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July 25, 2018

Chairman Kevin McIntyre
Federal Energy Regulatory Commission
888 First Street NE
Washington D.C. 20426

ERRATA COMMENTS

Re: Notice of Inquiry Re: Certification of Interstate Gas Pipelines Docket PL18-1

Dear Chairman McIntyre and Commissioners,

My name is Carolyn Elefant and I am owner of the Law Offices of Carolyn Elefant, PLLC, a boutique law firm headquartered in Washington D.C. that focuses on power, pipelines and property. I am submitting this Errata Version of comments in response to the Commission's Notice of Inquiry regarding the Certification of Interstate Gas Pipelines. These comments reflect my own insights and recommendations and do not represent the views of any of my clients.[1] Please replace comments filed earlier today with this Errata Version which includes attachments.

My comments are informed by my unique experience as a seasoned energy regulatory and landowner rights attorney. After graduating from law school, I launched my career as an attorney-advisor at the Commission where I worked on hydroelectric matters under Part I of the Federal Power Act. I left the Commission in 1990 and following several years as an associate at prominent energy law firms in Washington D.C., I opened my own firm in 1994 where I continued to focus on energy regulatory matters. I began representing impacted landowners in 2009 and since that time, I have

[1] These comments are filed two days out of time due to undersigned counsel's involvement in six pipeline dockets decided by the Commission at its meeting last Thursday, or which required prompt action with respect to petitions for review. It is unlikely that this filing two days out of time will prejudice the other parties to this proceeding and I ask the Commission to consider these comments during this process.

been involved either behind the scenes or on the record in more than thirty Commission proceedings under Section 3 and 7 of the Natural Gas Act. I have also represented landowners in a half-dozen certificate order challenges before federal appellate courts and in approximately twenty pipeline-related eminent domain proceedings (including compensation hearings and constitutional challenges) in federal district courts around the country.

My comments are organized as follows. Part I of these comments will address the numerous procedural infirmities in the current Commission process that I have repeatedly brought to the attention of Commission staff either through informal conversations or in formal filings and which are so easily corrected that it is impossible to fathom why the Commission refuses to do so. Part II of these comments will respond directly to the questions posed in the Notice of Inquiry regarding assessment of project need and safety and use of eminent domain.

I. EASILY CORRECTABLE PROBLEMS IN THE COMMISSION PROCESS

Although Landowners are impacted more directly and substantially by natural gas infrastructure than any other stakeholders in the Commission certificate process, on the whole, they also have the fewest resources to protect their interests. To be sure, I recognize that the disparity of resources between parties is not unique to Commission proceedings but pervades our entire judicial system and as such, is not a problem that the Commission can readily solve within the context of this Notice of Inquiry. That said, the Commission can make relatively easy fixes to the "nuts and bolts" of certificate process which would enable landowners who cannot afford counsel to more effectively represent themselves and would reduce the cost and increase the transparency of the certificate process for all participants, including the applicants.

1. Correct the Notices of Application: The Commission must correct the inaccurate and confusing standard language in its notices of application which suggest that parties seeking to intervene must submit 7 copies of a motion to intervene and mail a copy to the applicant and every other party. Below is a screenshot of the portion of the notice from the Mountain Valley Pipeline, CP16-10 (November 5, 2018) showing the erroneous language.

> There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. 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. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

The above language is inaccurate as it has been supplanted by the Commission's e-filing rules. Yet the failure to correct this language - a problem that I have brought to staff's attention on multiple occasions -- creates confusion and has a chilling effect on landowners seeking to intervene. I frequently speak to landowners on the FERC process at community meetings and have been approached by at least a dozen landowners who shared that they did not intervene in the process because of the hassle of filing and mailing paper copies.

I realize that the erroneous notices are a seemingly minor issue and that despite the inaccurate information, hundreds of landowners manage to intervene nonetheless. At the same time, it is a trivial matter for the Commission to correct the standard notice provision and its failure to have done so - notwithstanding my many informal complaints - reflects a dismissive attitude towards landowner interests and serves only to heighten confusion in an already complex proceeding.

2. <u>Put an end to piecemeal processing of application materials and set deadlines for all submissions</u>

Once an company has submitted its application and motions to intervene have been filed, the Commission will often ask the company to provide additional information. Many times, the missing information is fairly substantial - for example, detailed mitigation reports or analysis of system or route alternatives. However, instead of responding to the Commission's information requests in an orderly manner, companies frequently submit materials in piecemeal fashion and then constantly update or supplement their responses. And many times, information is not submitted until after completion of the Draft EIS or Final EIS, thus precluding meaningful comment.

The constant stream of information is difficult and costly for landowners to track - and when submitted in an untimely fashion, may deprive landowners and other participants of a chance to respond. To address this problem in the Southeast

Connector/Sabal Trail Project Docket CP15-17, I proposed that the Commission issue a scheduling order establishing firm deadlines for the companies' submission of additional information and comment thereon. I even served a copy of the proposal on the Commission's then general counsel. *See* Attached Letter and Proposed Schedule. Shockingly, the applicant opposed this proposal notwithstanding that it would have expedited the process. The Commission never ruled on the proposal and ultimately deemed the request moot in its order granting the certificate.

A strict schedule and a prohibition on piecemeal submissions is a win-win for all parties. The benefits to applicants are self-evident because it allows for more expeditious processing of their application. But a clear schedule benefits landowners as well. First, a schedule guarantees that a landowner comments submitted by the applicable deadline will be considered by the Commission. Second a schedule enables landowners to pinpoint crucial deadlines and budget scarce resources to hire experts or retain counsel. Finally, a schedule spares landowners of having to track and review docket filings on a daily basis.

As an energy regulatory attorney, I have participated in numerous complex, multi-party proceedings before the Commission and regulatory commissions in five different states. Strict schedules are common in these proceedings and there is no reason why a similar practice should not apply in certificate proceedings as well.

