

FEDERAL OR FERC PIPELINE CONDEMNATION OR EMINENT DOMAIN

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Pursuant to the [Natural Gas Act](#) (“NGA”), the Federal Government regulates the transport and sale of natural gas “in interstate and foreign commerce.” § 717f(h) of the NGA, 15 U.S.C. § 717(f)(h), grants the right of eminent domain for construction of pipelines:

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, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, 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. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases where the amount claimed by the owner of the property to be condemned exceeds \$3,000.

The certificate of public convenience and necessity referred to in this section is issued by the Federal Energy Regulatory Commission (“FERC”), 15 U.S.C. § 717f(c). Before an oil and gas company can utilize eminent domain proceedings in order to construct a pipeline, it must obtain a certificate of public convenience and necessity from FERC. The procedure for obtaining a certificate from FERC is set forth in the NGA, 15 U.S.C. §§ 717f(c) through 717f(e), and its implementing regulations, 18 C.F.R. § 157.1 et seq.

In summary, the process begins with an application from the oil and gas company, which includes:

- (1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation, or otherwise; State under the laws of which organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed.
- (2) The facts relied upon by applicant to show that the proposed service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity.

- (3) A concise description of applicant's existing operations.
- (4) A concise description of the proposed service, sale, operation, construction, extension, or acquisition, including the proposed dates for the beginning and completion of construction, the commencement of operations and of acquisition, where involved.
- (5) A full statement as to whether any other application to supplement or effectuate applicant's proposals must be or is to be filed by applicant, any of applicant's customers, or any other person, with any other Federal, State, or other regulatory body; and if so, the nature and status of each such application.
- (6) A table of contents which shall list all exhibits and documents filed in compliance with 18 C.F.R. §§ 157.5 through 157.18, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in 18 C.F.R. §§ 157.14, 157.16, and 157.18 must be strictly adhered to and extra exhibits submitted at the volition of applicant shall be designated in sequence under the letter Z (Z1, Z2, Z3, etc.).
- (7) A form of notice of the application suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d) of this chapter.
- (8) For applications to construct new facilities, detailed cost-of-service data supporting the cost of the expansion project, a detailed study showing the revenue responsibility for each firm rate schedule under the pipeline's currently effective rate design and under the pipeline's proposed rates, a detailed rate impact analysis by rate schedule (including by zone, if applicable), and an analysis reflecting the impact of the fuel usage resulting from the proposed expansion project (including by zone, if applicable).

Notice of the application is filed in the Federal Register. Id. § 157.9. Notice to affected landowners is to be sent by certified or first class mail within three (3) business days following the date that FERC issues a notice of the application. 18 C.F.R. § 157.6(d)(1)(i). Intervention and protest are allowed, Id. § 157.10, and FERC conducts a public hearing on the application. Id. § 157.11. As part of its evaluation, FERC must also investigate the environmental consequences of the proposed project and issue an environmental impact statement. See 42 U.S.C. § 4332. At the end of the process, FERC issues a certificate if it finds that the applicant is properly able and willing to do the acts; perform the service proposed; conform to the provisions of the NGA and the requirements, rules and regulations of FERC; and if the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).[1] A final decision on the request for a certificate of public convenience and necessity is due no later than 40 days after FERC issues the final environmental document, unless a schedule is otherwise established by Federal law. 18 C.F.R. § 157.22.

The certificate of public convenience and necessity may include any terms and conditions that FERC deems "required by the public convenience and necessity." Id. § 157.20. Once FERC has issued a certificate, the NGA empowers the certificate holder to exercise the right of eminent domain over the lands needed for the project. 15 U.S.C. § 717f(h). See *E.Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004).

If the oil and gas company, who has obtained the certificate of public convenience and necessity, is unable to acquire the property rights it needs by contract, it may bring a condemnation action in federal district court for the district in which the property is located. 15 U.S.C. § 717f(h). In order to establish a right to condemn, the following elements must be proven:

1. The oil and gas company has been issued a certificate of public convenience and necessity;
2. The oil and gas company has been unable to acquire the needed land by contract or is unable to agree with the owner of the property on the compensation to be paid, and
3. The value of the subject property claimed by the owner exceeds \$3,000.

See Id. § 717f(h).

The NGA provides that “The practice and procedure in any action or proceeding for that purpose . . . shall conform . . . with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated.” Id. This state procedure requirement has, however, been superseded by Federal Rule of Civil Procedure No. 71.1. *Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.07 Acres, More or Less, in Monroe Township*, 2008 W.L. 4346405 (W.D. Pa. September 19, 2008). Federal Rule of Civil Procedure No. 71.1 governs the proceedings to condemn real and personal property by eminent domain except as may otherwise be provided in the rule.

When an eminent domain proceeding is commenced, the federal district court’s sole function under the NGA is to order condemnation in accordance with the FERC certificate. *William’s Natural Gas Co. v. City of Okla. City*, 890 F.2d 255, 264 (10th Cir. 1989). The district court lacks jurisdiction to review the validity and/or conditions of a FERC certificate. Id. at 262. Review of FERC certificates is within the exclusive jurisdiction of federal courts of appeals. Id. The eminent domain authority granted the district courts under § 7(h) of the NGA, 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 statute is not appellate, but, rather, to provide for enforcement. Id. at 264. Once the holder of a FERC certificate of public convenience and necessity asks a district court to enforce its right to condemn, the findings in the FERC certificate are treated as conclusive. *Kan. Pipeline Co. v. A 200 Foot By 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1255-1256 (D. Kan. 2002).

Federal Rule of Civil Procedure No. Rule 71.1 does not provide procedures for early possession or quick take; however, once the oil and gas company has established a substantive right to condemn the property, a federal district court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction pursuant to Federal Rule of Civil Procedure No. 65. This rule governs the granting of preliminary injunctions. *Transcontinental Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres*, 2017 WL 1105237 (M.D. Pa. March 24, 2017).

If you are threatened with an eminent domain action, you need to [talk with an oil and gas lawyer](#). We can assist you.

[1] For more specific information as to: [how to get involved in the FERC proceedings](#), [deciding whether to intervene in a FERC proceeding](#), [the planning process for obtaining a natural gas certificate](#), [the application process for obtaining a natural gas certificate](#), [the EIS Pre-Filing Environmental Review Process](#), [the EA Pre-Filing Environmental Review Process](#), and [the construction process](#), please see the attached information from the FERC website, www.ferc.gov.