COMMENT

THE TANGLED WEB: REGULATION, INTERSTATE PIPELINE COMPANIES, AND DUE PROCESS RIGHTS OF PROPERTY OWNERS

I. SUMMARY

In May of 2002, a group of Illinois property owners (Property Owners) sued Natural Gas Pipeline Company of America (Natural) in the United States District Court for the Northern District of Illinois alleging that Natural violated their right to procedural and substantive due process when Natural installed a pipeline lateral without giving the Property Owners prior notice and an opportunity to be heard. Natural moved to dismiss arguing that: (1) The due process constraints of the Fifth Amendment of the United States Constitution were not applicable to a private entity; (2) If Natural owed the Property Owners notice and an opportunity to be heard, such process was not limited to a pre-deprivation hearing, therefore, the Property Owners could still seek post-deprivation remedies; and (3) Natural engaged in actions in accordance with its Blanket Certificate, which had been issued via a Federal Energy Regulatory Commission (FERC) order, so that the United States district court did not have the authority to hear the case.[1] The court denied Natural's motion.

This comment begins with a review of *Pavelich v. Natural Gas Pipeline Co. of America*. Following this synopsis is an examination of the *Pavelich* Property Owners' assertion that Fifth Amendment due process requirements could, and should, be imposed on an interstate pipeline company to whom powers of eminent domain have been delegated (a power traditionally reserved exclusively to the state) and whether such an interstate pipeline company had to recognize the procedural due process rights of property owners as though the pipeline company was the sovereign.

II. BACKGROUND AND STATEMENT OF THE CASE

Natural was, and currently is, the holder of a blanket certificate that the FERC issued over twenty years ago.[2] The blanket certificate automatically authorized Natural to install and operate delivery points and pipeline laterals, provided that the construction costs fell within price limitations set by the FERC.[3] Additionally, Natural retained the power to exercise eminent domain, pursuant to the Natural Gas Act,[4] by which Natural could obtain easements from property owners, if such easements could not be successfully negotiated. Acting pursuant to its FERC blanket certificate, Natural negotiated easements and subsequently began construction of a natural gas pipeline lateral in the Illinois towns of Zion, Wadsworth, and Russell,[5] but not without opposition.

On April 16, 2002, several Property Owners sued Natural in Illinois state

1. Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946, at *15 (N.D. Ill. Dec. 11, 2002) [hereinafter Pavelich I].

2. *Id.* at *15. *See also Natural Gas Pipeline Co. of Am.*, 10 F.E.R.C. ¶ 62,166 (1980).

3. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *15. *See also* 18 C.F.R. §§ 157.208(a), (d) (2003).

4. 15 U.S.C. § 717(f)(h) (2000).

5. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *1, *11 n.5.

court.[6] The Property Owners contended that Natural's acquisition of easements by threatening to exercise the pipeline company's eminent domain power and the subsequent installation of the pipeline lateral (as authorized by Natural's FERC-issued blanket certificate) constituted "governmental or quasi-governmental action."[7] Furthermore, the Property Owners asserted that the private entity's state action was subject to the due process limits of the Fifth Amendment to the United States Constitution,[8] and that Natural violated those limits by failing to give the Property Owners an opportunity to address concerns about safety and diminution in the value and quiet enjoyment of their properties.[9]

Natural subsequently filed a Rule 12(b)(6) Motion to Dismiss, arguing that the Property Owners had failed to state a claim for which relief could be granted because:

> (1) [P]laintiffs cannot assert a due process claim because Natural is a private company, not a government actor; (2) plaintiffs have not been deprived of due process because they had other meaningful remedies; and (3) plaintiffs cannot make an impermissible collateral attack on the FERC's Blanket Certificate provision because they failed to timely intervene and properly appeal any rules promulgated by the FERC.[10]

III. ANALYSIS

A. The Imposition of Government Status on a Private Entity

The Fifth Amendment of the United States Constitution provides that, "No person shall be . . . deprived of . . . property, without due process of law . . . ."[11] The U.S. Supreme Court has held,

> Since the decision of the Court in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[12]

Thus, the protection the Due Process Clause provides is limited to those actions directed against individuals by a government authority.

While the Due Process Clause of the Fifth Amendment typically does not restrict a private entity's activities, if the entity's actions equate to those of a

---

6. The case was subsequently moved to federal court on the basis of federal question jurisdiction. Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946, *1 (N.D. Ill. Dec. 11, 2002).

7. *Id.* at *7.

8. The court "construe[d] plaintiffs' complaint as alleging violations of the Fifth, not Fourteenth, Amendment, as the only alleged governmental entity [was] the federal government, to which the Fifth Amendment Due Process Clause applies." *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *3 n.1.

9. *Id.* at *5. The Property Owners sought an injunction, which would prevent the operation of the pipeline, or in the alternative, the removal of the lateral because of the failure of Natural to give the plaintiffs the right to due process.

10. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *5–*6.

11. U.S. CONST. amend. V, XIV.

12. Shelley v. Kramer, 334 U.S. 1, 13 (1948) (citation omitted).

government actor this immunity may be lost.[13] As seen in *Pavelich I*, the court noted that in order "to succeed on their procedural due process claim, [the Property Owners] must show that Natural was acting as a government actor."[14] The court's analysis of whether government actor status could be imposed on Natural consisted of two considerations: (1) Whether the status of a government actor could be placed on Natural because of its authority to install the pipeline under its FERC-issued blanket certificate; and (2) Whether Natural's exercise, or threat of the use, of the power of eminent domain could establish that Natural had acted as a government actor.

1. The Authority Granted Under the FERC-issued Blanket Certificate

In its consideration of whether Natural could be imposed with government actor status, the court relied on the 1993 Seventh Circuit opinion in *Sherman v. Community Consolidated School District.*[15] In *Sherman*, the court identified four situations where the judiciary has traditionally found that actions of the private entity constituted state action requiring those persons affected by the private entity's actions be given due process protections: (1) A symbiotic relationship existed between the state and the private entity; (2) The private entity's conduct was achieved by using state provisions (the court system); (3) The state encouraged the private activity; and (4) The private entity carried on a traditional state function.[16] The *Pavelich* court determined the fourth test of 'traditional state function' was applicable to the principle case, based on the Property Owners' argument that Natural's authority to install the pipeline pursuant to the FERC-issued blanket certificate constituted "governmental or quasi-governmental action."[17]

In considering the 'traditional state function' test, the *Pavelich* court turned to *Jackson v. Metropolitan Edison Co.*[18] where the U.S. Supreme Court considered whether a privately owned utility company, the subject of "extensive state regulation,"[19] was a state actor when it terminated a customer's utility service. "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities."[20] Rather, the key to the determination of whether a private entity's actions could be equated to those of the state was "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[21]

13. Sherman v. Consol. Sch. Dist., 8 F.3d 1160 (7th Cir. 1993).

14. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *6.