3. Facilitating Access Confidential Information - The Commission must revise its procedures for enabling the public to access critical energy infrastructure information (CEII) which includes Exhibit G diagrams, information about a pipeline maximum allowable operating pressure (MAOP) and hydraulic flow studies. In the hands of an expert, this information can be used to evaluate whether a pipeline has been overbuilt or whether gas is destined for export.[2] But under the present system,

[2] *See* Tennessee Gas Pipeline, 158 FERC ¶ 61,110 (2017), P. 37 (noting that expert, relying on Exhibit G diagrams, found that 36-inch pipeline could be reduced to 16 inches); *Algonquin Gas Transmission*, 154 FERC ¶ 61,048 (2016) P. 68 (referencing expert report concluding, based on Exhibit G Diagrams that pipeline is overbuilt to compensate for anticipated expansion), Comments of Delaware Riverkeeper Network, *Millennium Eastern Upgrade*, CP16-486 (March 26, 2017)(submitting expert testimony based on Exhibi G showing that proposed pipeline is unnecessary); *Dominion Gas LLC,* 148 FERC ¶ 61,244, P. 255 (2014)(acknowledging expert's analysis based on Exhibit G that facilities that company claimed would not support gas export showed that facility would support delivery to Cove Point).

landowners and their counsel must jump through multiple hoops to obtain this information and in many instances, are unable to do so in time for an expert to prepare a report before the deadline for comments or rehearing requests has expired.

In two recent Commission rehearing orders, *Mountain Valley Pipeline,* 163 FERC ¶ 61,197 (June 15, 2018) and *Nexus Pipeline*, 164 FERC ¶ 61,054 (July 25, 2018), the Commission faulted me for seeking CEII information directly from the Commission instead of using the procedures available to impacted landowners under 18 C.F.R. §388.11132(b) and 388.1113(4) of the Commission regulations. However, there is good reason why I and many other parties no longer bother to request CEII information directly from a company. First, the Commission's regulation only applies to landowners or intervenors seeking information and not their counsel. Traditionally, all parties accessing CEII - attorneys, experts and landowners - are required to sign individual non-disclosures and cannot share information without it. Thus, even if a landowner could obtain information under this regulation, as counsel, I would still be required to seek CEII through the Commission directly. Second, in prior cases, I have requested CEII information directly from companies which often delay in responding to CEII requests or deny the requests -- and I have had to go back to the Commission anyway to obtain the information. Third, whereas the Commission has an acceptable standard non-disclosure agreement for parties seeking CEII many companies require signature of agreements with far more onerous terms include substantial financial penalties for violations. It is illogical that an impacted landowner should be required to sign a more stringent non-disclosure agreement than a non-affiliated party seeking CEII materials directly from the Commission under other parts of its regulations.

I have explained the problems with the Commission's regulations to Commission staff in the CEII office on numerous occasions - sometimes for up to an hour long phone call at a time. Yet, the problem has only deteriorated in the time that I have been representing landowners.

Moreover, irrespective of whether a landowner must first jump through the hoop of seeking CEII from the company itself, that is no excuse for the Commission's processing time for CEII requests - which now runs at around six to nine months. In most instances, by the time the Commission releases the CEII information, the deadline for seeking rehearing has passed and landowners must decide whether to risk spending five or ten thousand dollars to hire an expert to review the materials when any opinion provided may be time barred.

There is no reason that processing a CEII request should not take six to nine months. All the Commission must do to process a CEII request is send a letter to the company and ask whether it objects to the release - which is invariably the case. And if the company does not timely follow up, the Commission need not wait indefinitely for a response. Moreover, I am a highly regarded energy regulatory attorney who has been entrusted with thousands of confidential documents in litigated regulatory matters. The CEII process is the only situation where my requests for confidential information are delayed or denied not because of my trustworthiness - which is unimpeachable - but because of the client who I represent.

The Commission presumably relies on CEII information to evaluate project need. Given that the Commission uses this information as a basis for making decisions that impact landowners, it is the Commission's responsibility to ensure that CEII information is made available in a timely manner by expeditiously processing CEII requests and automatically granting access to attorneys and experts who sign a non-disclosure agreement.

4. Working e-library

The Commission must improve the reliability of its e-library system which has deteriorated significantly over the past year, particularly after hours. Although an unreliable system impacts participants in all types of Commission proceedings, it has a disproportionately adverse effect on landowners for several reasons.

First, many landowners hold jobs during the day and can only access e-library at night or on weekends. Thus, the frequent outages make it difficult for landowners to reliably access documents.

Second, the e-library's frequent outages impair my ability to competently represent landowner clients. Because most landowners have tight budgets, they are often unable to retain my firm until a critical juncture in a proceeding - such as a deadline for seeking intervention or filing for rehearing. Often, I am brought into a case a week or two before a deadline, and therefore it is critical for me to be able to access the FERC e-library to get up to speed on a matter or gather documents necessary for a case. There have been times when I have been forced to proceed with a filing without having had an opportunity to review all relevant documents due to outages on the FERC system - and this in turn compromises my ability to do my best work for my clients. By contrast, I cannot think of a single time when a state regulatory or federal court website was non-functional. For the benefit of landowners

and the public at large, the Commission must upgrade its elibrary system and improve its reliability.

5. Optics With all due respect to some the organizations that routinely oppose pipelines, I do not agree that the Commission is biased in favor of pipelines. As I mentioned, I have worked at the Commission and with Commission staff and have no reason to question their partiality.

That there is much that the Commission can do to improve the optics of certificate proceedings and educate itself more fully about the very real and disruptive impacts that pipelines and compressor stations have on landowners. For example, as evidenced by recent FOIA requests (*see* attached), the Commissioners and staff routinely meet with pipeline applicants and energy companies to discuss proposed projects. By contrast, when I have requested meetings with the Commissioners on several occasions on behalf of my landowner clients, only one Commissioner (former Commissioner Moeller) was willing to accomodate my request.

Similarly, the Commissioners and staff are frequent speakers at industry symposiums, energy bar conferences where they share insights on the Commission's policies or offer advice on best practices. Yet Commissioners and staff rarely have an opportunity to meet or interact with landowners. Indeed, this Notice of Inquiry would have afforded an ideal chance for the Commission to invite landowners to a technical conference or ask them to speak on a panel - but instead, it is a missed opportunity.

