to intervene.

In terms of conditional certificates that allow construction activity before all permits are received, Bookbinder said he believes that the recent certificate for Jordan Cove LNG is a model that should be made permanent. The conditional certificate prohibits tree felling or ground disturbance until all federal permits are acquired. "We'd like to see this enshrined in some type of regulatory permanence. It's an excellent step forward," he said.

The conditional certificates apply only to required federal permits, Bookbinder said, which are: Clean Water Act Section 401, Clean Air Act discharge permits (relevant for compressors), Coastal Zone Management Act conformity, and Clean Water Act discharge permits.

Quirks of tolling

Tolling arrangements, which have raised a great deal of opposition from pipeline opponents, especially in the last couple of years, are a big challenge, both panelists said.

"The issue has been percolating for a while," Stetson said, and the DC Circuit granted a rare en banc review of FERC's tolling order for the Atlantic Sunrise Pipeline. The project was mostly completed while FERC considered whether to grant a rehearing on the certificate. By the time it declined the rehearing, the project was nearly finished, which one of the judges in the case said calls into question whether the petitioners' rights to a court review was violated.

"The reason behind the tolling orders is that FERC is that rare agency where you have to seek rehearing before you proceed to court," Stetson said. "Also, you have to seek rehearing on issues you raised—and only on the issues that you raised. The consequence is that FERC receives regularly in complex pipeline cases sometimes hundreds and hundreds of pages of rehearing petitions. FERC has to act, by statute, within 30 days."

Since it's impossible for FERC's staff to give a fully reasoned response in 30 days, FERC has developed the procedure of fulfilling the law by saying that the tolling order meets the standard of "acting on" the rehearing request within 30 days. But the tolling arrangement is conditional, as FERC gives itself more time to "substantially review" the rehearing request at a later date. "So, is there a statutory or constitutional problem of issuing tolling orders to give itself time to review these complex rehearing decisions? What is 'acting upon' a rehearing? And assuming tolling is allowed, is there a constitutional dimension in which landowners are being denied to seek a merits review?" Stetson said.

Petitioners have said that the issue raises a constitutional question because their land is being taken. But FERC said that because the landowner will be compensated, a pipeline certificate and tolling arrangement is not a taking in violation of the Constitution.

Both Stetson and Bookbinder said that the requirement—unusual in land matters—that a landowner must ask for a rehearing from the federal agency before it goes to court is the source of much of the problem. "If this was any other agency, you could just go to the appellate court and simultaneously request a rehearing. Not on pipelines," said Bookbinder.

However, FERC can't change that rule. Only Congress can by amending the Natural Gas Act.

Thinking about the outcome of the Atlantic Sunrise case, Stetson said, "You can imagine a regime where FERC is told that it must respond substantively to a rehearing in 30 days, so FERC issues rehearing orders that are missing a few things...or that get a complicated issue wrong.... The effect of that is that it goes up on appeal, the circuit court reverses, the landowners and developer have gone through condemnation, and FERC must revise its decision. Or, you could imagine that FERC would have to take more time on the certificate on the front end to anticipate all the issues [that would be raised for a rehearing]."

Those types of situations would delay pipeline projects, she said, but they would not necessarily be good for landowners, either. As for the outcome of the case, Stetson said, "I'm not going to speculate on this...but it's not a

shoo-in that either side will win.”

More litigation

At the end of the session, Bookbinder and Stetson commented on the high-profile PennEast case that the Supreme Court is considering taking (whether New Jersey can refuse eminent domain for parts of the route), and the court’s upcoming decision on the validity of Forest Service permits for the Atlantic Coast Pipeline.

On PennEast, Stetson said, “There are definitely solid arguments for the court to hear the case. It has something, arguably, of national importance.” But she said it doesn’t meet the other test typical of Supreme Court-accepted cases, which is a dispute at the federal court level. Only the Third Circuit has looked at this particular issue, finding in New Jersey’s favor.

Bookbinder said, “I think the odds are that they will take this one,” and he noted that the Atlantic Coast Pipeline case met neither of Stetson’s criteria for inclusion. As for how the case could be decided, Bookbinder added, “We’ve got a lot of 11th Amendment advocates on that court...it’s very important to the conservative wing of the court.” The 11th Amendment restricts how individuals, or in this case, the developers of PennEast, can sue states in federal court.

As for Atlantic Coast Pipeline, Stetson called it “fascinating” and said the oral arguments and questions from court justices “had a very metaphysical distinction” about how to define land and trails. But the question related to the pipeline is whether the Forest Service or the US Park Service get to “make the call” on the project. The problem is that the Forest Service is allowed to approve a pipeline, but the Park Service is prohibited from allowing that type of development across a national park. “I think the government and ACP have the better of the argument,” she said. “But the questions in February signal it’s not going to be a unanimous decision.”