15. *Sherman*, 8 F.3d at 1168–69.

16. *Id.* at 1168–69.

17. *Sherman*, 8 F.3d at 1168–1169.

18. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

19. *Id.* at 350 (quoted in Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946, at *8 (N.D. Ill. Dec. 11, 2002)).

20. *Jackson*, 419 U.S. at 350–351.

21. *Id.* at 351. *See also Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *8–*9 (quoting *Jackson*). Among

Applying *Jackson* to the *Pavelich* facts, the court ruled that the Property Owners' complaint did not state a claim based on the presence of federal regulation, but that Natural's function as a supplier of natural gas could support the Property Owner's claim. Thus, the court declined to impose government actor status on Natural based on the idea that Natural's authority to install the pipeline lateral as authorized by its FERC-issued blanket certificate constituted governmental or quasi-governmental activity.

2. Government Actor Status and the Power of Eminent Domain

The *Pavelich* court found that Natural could be imposed with the status of government actor because Natural reserved the power to exercise eminent domain to acquire easements when negotiations with landowners failed.[22] The Property Owners, in their response to Natural's Motion to Dismiss, conceded that Natural had not *actually* used eminent domain to obtain easements, but rather had *threatened* to use this power against the Property Owners if the Property Owners failed to voluntarily grant easements.[23]

In *Jackson*, the power of eminent domain was identified as a 'traditional government function.' In fact, the *Pavelich* court quoted *Jackson* in its consideration of whether Natural could be deemed a government actor based on Natural's power to exercise eminent domain for the obtainment of easements: "If we were dealing with the exercise by [the utility] of some power delegated to it by the State which is traditionally associated with sovereignty, *such as eminent domain*, our case would be quite a different one."[24] The *Pavelich* court held that Natural had failed to offer a "principled basis for a distinction between a private actor who uses powers traditionally reserved to the government and one who merely threatens to use such powers to effectuate the same purpose."[25] Thus, the court denied Natural's motion to dismiss based on the argument that it was not a government actor.

B. Other Meaningful Remedies via a Post-Deprivation Hearing

The *Pavelich* court rejected Natural's argument that the availability of post-

---

the electric consumers' arguments for why status of state actor should have been imposed on the utility was (1) The idea that the state had given the utility monopoly status; and (2) Utility's provision of electricity was a public function. *See Jackson*, 419 U.S. at 350–352.

22. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *10–*11. *See also* 15 U.S.C. § 717(f)(h) (2000), entitled, "Right of eminent domain for construction of pipelines, etc." providing, in part,

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

23. Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946, at *10, *11 n.5 (N.D. Ill. Dec. 11, 2002).

24. *Id.* at *9 (emphasis added).

25. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *10–*11. The court also rejected Natural's argument that the Property Owners were challenging Natural's right to install the pipeline. Rather, the court found the the Property Owners were arguing that Natural had failed to provide an opportunity to be heard prior to the installation of the pipeline and were not arguing against Natural's authority to make such an installation.

deprivation remedies would satisfy the Property Owners' right to due process.[26] The court noted that the deprivation of a constitutionally protected interest was not unconstitutional; rather, it was the "deprivation of such an interest *without due process of law*[]"[27] that made the deprivation an unconstitutional one. Yet, the court held that whether or not post-deprivation procedural due process was appropriate for the Property Owners was a question of fact that was not decided in the Motion to Dismiss.

C. Improper Collateral Attack on a FERC Order

The court also rejected Natural's argument that the Property Owners' suit was a prohibited collateral attack on a FERC order. Natural had argued, to no avail, that its FERC blanket certificate authorized it to install delivery points and pipeline laterals in accordance with FERC rules and regulations, and any argument against its blanket certificate authority constituted an improper collateral attack on a FERC order.[28]

The court distinguished the Property Owners' argument as not an improper collateral attack on a FERC order, but rather that the Property Owners were asserting "they should have been afforded notice and an opportunity to be heard with respect to safety concerns about the project."[29] The court noted:

> Indeed, if Natural's arguments were true, plaintiffs would have been required to intervene in the proceeding by which the Blanket Certification was issued by the FERC well before they even had an idea that a pipe line was to be installed specifically on or near their properties if, indeed, notice is required at all under the regulations.[30]

---

26. *Id.* at *12–*15.

27. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *12 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)). In its analysis of whether procedural due process requirements have been met, the *Pavelich* court quoted four factors to be weighed, including,

> (1) 'the private interest that will be affected by the official action;' (2) 'the risk of an erroneous deprivation of such interest through the procedures used;' (3) 'the probable value, if any, of additional or substitute procedural safeguards;' (4) 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'

See id. at *12 (quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

28. Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946, at *15–*19 (N.D. Ill. Dec. 11, 2002). Natural argued it was automatically authorized to construct the pipeline because costs did not exceed $7.4 million as set forth in 18 C.F.R. § 157.211. 18 C.F.R. § 157.211(a)(1) (2003), entitled, "Automatic authorization," provides,

> "The certificate holder may acquire, construct, replace, modify, or operate any delivery point, excluding the construction of certain delivery point . . . if (i) [t]he natural gas is being delivered to, or for the account of, a shipper for whom the certificate holder is, or will be, authorized to transport gas; and (ii) The certificate holder's tariff does not prohibit the addition of new delivery points." Additionally, 18 C.F.R. § 157.208(a) (2003) also provides such automatic authorization in that, "[i]f the project cost does not exceed the cost limitations [as set forth by the FERC], or if the project is required to restore service in an emergency, the certificate holder is authorized to make miscellaneous rearrangements of any facility, or acquire, construct, replace, or operate any eligible facility. The certificate holder shall not segment projects in order to meet the cost limitations . . . ."

29. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *19.