Nor do the Commissioners or most of their staff actually visit and spend time at the project sites - an exercise which would change their perspective regarding landowner concerns. Prior to taking on landowner clients, I was often skeptical of landowner claims of damage. Yet once I began representing landowners and visiting project sites or walking the pipeline route (which I do on my own dime in most of my cases), devastation that I have witnessed - from placement of a compressor station *across the street* from houses to clearcutting of swaths of trees, leveling once rolling terrain to destruction of a conservation easement that an owner committed not to develop - is far, far worse than even the landowner's description.

The Commission and its staff are highly capable when it comes to analyzing the engineering and operating features of a pipeline, as well as the financial and business considerations that drive development. But the Commission simply does not comprehend the human impacts of their decision on landowners and until they do, any balancing of interests under the Certificate Policy Statement will be inadequate.

II. RESPONSE TO SPECIFIC ISSUES IN THE NOTICE OF INQUIRY

A. Demonstration of Need and Commission Assessment of Public Convenience and Necessity

The Commission's current practice of relying solely on precedent agreements and avoidance of project subsidization is too narrow to satisfy that statutory standard for granting a certificate under Section 7 of the Natural Gas Act. Specifically, Section 7 provides in relevant part that:

> [a] certificate shall be issued to a qualified applicant...for proposed service, sale, operation, construction, extension, or acquisition...that **is or will be required by the present or future public convenience and necessity.**

Need is a key component of the public convenience and necessity. In one of its first certificate cases the Commission Commission defined the public convenience as a

> public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both--without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated.

Kan Pipeline & Gas, 2 FPC 29, 56 (1939).

Courts recognize that the Commission is "the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted" *FPC v. Transcontinental Gas Corp*, 365 U.S 1, 7 (1961). As such, the Commission has a duty to evaluate all factors bearing on the public interest. *See Alaska Federation v. Alaska Utilities*, 879 P.2d 1051 (Alaska 1994). The Commission's discretion under the public convenience standards extends to landowner concerns because "the Commission must consider all factors bearing on the public interest, not simply those immediately relating to the objects of its jurisdiction." *Cascade Natural Gas Corp. v. Federal Energy Regulatory Comm'n*, 955 F.2d 1412, 1421 (10th Cir. 1992).

By basing a finding of public convenience and necessity almost exclusively on private contracts, the Commission unlawfully constricts the broad discretion conferred on it by Congress. Indeed, those court cases which have vacated

Commission certificates took the Commission to task for overly narrow reliance on contracts to the exclusion of other relevant factors. For example, in *Atlantic Ref. Co.v. PSC of NY,* 360 U.S. 378, 393 (1959), the Supreme Court reversed a Commission certificate after finding the record inadequate to to support a finding of public convenience and necessity in part because "the witnesses tendered developed little more information than was included in the printed contracts." In other words, the Court expected the Commission to support its finding with more than just a bald regurgitation of contract terms. And in *City of Pittsburgh v. FPC*, 237 F.2d 741 (DC Cir. 1956) the Court vacated the Commission's approval of a proposal to transfer a company's gas load to a newly built line without considering a potentially less costly expansion alternative even though the applicant had not proposed it.

The certificate policy statement already identifies many factors that contribute to the public interest - enhancing system reliability, avoiding duplication and fostering competition. Yet the Commission rarely if ever discusses these factors. Other factors relevant to the present and future convenience is the availability of alternative energy supply, the long-term environmental costs associated with abandonment of infrastructure on landowner property (which are forever encumbered by infrastructure) and subsidization of pipelines not by ratepayers but by pipeline affiliates.

B. Programmatic Review and Project Alternatives

The Commission frequently takes the position that its scope of application review under the Natural Gas Act is narrowly confined to either reviewing or accepting an application as proposed. To the contrary, nothing could be further from the truth. As discussed above, the Natural Gas Act is, at its core, a public interest statute and that it does not specifically delineate findings that the Commission must make vests the Commission with the broadest possible authority.

As part of a public interest analysis, the Commission must play a broader role. The Commission's role as guardian of the public interest "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." *See Scenic Hudson Preservation v. FPC*, 354 F.2d 608 (1965).

The Commission should expand its public interest analysis not just to consider project alternatives but to work with the parties to identify viable alternatives, including no-action alternatives. The Commission may also adopt a programmatic approach to project review as it has done with hydroelectric siting under Part I of the Federal Power Act.

NEPA also contemplates the prospect of programmatic review for projects located in the same area. In December 2014, CEQ issued its Final Guidance on Effective use of PEIS for NEPA Reviews. Among other things, the Guidance "clarifies when and how federal agencies should use programmatic NEPA reviews" and "provides an overview of the opportunities for departments and agencies to use programmatic analyses to provide for greater efficiency in their work and to comply with NEPA requirements...[to] help agencies make better informed decisions."[3]

CEQ explains that one advantage of programmatic review for repetitive agency activities is

> that the programmatic NEPA review can provide a starting point for analyzing direct, indirect and cumulative impacts. Using programmatic NEPA reviews allows an agency to subsequently tier to this analysis and analyze narrower site or proposal specific issues. This avoids repetitive broad level analyses in subsequent NEPA reviews and *provides a more comprehensive picture of the consequences of multiple* actions.[4]

The CEQ guidelines – and judicial precedent leave the Commission little option but to prepare a PEIS for the regional development. The Ninth Circuit holds that:

> we stated that an agency must prepare both a programmatic EIS and a site-specific EIS where there is large scale plans for regional development. At least when the projects in a particular geographical region are foreseeable and similar.[5]

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[3] *Id*.

[4] CEQ Guidance at 10.

[5] *Churchill County*, 276 F.3d at 1077.

The CEQ guidelines also instruct that a PEIS should include discussion of similar actions which are common as to timing, location, impacts, alternatives and methods for implementation. As an example, the guidelines describe: [6]

> Several energy development programs proposed in the same region of the country are proposals of similar actions if they have similar methods of implementation and similar best practice and mitigation measure that can be analyzed in the same document.