30. *Id.*

IV. SUBSEQUENT SUMMARY JUDGMENT OF THE CASE

At the end of the opinion, the court challenged the Property Owners to clarify their theory of why due process obligations should be imposed on Natural, because the court could not discern whether they were "attacking the regulatory scheme which d[id] not provide them due process or seeking to impose a governmental due process obligation on Natural."[31] Although the Property Owners accepted the court's invitation and submitted a Second Amended Complaint, Natural responded with a Motion for Summary Judgment, which was granted.[32]

In granting summary judgment for Natural, the court held that "Natural need not seek any hearing, action, or approval so long as the blanket certificate requirements are met."[33] Additionally, Natural "could not seek case specific applications from the FERC and was required to use the authority granted to it under the blanket certificate."[34] Thus, the Property Owners' argument in their Second Amended Complaint that Natural's "decision to follow the 'truncated' blanket certificate that provides no notice or hearing instead of applying to the FERC or giving full landowner notice[]"[35] was rejected. At the end, the Property Owners had failed to explain how Natural, by following the authority granted to it by the FERC, had violated their right to due process.

The scenario presented in *Pavelich* resulted from Natural acting pursuant to the automatic authorization of its FERC-issued blanket certificate; specifically, that Natural had the authority to install a pipeline lateral that fell below the cost threshold set forth in Table I of 18 C.F.R. § 157.208(d).[36] Left open by these decisions was the method by which procedural due process could be provided to property owners when private pipeline companies, acting pursuant to FERC-issued blanket certificates, exercise (or threaten to exercise) the power of eminent domain. Should pipeline companies, acting pursuant to the automatic authorization of 18 C.F.R. § 157.208(a), be required to provide property owners

31. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946, at *20. The court noted that if the Property Owners were attacking the regulatory scheme, it was questionable whether Natural was the proper defendant; rather, the Property Owners should have argued the issue with the FERC. Also, the court indicated that if, in fact, the Property Owners were arguing that a governmental due process obligation should have been imposed on Natural, based on the allegation that the pipeline was installed via the power granted to Natural by way of the Blanket Certificate, and the power to use eminent domain, the Property Owners had not set forth a clear understanding of the basis for such an argument.

32. Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2003 U.S. Dist. LEXIS 17854 (N.D. Ill. Oct. 8, 2003) (hereinafter *Pavelich II*).

33. *Pavelich II*, 2003 U.S. LEXIS 17854, at *8.

34. *Id.*

35. *Pavelich II*, 2003 U.S. Dist. LEXIS 17854, at *8. (citations omitted). Specifically, the Second Amended Complaint alleged, "Had Defendant given full landowner notice under 18 C.F.R. § 157.203(d)(2), or had Defendant exercised its option under 18 C.F.R. § 157.201(d) to install its pipeline by applying to the [FERC] for a case-specific certificate of public convenience, Plaintiffs would have been given the pre-installation notice of hearing . . . but Defendant ignored these options provided by FERC regulations and instead chose to install its pipeline under a truncated blanket certificate procedure that contemplated no such notice and hearing." Plaintiff's Second Am. Compl. at para. 13, *Pavelich II*, (No. 02-C-3374).

36. This cost limit was $7.4 million at the time of the *Pavelich* lawsuit. *See* 18 C.F.R. § 157.208(d) (2003); Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946, at *17 (N.D. Ill. Dec. 11, 2002).

with the opportunity to be heard regarding the pipeline's activities, or should the FERC provide such due process to property owners?

V. SEEKING DUE PROCESS

The Property Owners' argument in *Pavelich I* was not that Natural lacked the authority to install the pipeline lateral, but rather that the Property Owners should have been allowed to voice their concerns about the safety of a pipeline lateral crossing their properties.[37] This reasoning brings to light an important consideration regarding constitutional rights: Should the private entity or the state have the responsibility of providing persons with notice and the opportunity to be heard when the private entity exercises the power of eminent domain (a traditional government power) and deprives property owners of their property?

As one court explained, "Minimal due process requires 'notice and an opportunity to be heard . . . 'granted at a meaningful time and in a meaningful manner' before a person may be finally deprived of his constitutionally protected interests."[38] However, as discussed below, there is a limited set of forums in which those subjected to a deprivation of property can voice their concerns.

A. *The Problems Posed by Section 157.208(a) Automatic Authorization*

FERC regulations provide that a blanket certificate holder is automatically authorized "to make miscellaneous rearrangements of any facility, or acquire, construct, replace, or operate any eligible facility" on the condition that the activities' costs do not exceed the pricing limitations the FERC has set forth.[39]

---

37. *Pavelich I*, 2002 U.S. Dist. LEXIS 23946. The property owners in *Pavelich* sought a forum in which to voice concerns regarding the safety of the installed lateral, and argued that their fears interfered with the quiet enjoyment of their property.

> While the pipeline company obviously has labored intensley to defend itself by attempting to show that the plaintiffs did not sustain significant monetary damages, this only misleads the court, since monetary damages are not sought. Whether the plaintiffs will ever be able to show a specific amount of diminution of value for their individual properties is meaningless. All they have to do is show that they had one or more protectible interest that was or were damaged. . . It is for that reason that the plaintiffs have called upon an MAI appraiser to give a reasonable estimate of the fact of their loss without asking him to do a complete appraisal and show the ultimate exact nature and the extent of their loss. In the setting of this case, such percision is irrelevant. This is made even clearer by the fact that the plaintiffs have sustained other significant and cognizable damages of a non-monetary nature. Mr. Pavelich's affidavit and deposition also demonstrate that the quiet enjoyment of his family home has been undermined by his fears of a pipeline explosion, fears heightened by internet information about pipeline catastrophes and repeated governmental warnings in the precarious post-911 period. Similar fears are indicated in the deposition of Mildred Corder . . . It cannot be said as a matter of law that a person stuck with a highly pressurized gas line right next door to his house has only ephemeral fears because as the exhibits to the complaint demonstrate, gas lines sometimes do explode. While the risk of an incident may be loaw, the extent of the damage that occurs when one does is immense. Fear of that immensity is not unreasonable, nor is it unwarranted.

Plaintiffs' Reply in Support of Their Cross-Motion for Summ. Judg. at 2–3, *Pavelich II* (No. 02-C-3374).