A programmatic approach has also been endorsed as a means to evaluate upstream and downstream emissions impacts on climate change.[7] Programmatic review also becomes more important with recent efforts to coordinate electric and gas operations. Other commenters have provided ample support for a programmatic approach to review and the Commission should give serious consideration to these views which will ensure that Commission gas development is consistent with state and regional energy planning.

C. Consideration of Additional Factors Is Meaningless Without the Rigor of Evidentiary Hearings

Not only is the Commission's analysis of project need and necessity and convenience overly narrow, but it is lacking in analytical rigor. This is because the Commission refuses to conduct adjudicative hearings in CPCN proceedings - even in contentious proceedings where material facts are in dispute - and as a result, the record lacks the benefit of testimony and vigorous cross examination. To be sure, evidentiary hearings are not necessarily required for all projects. But hearings might have assisted in decision-making for projects like Mountain Valley Pipeline Docket No. CP16-10 (factual disputes over need and availability of a "one pipeline alternative), NEXUS Pipeline Docket No. CP16-22 (whether 59 percent subscription rate is evidence of need and whether system alternatives

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[6] CEQ Guidance at 21.

[7] See Burger & Wentz: *Downstream & Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review* (March 2016) online at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/downstream_and_upstream_ghg_emissions_-_proper_scope_of_nepa_review.pdf

could satisfy need) or Atlantic Sunrise Docket No CP15-138 (whether project gas will be exported overseas or transported for domestic use).

Indeed, when it comes to CPCN proceedings - particularly those which may result in a taking of property by eminent domain - hearings are the **rule** rather than the exception. Most of the early FPC cases reviewing CPCNs involved adjudicative hearings. *See e.g., City of Pittsburgh supra*, 237 F.2d 741 (describing hearing and cross examination of company witness regarding future project plans); *Transwestern Pipeline Company,* 22 FPC 391 (1959) *(*finding need for project based on testimony by company principals and efforts to negotiate agreements) Likewise, most state commissions conduct extensive evidentiary hearings when ruling on contested CPCN applications. *See e.g., Matter of Tri State Generation* 2010 Colo PUC LEXIS 1272 (2010) (conducting hearing before ALJ on need for transmission and finding of need); *Lockheed Pipeline* 1997 Ill PUC LEXIS 255 at *9 (describing 3 day hearing after which Commission finds no public need for pipeline); *Bangor Hydro-Electric Co. v. Public Utilities Com.*, 589 A.2d 38 (Maine 1991) (affirming Commission denial of certificate given that need is premature following evidentiary hearing with live testimony); *Application of PG&E for CPCN To Construct & Operate Expansion of Natural Gas Pipeline System* 1990 Cal PUC LEXIS 1421 (conducting evidentiary hearings on environmental and non-environmental issues such as need associated with CPCN application for pipeline).

In fact, evidentiary hearings would solve many of the problems that plague the certificate process as discussed below:

- Evidentiary hearings would increase transparency by allowing all participants to seek discovery of CEII information, precedent agreements, financial data and other materials necessary for a full understanding of a proposed application. Evidentiary hearings would also result in production of documents underlying the precedent agreements and would shed insight on whether those agreements are at arms-length as well as the motive behind a gas companies expansion (i.e., import versus export). Even this type of internal information, if relevant, is commonly released in regulatory proceedings involving rates and mergers, as well as state level CPCN proceedings.

- Evidentiary hearings would enable participants to question and cross examine company officials regarding the purpose of the project, conclusions regarding project need and other matters;

- Evidentiary hearings would ensure that opposing experts have a voice in the process. Currently, many landowners and environmental organization spend thousands of dollars to prepare reports on market demand or retain experts to opine on environmental impacts associated with the project. Yet these documents - even when submitted early in the process - are rarely addressed in the draft EIS, and eventually are cursorily ignored. This is another example of the Commission's dismissiveness of landowners' concerns and one that is particularly troubling because many of these studies that are commissioned by communities and landowner groups are costly. Yet if an expert can testify live at a hearing, the testimony cannot be ignored;

- Somewhat counterintuitively, evidentiary hearings are more efficient than the current process. All parties are held to a schedule, and participants can plan around firm deadlines. Indeed, because of the efficiencies with which regulatory hearings are conducted, I have often found that evidentiary hearings are not significantly more costly than the current certificate process which crawls on and on and on and they spare landowner counsel from wasting time fighting for FOIA and CEII requests that are all forthcoming in hearings.

D. Public Use and Eminent Domain

1. Constitutional Issues

A rigorous analysis of public use is imperative because certificates confer the power of eminent domain. The Commission must look behind precedent agreements to ensure that a project is for public use and not affiliate gain, and it must fully understand the destination of the gas because Section 7 of the does not authorize eminent domain for cross-border and export projects.

In 1947, when Congress amended the Natural Gas Act to grant certificate holders eminent domain powers, it assumed that pipelines would serve a public use as defined by the Natural Gas Act by engaging in "the business of transporting gas in interstate commerce...to consumers [which] is affected with the public interest." 15 U.S.C. §717(a). Congress determined that eminent domain was necessary to ensure that the national public interest goal of transporting gas in interstate commerce to

consumers could be met.[8] But Congress did not authorize use of eminent domain for gas that would not be delivered to domestic consumers. For that reason, Section 3 of the FPA, which governs authorization of cross-border projects and import and export LNG terminals which does not grant eminent domain powers.[9]

Interstate commerce and foreign commerce are two distinct concepts in the Constitution:[10] The Natural Gas Act retains this distinction, defining interstate commerce as exclusive of foreign commerce:

> Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.[11]

Because the Natural Gas Act does not authorize eminent domain for export and requires a public purpose, the Commission must ensure that the certificates that it grants are only for those projects for which eminent domain may be permissibly used.

2. The Commission Must Eliminate Its Practice of Considering the Percentage of Negotiated Easements When Considering Adverse Impacts.

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[8] *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950)(upholding constitutionality of delegation of eminent domain powers based on operation of pipelines as public utilities).

[9] Section 3 of the Natural Gas Act, 15 U.S.C. §717b does not authorize use of eminent domain for liquified natural gas (LNG) terminals and cross-border projects. *See also Liquified Natural Gas Litigation After EPAct 2005*, 27 Energy L.J. 473 (explaining difference between Section 7 certificate power which confers eminent domain and Section 3 approvals which do not].

[10] *See Border Pipeline Co. v. Federal Power Commission,* 171 F.2d 149, 150 (D.C. Cir. 1948).

[11] 15 U.S.C.A. § 717a(6) (defining interstate commerce).

In reviewing a company's application for a certificate of convenience under its Certificate Policy Statement, the Commission applies a sliding scale test to balance project benefits such as need on the one hand, against project impacts to ratepayers, landowners and the environment. Under the sliding scale test, if the Commission determines that a project makes a strong showing of project benefits, such as need - FERC may be more inclined to excuse the project's adverse impacts on other interests. *See* Certificate Policy Statement at 24 (discussing sliding scale approach).

Under the current Certificate Policy Statement, the Commission treats the number of negotiated easements along a pipeline as a proxy for impacts to landowners. *See* Certificate Policy Statement at 27. FERC explains that where a project sponsors "are able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing the application, landowners interests would not be adversely impacted because they would not be subject to eminent domain. *Id*.

The Commission's decision to equate the percentage of negotiated easement agreements along a pipeline corridor with lack of impacts to landowners is troubling enough. But worse, FERC goes on to state that in circumstances where a pipeline minimizes impacts to landowners and other interests, it would not need any additional indicators of need short of the *prima facie* showing that the pipeline will not be subsidized by existing customers - a given, according to the Commission, for new pipelines which do not yet have customers. In short, for companies able to negotiate a large number of easements, grant of a certificate is virtually assured, even if project need is, best, non-existent.

By effectively guaranteeing a certificate to companies that can negotiate easements, the Commission improperly abrogates its statutory obligation to determine the need for a project prior to granting a certificate.[12] The Commission's policy biases the outcome of the proceeding in favor of the applicant,[13] effectively resulting in a

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[12] *See City of Pittsburgh v. FPC* 237 F.2d 741 (DC Cir. 1956)(finding that Commission is obligated to consider present and future need for project as part of evaluating certificate application)

[13] *Cf Minisink Residents for Envtl. Pres. v. FERC, 762 F.3d 97 at n. 7* (noting that it is "conceivable that one might come away thinking the FERC has a thumb on the scale for industry applicants" given FERC's presumption that a pipeline has no incentive to pursue a project that it believed would not meet FERC standards for approval).

prejudgment of the outcome before impacted parties have an opportunity to comment, in violation of their due process rights.[14]

Moreover, the Commission's policy of rewarding companies for signing easements early on results in an irretrievable commitment of resources to the applicant's proposed route and prevents fair consideration of alternative paths raising concerns under the National Environmental Policy Act.[15] By acquiring property interests early on, companies are able to lock down a preferred route, thus minimizing the chance that FERC will require a variance even if another alternative is operationally or environmentally preferable. Likewise, in evaluating projects under NEPA, the Commission should not use site access as the determinative factor in route selection as it currently does now. Because companies can purchase their pick of sites, use of site access to select a route makes landowner challenges to the presumptive route virtually impossible.

As discussed in the next section, there is much more that the Commission can and must do to protect landowners' rights in the certificate process. But at a minimum, the Commission should cease its practice of using landowner agreements acquired under duress to suggest that the project has minimal impacts.

3. Surveys

The Commission seeks input on how to handle the issue of surveys. But a more foundational question is the extent to which on site surveys are actually required early on. With today's technology, large amounts of information can be gleaned from public databases, remote surveillance and drones. The Commission should keep in mind that once pipeline representatives are able to access a property and deal with a landowner directly, it affords an opportunity to harass or mislead the landowner. On other occasions, pipelines have characterized landowners' grants of access as a reflection that they do not oppose the pipeline.

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[14] *Forest Guardians v USFWS* 611 F.3d 692 (10th Cir 2010)(describing applicable standard for predetermination of NEPA issues is "irretrievable commitment of resources); *David v. Mineta* (cite).

[15] *Public Utility District No. 1 of Chelan County, Washington*, 102 FERC ¶ 61043, 2003 WL 245763 (Jan. 16, 2003).

To be sure, these types of pipeline actions do not happen in all cases, but I have observed this enough to recognize that it is a problem. In jurisdictions that do not permit surveys, landowners have an absolute right to deny entry. It is possible that landowners might be more willing to agree to surveys if companies were accompanied by a neutral representative or if landowners had access to counsel or an advocate. Landowners might also be more willing to grant survey access if they were paid for access or were provided with the data gleaned from the surveys (most landowners who agree to access are never given any information about what the surveys yielded). The Commission ought to step in here and require companies that conduct surveys - whether access is granted by eminent domain or landowner agreement - to provide landowners will a full copy of all data gathered from their property.

4. Landowner Accommodations

The Commission can and MUST do far more than it does to minimize the impact of pipeline construction on properties. The Commission assumes that because landowners will be compensated, that they suffer no harm - but nothing could be further from the truth.

For starters, compensation proceedings do no even come close to compensating landowners for all the costs associated with participation in the FERC process and eminent domain proceedings including attorneys fees and expert costs. In addition, compensation is only about money, not restoration. For example, in cases where companies raze hundreds of acres of trees across properties, the Commission should require replanting trees in the temporary easement as mitigation. Many other agencies require tree-replanting as mitigation and the only reason that the Commission rejects this mitigation out of hand is because the companies do not volunteer to do it. The Commission is an independent body that supposedly protects the public. It is not bound by the mitigation that the company proposes but can craft is own mitigation that reasonably addresses the damage done.