38. Denver Welfare Rights Org. v. Colo. Pub. Utils. Comm'n, 547 P.2d 239, 247 (Colo. 1976) (en banc).

39. 18 C.F.R. § 157.208(a) (2004). Table I of the regulations sets forth the cost requirement limitations according to calendar years. Additionally, 18 C.F.R. § 157.208(d) (2004) notes that the Table "shall be adjusted each calendar year to reflect the 'GDP implicit price deflator.'"

Whereas 18 C.F.R. § 157.208(b) requires certificate holders to file a notice with the FERC in order to carry out the construction, acquisition, operation, replacement, and miscellaneous arrangement of facilities exceeding the cost limit for automatic authorization provided in § 157.208(d), no such notice is required for activities meeting the requirements of § 157.208(a). Rather, § 157.208(a) automatic authorization occurs in those instances where the costs of construction of the pipeline lateral do not exceed expense limitation (cost threshold), with the result being that the certificate holder has authority to act without providing the FERC with prior notice of the holder's activities.[40]

Past FERC decisions reveal the Commission's general refusal to hear certificate holder proposals or requests when the Commission has previously granted a certificate holder authority to act under its blanket certificate.[41] The FERC's rationale for not hearing case-specific applications when automatic authorization has been granted to the blanket certificate holder is based on the idea of reducing the burden on the Agency:

> [W]e perceive no legal, policy or administrative purpose to be served by continuing to process applications for authority to perform transactions that the applicant has full authority to perform. The Commission has limited resources, and those resources are best allocated to the processing of applications whose grant or denial will have a meaningful and tangible effect on the service that can be rendered.[42]

In certain instances, property owners may voice their concerns to the FERC regarding the actions of the Agency or a certificate holder. For example, upon the initial issuance of a blanket certificate, a property owner may seek a hearing with the FERC within thirty days.[43] Also, federal regulations[44] require that the affected landowners be given notice and the opportunity to file protests with the FERC prior to a certificate holder engaging in an 18 C.F.R. § 157.208(b) activity. Finally, pipeline companies acting pursuant to the automatic authorization of 18 C.F.R. § 157.208(a) (e.g., installation of a pipeline lateral that falls below the cost threshold) must make a good faith effort to notify affected landowners at least thirty days "prior to commencing construction or at the time it initiates easement negotiations, whichever is earlier."[45] The notice must

40. Instead, the certificate holder must file annual reports with the Commission concerning activities taken. *See* 18 C.F.R. §§ 157.207, 157.208(e).

41. *S. Natural Gas Pipeline Co.*, 50 F.E.R.C. ¶ 61,081 (1990) (dismissing blanket certificate holder's case-specific application request because certificate holder had authority to act under certificate); *Panhandle E. Pipe Line Corp.*, 80 F.E.R.C. ¶ 61,193 (1997) (noting the FERC's policy of not granting case specific authorization when such authority has already been granted to the certificate holder); *Tenn. Gas Pipeline Co.*, 43 F.E.R.C. ¶ 61,042 (1988) (refusing to grant case-specific applications for transport of natural gas when pipeline companies when blanket certificates had previously granted such authority), *aff'd*, Tenn. Gas Pipeline Co. v. FERC, 898 F.2d 801 (D.C. Cir. 1990). *See also Gas Transport, Inc.*, 50 F.E.R.C. ¶ 62,013 (1990); *Midwestern Gas Transmission Co.*, 85 F.E.R.C. 61,358 (1998); *Fla. Gas Transmission Co.*, 77 F.E.R.C. ¶ 61,054 (1996); *Koch Gateway Pipeline Co.*, 72 F.E.R.C. 61,006 (1995); *ANR Pipeline Co.*, 71 F.E.R.C. 61,289 (1995); *Williams Natural Gas Co.*, 70 F.E.R.C. ¶ 61,306 (1995).

42. *Tenn. Gas Pipeline Co.*, 43 F.E.R.C. ¶ 61,042, 61,126 (1988).

43. *See* Natural Gas Act, 15 U.S.C. § 717r(a) (2000).

44. 18 C.F.R. § 157.203 (2004).

45. 18 C.F.R. § 157.203(d)(1) (2004). "Affected landowners" includes:

> [O]wners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property:

comply with specific requirements, including, at a minimum: a description of the construction project; contact information for a pipeline company representative who can knowledgably discuss the project with a concerned citizen; and the phone number to the FERC's enforcement hotline, as well as a description of the hotline's procedures.

In implementing the notice requirement and Enforcement Hotline, the FERC stated, "[T]he Commission believes that many of the activities performed under the pipeline's blanket construction certificate authorization require that the pipeline notify the affected landowners . . . we believe that the landowners deserve the opportunity to air their views and concerns regarding the activity proposed for their property."[46] The FERC Enforcement Hotline allows a landowner to voice concerns to the FERC, and the Commission's Staff may attempt to resolve the dispute on an informal basis.[47] A landowner seeking a formal resolution to a complaint "is not precluded from filing a formal action with the Commission if discussions assisted by Hotline Staff are unsuccessful at resolving the matter. A caller may terminate use of the Hotline procedure at any time."[48]

Indeed, the Enforcement Hotline provides a method by which property owners may voice their concerns regarding a pipeline company's blanket certificate activity. However, it is questionable if the Hotline serves to provide property owners with the opportunity to be heard "at a meaningful time and in a meaningful manner"[49] so as to afford the property owners with due process when the owners voice concerns regarding § 157.208(a) activity. Section 157.208(b) actions must receive case-specific FERC approval, and in addition to using the Hotline to voice concerns, property owners may file official protests in accordance with § 157.205. Therefore, property owners affected by § 157.208(b) activity have the opportunity to have their concerns considered by the FERC prior to authorization of the blanket certificate activity. However, property owners affected by § 157.208(a) are limited to calling the Hotline to complain about safety concerns with the knowledge that, although the FERC Staff will listen to their informal complaints, the FERC will not review the §

(i) Is directly affected (i.e., crossed or used) by the proposed activity, including all facility sites, rights-of-way, access roads, pipe and contractor yards, and temporary workspace;

(ii) Abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of the proposed construction work area;

(iii) Contains a residence within one-half mile of proposed compressors or their enclosures or LNG facilities; or

(iv) Is within the area of proposed new storage fields or proposed expansions of storage fields, including any applicable buffer zone.