The restoration that the Commission often requires might be appropriate for public fields and properties - but it is utterly substandard for properties where people live. If a private contractor came to do work on a property and left it in the same condition as many pipelines - trash and tires strewn in easements, rocks embedded in he easement instead of removed, fences broken and driveways scarred - a landowner would sue them and have their license revoked. But pipeline contractors cannot be "fired" or sued - the landowners' sole source of relief is the Commission which does very little.

There is so much that the Commission can do to make the construction and restoration process more palatable for landowners - again, by requiring a higher level of mitigation and restoration to properties, limiting work hours and actually enforcing them (in many communities, companies work 24/7), directing companies to simply pay landowners up front for boarding or additional hay necessitated by occupation of fields. Landowners have to fight tooth and nail for many of these basic requirements. Other times, companies will promise all of these amenities up front and then fail to deliver. The Commission's dispute resolution office cannot even address these matters because dispute resolution is not binding (the Commission should require, as a condition of the license, that pipelines be required to enter into Commission-facilitated dispute resolution at the request of the landowner). The environmental inspectors are hardly neutral as they are hired by the companies.

The Commission cannot wash its hands of impacts to landowners once a pipeline is approved or assume that these issues will be addressed in easement negotiation or compensation proceedings. Many landowners cannot even afford attorneys to review their easement agreements let alone negotiate terms that will protect them and ensure remediation of their property. The Commission has shown itself willing (on some occasions) to enforce environmental conditions to protect the environment. It must do the same when it comes to crafting and enforcing mitigation to protect landowner property.

One last point on mitigation. The Commission must require some minimum setback laws. Placing a compressor station across the street from homes as in *Minisink* or near schools or parks is simply unconscionable. There are some areas where above ground industrial facilities simply should not be sited and the Commission's policies should reflect that.

5. Standard Easement Terms

The Commission should develop a model standard easement that includes certain basic protections and reflects applicable law. For example, as the Commission knows, its certificates authorize eminent domain only for the specific project approved. Yet many companies, in negotiating easements, will insist on rights to install multiple pipelines. In other words, companies attempt to take more rights than they would be entitled to if the case went to eminent domain. Many times, landowners are effectively forced to negotiate against themselves - i.e., give up dollars in order to secure a term that is legally required.

The Commission could improve landowners' bargaining power with basic standard easement terms that would serve as a start for negotiations. Terms should include:

- Easement conveys only rights authorized by the FERC certificate (*See Tennessee Gas v. 104 Acres*, 749 F.Supp. 427 at 2 43(D.R.I. 1990) (refusing to allow pipeline to take rights not granted by FERC certificate such as right to enlarge pipeline size or to carry substances other than natural gas).
-
- Hold harmless and limitation of liability clauses;
- Commitment to pay increases in property insurance caused by placement of pipeline;
- Agreement that pipeline must participate in FERC dispute resolution if requested by landowner and that results of dispute resolution are binding;
- Agreement to pay all out of pocket costs, including relocation during construction if needed, boarding and hay and to restore property to a condition suitable to landowner, not FERC
- Agreement to test impacted wells and provide all results to landowners;
- Refrain from working early mornings, nights and weekends;
- Agreement not to smoke, drink or use drugs within the easement, to present ID to landowners at request and provide results of background test.
- Restrictions on drones and overhead surveillance if requested by landowners, as well as no visible pipeline signs on property

This list is just a start and there are many more requirements that ought to be added. The Commission could create a standard list and seek further comment.

D. Safety, Siting and PHMSA Coordination

The Commission's pipeline siting process simply does not take safety into account sufficiently up front. The Commission is willing to allow pipelines to be sited anywhere so long as the applicant commits to complying with PHMSA regulations - but the Commission never evaluates whether the applicant's compliance is feasible.

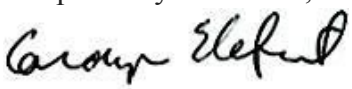
To be sure, PHMSA does have regulations that require more stringent construction standards for pipeline in populated areas. But the PHMSA regulations are meant to serve as a last resort. The first step to ensuring project safety is through prudent siting - an activity over which the Commission has discretion.

The Commission should look to the states for lessons on safe project siting. Intrastate pipelines are required to comply with PHMSA standards as well. But when considering pipelines, many states and localities have adopted minimum setbacks and areas where pipelines are not permitted as a way to minimize safety through siting. If it turns out that a pipeline or compressor station must unavoidably be sited in a populated area, then PHMSA regulations operate as a fallback.

Safety is nearly an after thought in pipeline proceedings when safety concerns should be incorporated up front and built into the siting process because the most effective safety protections come through prudent siting. Second, the Commission cannot take the applicant at its word that it will comply with PHMSA regulations but instead must evaluate whether given the project location and design, if compliance is feasible.

Thank you for the opportunity to comment on the Commission's certificate policy statement. I would be happy to answer any follow up questions that the Commission may have or to meet in person to discuss these matters further.

Respectfully submitted,



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David Morenoff
General Counsel, FERC
888 First Street NE
Washington DC 20426
Cc: Public Docket

February 19, 2015

Re: Sabal Trail Pipeline CP15-17, Hillabee Expansion Project, CP15-16, Florida Southeast Connector CP14-554.

Dear Mr. Morenoff,

I represent the Kiokee-Flint Group, a grassroots organization of landowners located in the Albany, Georgia area who are directly impacted by the proposed Sabal Trail Pipeline Docket No. CP15-17 and two other interconnected projects. The Kiokee-Flint Group is coordinating with a larger coalition of area environmental groups, landowners, small businesses and farms to offer meaningful comment on the impacts of these proposed pipelines and to propose productive alternatives. I am writing to determine whether your office can assist with resolution of two outstanding procedural concerns in the docket relating to scheduling which remain unaddressed.

By way of background, the Kiokee Flint Group has been involved in the Sabal Trail project since the pre-filing stage that began in 2013. The group has filed numerous comments, met with project manager John Peconom. In addition Kiokee-Flint Group representatives traveled to Washington D.C. last year at their own expense to meet Commissioner Moeller and discuss the project. Despite this extensive involvement, it was not until this past November that the group learned that FERC would consolidate the Sabal Trail pipeline project with two other projects for purposes of environmental review - thus vastly increasing the complexity of the proceeding.