18 C.F.R. 157.6(d)(2) (2004).

46. Order No. 609, *Landowner Notification, Expanded Categorical Exclusions, and Other Environmental Filing Requirements*, [REGS. PREAMBLES 1996–2000] F.E.R.C. STATS & REGS. ¶ 31,082, 30,956–57, 64 Fed. Reg. 57,374 (1999).

47. 18 C.F.R. § 1b.21(b) (2004).

48. 18 C.F.R. § 1b.21(e) (2004).

49. Mathews v. Eldridge, 424 U.S. 319 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

157.203(a) blanket certificate actions because of the FERC's policy of not reviewing automatically authorized activities.

The property owners' complaints to the Commission concerning a pipeline company's impending § 157.208(a) activity fall on 'deaf ears,' in that the Commission does not grant case-specific reviews of automatically authorized activities. Section 157.208(a) provides mechanisms for meeting the first component of procedural due process (notice), but the second component (opportunity to be heard in a meaningful manner) fails.[50] As discussed below, property owners have limited options in pursuing the right to be heard when the pipeline company has acted pursuant to § 157.208(a) authorized blanket certificate authority, and any case specific applications made to the FERC by the pipeline company requesting authorization to act pursuant to § 157.208(a) would result in unnecessary redundant Agency action.

B. The Limits of Due Process in Eminent Domain Proceedings

The construction of a pipeline lateral will require that the certificate holder obtain easements to property. If the certificate holder cannot acquire the necessary easements by successfully negotiating with the property owners, the certificate holder has the authority, pursuant to the Natural Gas Act, to exercise the power of eminent domain by initiating court proceedings.[51] However, the hearings afforded property owners in eminent domain proceedings are designed to ensure that the landowners are properly compensated for the loss of their property.[52] As discussed below, these hearings are not the arena in which property owners may voice concerns regarding FERC orders (i.e. activities authorized pursuant to blanket certificates).

The federal courts play two different roles in the pipeline installation process. The district courts may hear certain eminent domain cases,[53] whereas the appellate courts have jurisdiction to hear the aggrieved property owners when an issue arises concerning an agency's order.[54]

From a general perspective of the appropriateness of delegating the power of eminent domain to a private entity, the courts have supported such delegation. For instance, the court in *Williams v. Transcontinental Gas Pipe Line Corp.* discussed two guiding principles concerning a court's refusal to consider the

50. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See generally Mathews*, 424 U.S. at 319.

51. *See* Natural Gas Act, 15 U.S.C. § 717f(h) (2000) providing:

> When any holder of a certificate of public convenience and necessity . . . is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. . . Provided, that the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $ 3,000.

52. *See infra* note 63 and accompanying text.

53. *Id.*

54. 15 U.S.C. § 717r(b) (2000).

necessity of an entity's eminent domain action.[55] First, the action must be for "a valid public purpose to be furthered by condemnation[.]"[56] Importantly, "a determination by the condemnor of the necessity of a certain taking to carry out the public purpose is conclusive and cannot be examined by the Court."[57] As applicable to the pipeline company, the district court will not review whether or not the taking is needed because the pipeline company's determination of this need is conclusive.[58]

Secondly, "when the Legislature [or Congress] provides for the taking of private property for a public use it may either prescribe specifically the property that may be taken, or delegate that determination to the agency, whether public or private, which is charged with developing the public use."[59] Congress has chosen the latter method by delegating the power of eminent domain to FERC-governed blanket certificate holders.[60]

1. The Role of Federal District Courts

The potential administrative burden on the FERC prevents the Commission from providing case-specific hearings, thus failing to give the property owners the opportunity to voice their concerns regarding the safety of the pipeline's authorized activity. Yet, neither do federal district courts have the ability to hear the property owner's arguments regarding the safety of the installed pipeline lateral. Instead, the district courts have a limited role: providing the property owners with the opportunity to be heard regarding the condemnation and fixing of compensation for the taking of their private property for public use. This due process arena does not allow the property owners to argue safety concerns of the pipeline company's activities. In *Williams Natural Gas Co. v. City of Oklahoma City*,[61] the court opined:

> [T]he eminent domain authority granted the district courts under . . . 15 U.S.C. § 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function under the [Natural Gas Act] is not appellate but, rather, to provide for enforcement.[62]

More specifically, the courts have held that their role in eminent domain proceedings is not to provide a property owner the right to be heard regarding the installation of the pipeline, but rather "to order condemnation in accordance with a FERC certificate."[63] The property owners' due process during the

55. Williams v. Transcon. Gas Pipe Line Corp., 89 F. Supp. 485, 489 (W.D.S.C. 1950).

56. *Id.*

57. *Transcon. Gas Pipe Line Corp.*, 89 F. Supp. at 489.

58. *See id.*

59. *Transcon. Gas Pipe Line Corp.*, 89 F. Supp. at 489.

60. 15 U.S.C. § 717f(h) (2000).

61. Williams Natural Gas Co. v. City of Okla. City, 890 F.2d 255 (10th Cir. 1989).

62. *Id.*

63. Kan. Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land, 210 F. Supp. 2d 1253, 1256 (D. Kan. 2002) (citing Williams Natural Gas Co. v. City of Okla. City, 890 F.2d 255 (10th Cir. 1989)). *See also* Guardian Pipeline L.L.C. v. 529.42 Acres of Land, 210 F. Supp. 2d 971 (N.D. Ill. 2002) (observing that a district court is limited to the determination of scope of a blanket certificate ordering property condemnation in accordance with the certificate).

condemnation proceedings is limited to determining compensation for the taking of their property; thus, the eminent domain proceeding is not the forum in which property owners may voice their concerns and potentially obtain relief regarding whether the installed pipeline lateral is appropriate or a safe route.[64] To hold otherwise would result in an improper collateral attack on a FERC order.[65] Thus, in those instances in which the cost of the installation of the pipeline lateral is below the cost threshold as set forth in 18 C.F.R § 157.208(d), the district court's jurisdictional role is limited to determining the compensation cost in eminent domain proceedings. The district courts do not have the power to determine the appropriateness of the pipeline's actions taken pursuant to its blanket certificate.

2. The Role of Federal Appellate Courts

In some instances, the federal circuit courts may provide relief for the property owner. The certificate holder is required to seek prior FERC approval pursuant to 18 C.F.R. § 157.208(b) when the cost of the pipeline installation exceeds the threshold set forth in 18 C.F.R. § 157.208(d). This request for approval includes publishing the notice of the application in the Federal Register, providing a forty-five day deadline for the filing of protests.[66] The FERC will treat the certificate holder's request to act as an application "for section 7 [of the Natural Gas Act] authorization for the particular activity"[67] if the protests are not withdrawn within thirty days or resolved.

The Natural Gas Act grants the federal circuit courts the authority to review a FERC order,[68] provided that the aggrieved party exhausts administrative remedies by applying for a rehearing of the FERC order and petitioning the court within sixty days after the FERC's ruling on the application for rehearing.[69] However, this review only includes activities that require case-specific applications and approvals and fails to encompass automatically authorized activities under 18 C.F.R. § 208(a).

VI. THE PIPELINE COMPANY AS A STATE ACTOR

The administrative burden that case-specific applications would place on the FERC, the limited jurisdiction of the federal district courts in eminent domain proceedings, and the timing issue of filing a petition with a federal circuit court when a blanket certificate is the source of a pipeline company's authority to act all point to one possible resolution for property owners' due process dilemma—the pipeline company having the only opportunity to provide

64. *See* Williams v. Transcon. Gas Pipeline Corp., 89 F. Supp. 485, 488 (W.D.S.C. 1950), in which the court stated, "All that is required is that [the procedure] shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, *and to be heard thereon*," (quoting United States v. Jones, 109 U.S. 513 (1883)) (emphasis added).

65. *See* Pavelich v. Natural Gas Pipeline Co. of Am., No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946 at *19 (N.D. Ill. Dec. 11, 2002). *See also* Natural Gas Act, 15 U.S.C. § 717r(a) (2000) (providing applicable federal circuit courts with the authority to hear collateral attacks on FERC orders).

66. 18 C.F.R. § 157.205(d) (2004).

67. 18 C.F.R. § 157.205(f) (2004); *see also* Natural Gas Act, 15 U.S.C. § 717f (2000).

68. 15 U.S.C. § 717r(b) (2000).

69. *Id.* § 717r(a)–(b).

true procedural due process to the affected property owners. However, only a state entity can be required to provide a person deprived of constitutional rights with notice and the opportunity to be heard.[70] This was explained by the U.S. Supreme Court in *Blum v. Yaretsky*: "The Fourteenth Amendment [and its federal counterpart of the Fifth Amendment] erects no shield against *merely private conduct*, however discriminatory or wrongful."[71] The only circumstance in which a blanket certificate holder may be obliged to provide due process to property owners is if the certificate holder is imposed with the status of state actor.

A. Under Color of State Law

1. The Intertwining of Governmental Policies and Private Activities

The line between 'private' and 'state' action blurs when the two commingle. When a private actor exhibits state power, the *Yaretsky* idea of 'merely private conduct' becomes problematic.[72] *Stanford v. Gas Service Co.* explained, "'What is 'private' action and what is 'state' action is not always easy to determine. Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action . . . .'"[73] In effect, a private entity can operate under color of state law.

Such commingling often arises in the context of public utilities. For instance, in *Stanford v. Gas Service Co.* the court determined that a public utility (a local gas distribution company) was a state actor, operating under color of state law as set forth under the Civil Rights Act.[74] Several factors guided the *Stanford* court. First, the applicable state statute, which empowered the state regulatory agency with governance over public utilities and common carriers, was a broad power and grant of authority.[75] Second, the public utility could operate as a business in the state only upon the approval of the state agency.[76] Third, the agency had been granted broad powers of enforcement that would allow it to "compel all regulated bodies to comply with the [statute] and [state agency] orders."[77] Fourth, because the public utility was governed by the statute and the agency and was subject to "extreme regulation" the utility had "tended to

70. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978), where the court noted "while any person with sufficient physical power may deprive a person of his property, only a State or private person whose action 'may be fairly treated as that of the State itself,' may deprive him of 'an interest encompassed within the Fourteenth Amendment's protection.'"

71. Blum v. Yaretsky, 457 U.S. 991, 1002 (1982) (emphasis added).

72. *Id.*

73. Stanford v. Gas Serv. Co., 346 F. Supp. 717, 721–22 (D. Kan. 1972) (quoting Evans v. Newton, 382 U.S. 296 (1966)) (citations omitted).

74. *See generally* 42 U.S.C. § 1983 (2000) (providing a private cause of action against an entity that has deprived a plaintiff of his/her right to due process where such deprivation occurred 'under color of law').

75. *Stanford*, 346 F. Supp. at 721.

76. *Id.*

77. *Stanford*, 346 F. Supp. at 721.

lose its private character."[78] Fifth, the court found that the public utility and other such similarly situated entities were allowed to engage in monopolistic behavior by providing "an essential commodity to the citizens of this and other states whose rates, method of and right to do business are solely under state control."[79] The court concluded that "[s]uch public utilities, beyond question, perform public functions in the public interest under public regulation. As such, they are subject to constitutional restraint."[80]

The *Stanford* court's reasoning could just as easily apply to pipeline companies holding blanket certificates: the Natural Gas Act grants broad authority to the FERC to regulate interstate pipeline companies, pipeline companies can only enter the interstate field if the FERC grants a certificate of necessity and convenience, the FERC has broad enforcement authority, and the transportation and associated activities of interstate pipelines serve public and national interests.[81]

The fact that an entity is regulated, or that such regulation is "extensive and detailed, as in the case of most public utilities" [82] does not automatically give rise to the labeling of state actor to all regulated utilities. Rather, the *Jackson* court explained the determination of state action must be based on "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[83] Unlike *Jackson*, the Property Owners in *Pavelich* were not arguing the termination of service by a utility was state action, but rather, that the threatened use of eminent domain gave rise to state action. Such exclusively sovereign power establishes such a close nexus between the state and the challenged action that the pipeline's use of its eminent domain authority equates to state action.