Accordingly, on December 24, 2014, the Kiokee-Flint Group, joined by ten other stakeholders filed a procedural motion, asking the Commission to establish a schedule and set deadlines to coordinate participation in the three above-captioned dockets. Traditionally, there is a four to eight month gap between the deadline for filing comments on a certificate application and the Commission's release of an environmental assessment or environmental impact statement. During this time, the Commission will accept comments on a rolling basis; however, without knowing when the EIS will release, intervenors cannot determine when to submit comments to ensure that they will be considered in the EIS. By setting firm deadlines, intervenors can be assured that if they meet these deadlines, their comments will be considered – particularly if they will be required to expend significant resources on experts.

Nearly two months have passed since the Kiokee-Flint Group filed its request, and we still have not received a response to our request to set deadlines. I note that since that time, the applicants have submitted two additional supplements to their application and as a result, the intervenors are dealing with a moving target. Again, firm deadlines would help keep the docket under control.

Based on my experience in other pipeline proceedings, I am aware that the Commission often defers most requests until its final order - at which point they are moot. Here, my clients and their allies have offered a sensible proposal to impose order on a complex proceedings that will facilitate meaningful public participation - and we hope to receive a response.

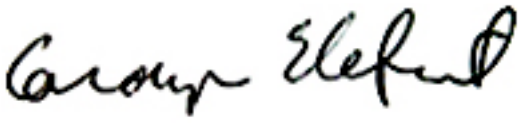
My second concern relates to the extensive amount of privileged information filed in the proceeding. As intervenors, my clients are entitled to service of all documents, including privileged information, under Rule 2010. My clients are willing to sign non-disclosure agreements to receive this information.

Yet the applicants have not provided this information to my clients, and instead, they must procure it through FOIA which is a lengthy process. Moreover, there is no guarantee that all of this information can be made available due to FOIA disclosure limitations. As such, they are further disadvantaged in this proceeding.

Accordingly, I am requesting that the Office of General Counsel (1) determine whether and when a procedural schedule will be set and (2) establish a process by which intervenors, particularly directly impacted landowners, who are entitled to service of all documents, can obtain information filed as privileged at the Commission.

Thank you in advance for your assistance. You may contact me at 202-297-6100 with further questions.

Respectfully submitted,



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Issue	Example Lease Agreement Terms	Favorable to Landowners	FERC Regulation
Easement Scope			
Scope of Easement	Perpetual right, privilege, and easement to construct, maintain, operate, inspect, repair, replace, change the size of, relocate or remove a pipeline for the transportation of natural gas	Scope specified so the pipeline operator is limited in its activities on your property; Need new agreement to relocate/change the size of	
Type of Easement	No equivalent	Make sure the easement is specific, not a blanket easement	
Temporary Extra Workspace	Perpetual right, privilege, and easement to construct, maintain, operate, inspect, repair, replace, change the size of, relocate or remove a pipeline for the transportation of natural gas	Require another agreement if extra workspace is required including what damages will be covered as well as rent payment for the excess land	
Ingress/Egress	Right of ingress and egress to and from the facilities over and through the property	Right of ingress and egress on portions of the property should be limited in the agreement	
Width and Diameter	Right of way granted shall consist of a permanent width of X feet	State the overall width as well as how much feet on each side of the pipeline included	Construction right-of-way width for a project shall not exceed 75 feet or that described in the FERC application (UEC pg. 7)
Construction	No equivalent	Construction easement shall expire 24 months from date of this easement agreement, or upon completion of construction, whichever comes first (Timetable)	Maintain safe and accessible conditions at all road crossings and access points during construction. Minimize the use of tracked equipment on public roadways. Remove any soil or gravel spilled or tracked onto roadways daily or more frequent as necessary to maintain safe road conditions. Repair any damages to roadway surfaces, shoulders, and bar ditches (UEC pg.9)
Depth	Pipeline shall bury the pipe for the pipeline to provide a minimum cover of thirty-six inches	Deeper depth is better. Local regulation can call for a deeper depth. Deeper depths necessary for agricultural use – IADD Pipeline Standards	No FERC standard for depth, but must follow recommendations in the EA. Pipeline safety regulations require 30-36 inch minimum 49 CFR § 192.327

Structures over Easement	May not construct permanent structures, plant trees or any plants higher than 5' at maturity	Specific limitations of what may be used or planted on the easement area	
Surface Facilities	No equivalent	Number and location of required surface facilities	
Additional Pipelines	Pipeline has the right from time to time to install additional pipelines within the width of the permanent easement granted herein	Negotiate for one pipeline at a time. Require new agreement for new additional pipeline	
Ongoing Activities			Vegetation covers established on right-of ways should be properly maintained; Access and service roads should be maintained with proper cover, water bars and the proper slope to minimize soil erosion. They should be jointly used with other utilities and land-management agencies where practical 18 CFR 380.15 (f)(1-2)
Remediation			
Restoration	Pipeline shall restore any and all parts of the property disturbed by the construction to a condition equal to or better than existed prior to construction	Make sure includes areas disturbed that were not in the easement area. Also must be done to grantors specifications	Commence cleanup operations immediately following backfill operations. Complete final grading, topsoil replacement, and installation of permanent erosion control structures within 20 days after backfilling the trench (10 days in residential areas). If seasonal or other weather conditions prevent compliance with these time frames, maintain temporary erosion controls (i.e., temporary slope breakers, sediment barriers, and mulch) until conditions allow completion of cleanup Grade the construction right-of-way to restore pre-construction contours and leave the soil in the proper condition for planting.