2. Utilities as State Actors

That public utilities are creatures of state or federal law was also discussed in *Denver Welfare Rights Organization v. Public Utilities Commission*, where the plaintiffs challenged a rule issued by the state public utilities commission (PUC) that allowed for discontinuance of certain utility services, arguing that the rule violated federal and state procedural due process rights. In *Denver Welfare*, the Colorado Supreme Court noted that privately owned public utilities, "operating pursuant to the regulation of the [state agency], are granted existence by virtue of State law . . . and thereafter carry on business under color of State law."[84] Furthermore, the PUC had adopted rules regarding the procedures utility companies must follow prior to termination of a customer's service. By adopting

78. *Id.* at 722.

79. Stanford v. Gas Serv. Co., 346 F. Supp. 717, 722 (D. Kan. 1972).

80. *Id.*

81. *See* Thatcher v. Tenn. Gas Transmission Co., 180 F.2d 644 (5th Cir. 1950).

82. Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).

83. *See generally Jackson*, 419 U.S. at 345.

84. Denver Welfare Rights Org. v. Pub. Utils. Comm'n, 547 P.2d 239, 244 (Colo. 1976) (en banc).

these procedures, the state had "throw[n] its weight on the side of the rule[,]"[85] which brought the utility companies' actions pursuant to these rules within the bounds of state action. Thus, the "uninterrupted continuation of utility service"[86] was a constitutionally protected property interest, the termination of which by a utility company constituted state action that must be carried out in accordance with the procedural due process protection of the Fourteenth Amendment of the United States Constitution and the applicable requirements of the Colorado Constitution.[87]

Particularly, the court found:

> [T]he [PUC] is to exercise an informed discretion—notably meaning that some investigation of the dispute, even if informal, occurs prior to the time service is terminated. Investigation serves as a deterrent to arbitrary and capricious actions on the part of the utility company. This procedure . . . satisfies the minimal protections afforded by the Due Process Clause of the Fourteenth Amendment.[88]

FERC-regulated interstate pipelines are similar to the regulated entities that were the subject of the *Stanford* and *Denver Welfare* cases: the interstate pipeline companies are highly regulated; the construction, operation, and abandonment of pipelines in the interstate arena are subject to FERC approval, the pipeline companies' existence and operation are dependent upon federal statutes and regulations, and these entities are compelled to respond to the governance of the FERC. These factors, which were deemed to establish the utilities as state actors subject to the constraints of the Fourteenth Amendment, should also establish the FERC blanket certificate holders as state actors subject to the constraints of the due process requirements of the Fifth Amendment.

However, there is a distinguishing factor between the due process procedural rules promulgated by the PUC in *Denver Welfare* and the FERC's § 157.208(a) automatic authorization scheme. The utility companies in Colorado were required not only to give notice to customers prior to taking their property interest, but also to provide the customers with the opportunity to be heard.[89] Yet, the FERC's policies fail to provide similar due process protections.

Under the sound reasoning of these cases, where the regulated blanket certificate holder is acting pursuant to federal law and has been delegated the power to deprive property owners of a property right, the interstate pipeline companies should be required to provide the property owners with the opportunity to be heard prior to the initiation of eminent domain proceedings. Whether the courts or the FERC should require such procedural protections is

85. *Id.* at 245.

86. *Denver Welfare*, 547 P.2d at 243.

87. *Id.* at 242. The *Denver Welfare* court determined that the PUC's rule requiring that a written notice be submitted to the customer seven days prior to interruption of utility service and allowing the customer to make an informal complaint to the utility or request a formal hearing before the public utilities commission regarding the impending discontinuance of the utilities provided procedural due process protections to affected customers. *Denver Welfare*, 547 P.2d at 247.

88. *Id.*

89. The customer was also entitled to request a formal hearing before the PUC. Furthermore, the Commission was required to "set the matter for hearing at the earliest practicable time . . . ." Denver Welfare Rights Org. v. Pub. Utils. Comm'n, 547 P.2d 239, 248 (Colo. 1976).

considered below in this comment.

Although "many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"[90] This exclusive reservation of power by the state was considered in *Jackson*, in which the petitioner unsuccessfully sought to have state actor status imposed on an electric utility company that shut off service to the customer without providing notice and a hearing prior to the termination of her service. One basis for the petitioner's argument was that the utility company "provid[ed] an essential public service required to be supplied on a reasonably continuous basis [pursuant to state law]."[91] Though holding that the provision of service by the utility was not a state function, the Court noted certain entity actions that were "traditionally exclusively reserved to the State,"[92] and stated, "If we were dealing with the exercise by [the public utility] of some power delegated to it by the State which is traditionally associated with sovereignty, *such as eminent domain*, our case would be quite a different one."[93]

The *Pavelich* court was dealing with eminent domain, a power the U.S. Supreme Court has specifically identified as being traditionally exclusively reserved to the state.[94] As such, interstate pipeline companies vested with authority to exercise this state power should be required to provide property owners with their constitutional right to procedural due process by not only giving owners notice of the impending action, but also by providing the landowners with the opportunity to voice their concerns regarding the safety of the pipeline company's automatically authorized § 157.208(a) actions.

C. Eminent Domain Procedure

Eminent domain proceedings may be needed to obtain easements to meet a public utility obligation, and certainly good faith negotiation and settlement is preferable to litigation.[95] How much negotiation is required before beginning eminent domain proceedings is not clear, nor is it clear that negotiations provide due process protections to the property owners.

1. The "Requirement" of Good Faith

As one court explained, "If an agreement for the value of the property interest cannot be reached between the property owner and the pipeline builder, the holder of the certificate of public convenience must proceed to court [to exercise the right of eminent domain]."[96] The court's rationale was based on the

90. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

91. Jackson v. Metro. Edison Co., 419 U.S. 345 (1974). *See also* United States v. Jones, 109 U.S. 513 (1883) (stating that eminent domain is an occurrence of sovereignty).

92. *Jackson*, 419 U.S. at 352.

93. *Id.* at 352–53 (emphasis added). *See Pavelich v. Natural Gas Pipeline Co. of Am.*, No. 02-C-3374, 2002 U.S. Dist. LEXIS 23946 (N.D. Ill. Dec. 11, 2002) (holding a private pipeline company could be imposed with the status of state actor because the company had the power to exercise eminent domain pursuant to the Natural Gas Act).

94. *Jackson*, 419 U.S. at 352–53.

95. *See* discussion *supra* Part I.C.

96. Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276 (D. Kan. 1999).

plain language of the eminent domain provision of the Natural Gas Act.[97] Although the pipeline company must engage in negotiations, courts have taken different approaches as to the necessary extent of those negotiations.