			(UEC pg. 12)
Soil	Segregating topsoil removed and replacing topsoil and sub-soils. “Double ditch” method	Good for Landowner	Unless the landowner or land management agency specifically approves otherwise, prevent the mixing of topsoil with subsoil by stripping topsoil from either the full work area or from the trench and subsoil storage area (ditch plus spoil side method) In residential areas, importation of topsoil is an acceptable alternative to topsoil segregation. (UEC pg.8)
Revegetation			Restore all turf, ornamental shrubs, and specialized landscaping in accordance with the landowner’s request, or compensate the Landowner. Restoration work must be performed by personnel familiar with local horticultural and turf establishment practices. (UEC pg.15)
Use of Pesticides	Use of herbicides approved by the State of X or the United States Environmental Protection Agency	Landowner specify which pesticides may be used	
Liability			
Insurance		State specific nominal amount of insurance required	
Hold Harmless	Pipeline will indemnify, hold harmless and defend the grantor, except when damage/claim caused by complete negligence of the landowner.	Good for landowner	
Environmental Issues	Pipeline shall be responsible for an timely pay all costs of clean-up, remediation, and other costs related to and arising from toxic, hazardous or polluted material being released	Good for landowner	
Dispute Resolution	Disputes as to damages shall be submitted to arbitration with each party	Alternate dispute resolution: such as FERC dispute resolution or Pipeline should pay arbitration expenses	

	paying equal arbitration costs, regardless of outcome		
Miscellaneous			
Consideration	$X and other valuable consideration	State what other valuable consideration is; price per foot	
Assignability	Successors and assigns (runs with the land)	Only for that pipeline company, any future owner needs additional approval	
Contractors Identity	No equivalent	Identify all contractors and subcontractors that will be on the property	
Streams/Water	Any streams located on or across the easement shall be maintained in a matter that flow is not disrupted	Good for landowner	
Safety Fence	May install a safety fence to protect the pipeline (Not standard to FERC pipeline easements)	If have children or animals may need a specific type of protective fence	
Taxes		Pipeline shall assume, pay and reimburse the landowner for any taxes associated with the pipeline/easement	
Reports	No equivalent	Pipeline shall provide, upon request, complete reports and results from any pipeline-related testing's within 5 miles of the property	Test topsoil and subsoil for compaction at regular intervals in agricultural and residential areas disturbed by construction activities. Conduct tests on the same soil type under similar moisture conditions in undisturbed areas to approximate preconstruction conditions. Use penetrometers or other appropriate devices to conduct tests. (UEC pg.14)
Local Laws	Pipeline shall, at its own expense, comply with all applicable laws and regulations	Good for landowner	
Termination	No equivalent	If construction is not complete or pipeline is not utilized in a certain period of time there should be means to terminate the agreement	
Contact Person	No equivalent	Identification of an actual person at the pipeline company that the landowner can contact, with immediate notice to landowner if that person is replaced	
Substances in Pipeline	For the transportation of gas or other products	Definition of substances that can be transported in the pipeline; including whether gas is scented or unscented	Natural Gas Act § 7(h) does not authorize the pipeline to acquire a

			right-of-way to transport a commodity other than natural gas
Trees	Pipeline shall have the right to cut and to keep clear all trees, bushes and other obstructions that may endanger or conflict with the construction operation	Require payment and permission for trees, crops, etc. damaged during installation of the pipeline	For all properties with residences located within 50 feet of construction work areas, project sponsors shall: avoid removal of mature trees and landscaping within the construction work area unless necessary for safe operation of construction equipment, or as specified in landowner agreements (UEC pg. 6)

Right-of-way through Federal Land	**30 U.S. Code § 185 Regulation of the Issue**
Grant of Authority	Granted by Secretary of the Interior or appropriate agency head
Definition: Federal Lands	All lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf
Width Limitation	Shall not exceed fifty feet plus the ground occupied by the pipeline unless the Secretary or agency head finds, and records the reasons for his finding, that in his judgment a wider right-of-way is necessary
Temporary Permits	Right-of-way may be supplemented by temporary permits for the use of Federal lands in the vicinity of the pipeline as the Secretary or agency head finds are necessary
Environmental Protection	Secretary or agency head, prior to granting a right-of-way or permit for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit
Disclosure	If the applicant is a partnership, corporation, association, or other business entity, the Secretary or agency head shall require the applicant to disclose the identity of the participants in the entity
Technical and financial capability	Secretary or agency head shall grant a right-of-way or permit under this section only when he is satisfied that the applicant has the technical and financial capability to construct, operate, maintain, and terminate the project for which the right-of-way is requested The holder is required to pay in advance the market rental value fee for the rights and privileges granted pursuant to each authorization
Public Hearings	The Secretary or agency head shall establish procedures, including public hearings where appropriate, to give Federal, State, and local government agencies and the public adequate notice and an opportunity to comment upon right-of-way applications
Reimbursement of Costs	The applicant for a right-of-way shall reimburse the United States for administrative and other costs incurred in processing the applicant, and the holder of the right-of-way shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline

Bond	Where he deems appropriate the Secretary or agency head may require a holder of a right-of-way to furnish a bond, or other security, satisfactory to the Secretary to secure all or any of the obligations imposed by the terms and conditions of the right-of-way
Duration of Grant	Each right-of-way granted shall be limited to a reasonable term in light of all circumstances concerning the project, but in no even more than thirty years
Suspension of right-of-way	If the Secretary or agency head determines that an immediate temporary suspension of activities within a right-of-way or permit area is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.
Joint use of right-of-way	Shall reserve to the Secretary or agency head the right to grant additional rights-of-way for compatible uses on or adjacent to rights-of-way granted
Common Carriers	Pipelines and related facilities authorized shall be constructed, operated, and maintained as common carriers
State Standards	The Secretary or agency head shall take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance
Reports	Secretary or agency head shall promptly notify the Committee on Natural Resources of the US House of Representatives and the Committee on Energy and Natural Resources of the US Senate upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way shall be granted until notice of intention to grant right-of-way has been submitted to such committees
Examination	At least once a year, the Secretary of the Dept. of Transportation shall cause the examination of all pipelines and associated facilities on Federal lands and shall cause the prompt reporting of any potential leaks or safety problems
Liability	The Secretary or agency head may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way; shall specify the extent to which such holders shall indemnify or hold harmless the United States for liability, damage, or claims arising in connection with the right-of-way
Termination	Suspension or termination of pipeline authorizations require an administrative proceeding