In *Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land*, the plaintiffs contended that the pipeline company had failed to engage in *good faith* negotiations prior to initiation of eminent domain proceedings.[98] However, the *Kansas Pipeline Co.* court rejected the plaintiff's argument that such good faith negotiations were required, holding:

> The plain language of the [Natural Gas Act] does not impose an obligation on a holder of a FERC certificate to negotiate in good faith before acquiring land by exercise of eminent domain . . . . The statute only requires that the party seeking to condemn be unable to acquire the property by contract or unable to agree on compensation to be paid for the property. The court declines to demand more than the statute requires by its terms.[99]

Yet, as the *Kansas Pipeline Co.* court recognized, some federal district courts have recognized a good faith requirement. In *Tennessee Gas Pipeline Co. v. New England Power, C.T.L, Inc.* the court ruled in favor of FERC blanket certificate holder Tennessee Gas Pipeline, even though the pipeline company had "failed to settle with [C.T.L.] despite *good faith* negotiations . . . ."[100] Another court, in reviewing judicial construction of eminent domain authorities, noted "the [certificate] holder must engage in good faith negotiations with the landowner before it can invoke the power of eminent domain."[101]

The *Kansas Pipeline Co.* court was not swayed by the federal courts' apparent requirement of good faith, stating, "These courts gave no explanation why they adopted such a requirement. None of them refused to authorize condemnation [in eminent domain proceedings] because a holder of a FERC certificate failed to negotiate in good faith before seeking condemnation."[102]

2. The Appropriateness of the Route

Not only have the district courts held that their role in eminent domain proceedings is limited to determining the compensation to be given to the property owners, they have also noted a more pragmatic reason for not requiring that landowners be allowed to argue against the suitability of the chosen pipeline route—the fact that most property owners would make a case to prevent the installation of a pipeline on their land, contrary to national interest and economic efficiency.

---

97. Natural Gas Act, 15 U.S.C. § 717f(h) (2000).

98. Kan. Pipeline Co. v. A 200 by 250 Foot Piece of Land, 210 F. Supp. 2d 1253 (D. Kan. 2002).

99. *Id.* at 1257 (citing USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816 (E.D. Tenn. 1998); Transcon. Gas Pipe Line Corp. v. 118 Acres of Land, 745 F. Supp. 366 (E.D. La. 1990); Kern River Gas Transmission Co. v. Clark County, 757 F. Supp. 1110, 1113–14 (D. Nev. 1990)).

100. Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F. Supp. 2d 102 (D. Mass. 1998) (emphasis added).

101. Guardian Pipeline, L.L.C. v. 529.42 Acres of Land, 210 F. Supp. 2d 971 (N.D. Ill. 2002) (considering the eminent domain procedures of the Federal Rules of Civil Procedure R.71A and the Natural Gas Act 15 U.S.C. § 717r (2000) and citing Transcon. Gas Pipe Line Co. v. 118 Acres of Land, 745 F. Supp. 366, 369 (E.D. La. 1990)).

102. *Kan. Pipeline Co.*, 210 F. Supp. 2d at 1257.

In *Humphries v. Williams Natural Gas Co.*, the Kansas district court considered the landowner's argument that the pipeline company, which had violated eminent domain procedures by taking control of the land before initiation of eminent domain proceedings, could be liable under Kansas law for trespass, unlawful taking, and property damage. The court noted the purpose for which Congress enacted the eminent domain procedures of the Natural Gas Act:

> Congress intended § 717(f)(h) [of the Natural Gas Act] to create a procedure, if followed by the holder of a certificate of public convenience and necessity, which foreclosed the possibility that a disgruntled or financially motivated landowner could, directly or indirectly, grind construction of a pipeline to a halt by asserting state law claims against the holder of a certificate of public convenience and necessity.[103]

Similarly, in *Williams v. Transcontinental Gas Pipeline Corp.*, the court considered a landowner's argument that the pipeline company "should have run its line across the property of some one else, or crossed petitioners' property at a different place."[104] The court ruled in favor of the pipeline, stating:

> If a landowner, merely by showing that it was possible for a utility line or highway to avoid crossing his property, could compel the condemnor to relocate its line, no power line, railroad, pipe line, or highway could ever be located properly to serve the public . . . .[105]

VII. CONCLUSION

The most logical arena in which property owners could have the opportunity to be heard prior to § 157.208(a) activity is in a pre-deprivation hearing that the pipeline company provides.[106] While the landowners may make informal complaints to the FERC through its Enforcement Hotline, the Agency turns a deaf ear to formal complaints in respect of its policy to avoid the burden of case-specific applications.[107] Furthermore, the landowners lack the security of true judicial scrutiny. The jurisdiction of the federal district courts is limited to determining the compensation for property in eminent domain proceedings and does not encompass deciding the safety of a FERC order. Federal appellate courts, meanwhile, are limited to determining the validity of initial blanket certificate issuance within the timeframe set forth in the Natural Gas Act.[108]

Courts should treat the pipeline companies as state actors, in that the companies exercise eminent domain power traditionally exclusively reserved to the state, and their existence, operations, and actions are closely regulated. As state actors, pipeline companies should abide by the constitutional due process requirements of the Fifth Amendment. Thus, the companies should not be allowed to carry out § 157.208(a) automatically authorized activity or initiate eminent domain proceedings within the district courts without giving the

103. Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276, 1279 (D. Kan. 1999).

104. Williams v. Transcon. Gas Pipe Line Corp., 89 F. Supp. 485, 488 (W.D.S.C. 1950).

105. *Id.*

106. This paper does not consider the procedural due process protections provided by the pipeline safety regulations issued by the Office of Pipeline Safety.

107. Excluding applications for rehearing as required by the Natural Gas Act, 15 U.S.C. § 717r (2000).

108. Natural Gas Act, 15 U.S.C. § 717r(b) (2000).

property owners a pre-deprivation hearing in which the owners may assert safety issues regarding the installation of a pipeline lateral on their property. This hearing need not be formal, rather the property owners could be allowed to informally submit protests with the option of requesting a formal hearing; however, the representatives of the pipeline company who review the protests should have decision-making authority within the company, and should be able to objectively consider the agendas of both the landowners and the company.

Lauren Mohr