

## Fact Sheet

### Process and Standards for Exercise of Federal Eminent Domain Authority Over Properties Within Approved Gas Pipeline Project

#### Overview

The Natural Gas Act, 15 U.S.C. §717 (the NGA), grants gas pipeline companies the ability, in conjunction with approvals from the Federal Energy Regulatory Commission (FERC) and the courts, to acquire property necessary for the development of gas pipelines through eminent domain (also known as “condemnation”).

Prior to exercising eminent domain, a gas pipeline company must receive approval of its project from FERC (known as a “certificate of public convenience and necessity”). The company may then petition the courts for an order granting it possession of the property in question and determining the compensation due the landowner.

#### Legal Background

Section 717(f) of the NGA states, in relevant 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, 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.*

In reviewing requests for the exercise of eminent domain, courts examine whether the pipeline company has a legal right to condemn the property in question. In demonstrating its right in a federal court, under 15 U.S.C. 717(f)(h) the company must show that:

- (1) it has been issued a certificate of public convenience and necessity;
- (2) the subject land is within the scope of the certificate;
- (3) it has been unable to acquire the needed land by contract with the property owners; and
- (4) the value of the subject property exceeds \$3,000.00.

#### Process

*Preemption.* Federal law preempts state law in condemnation proceedings, in both the substance and the process. Courts have held that federal condemnation procedures set forth in Federal Rule of Civil Procedure 71.1(h) apply in NGA condemnation actions.<sup>i</sup> One federal court has observed, “Congress, in the Natural Gas Act, had enacted a comprehensive scheme that preempted state law when the law was an obstacle to fulfillment of the NGA purposes.”<sup>ii</sup>

*Court filing and process.* Federal condemnation cases are initiated when a pipeline company files a complaint pursuant to Federal Rule of Civil Procedure 71.1 in federal district court. The complaint must contain:

- (1) the authority for the taking;
- (2) the uses for which the property is to be taken;
- (3) a description sufficient to identify the property;
- (4) the interests to be acquired; and
- (5) for each piece of property, a designation of each landowner defendant.

If the landowner has an objection, he or she must file an answer within 21 days after receiving notice of the action, stating objections and defenses to the taking. The court then considers whether the requirements for condemnation have been met and determines the compensation due to the landowner through a bench trial, trial by jury, or special commission. Just compensation covers only the value of the property taken.<sup>iii</sup>

*Immediate possession.* If its request is granted by the court, a pipeline company may be granted immediate possession in condemnation actions under the NGA, even if issues of compensation are not yet resolved. Some courts require a showing that the company will suffer irreparable harm without immediate possession.<sup>iv</sup>

### *Standards and Requirements*

*Extent of project eligible for eminent domain.* Eminent domain is available for any property that is deemed “necessary and integral” to an approved pipeline project, including underground gas storage facilities or required environmental mitigation projects.<sup>v</sup>

*Good faith negotiations.* Federal courts do not agree on the issue of whether the gas pipeline company must show that it negotiated in good faith with the property owner before filing for condemnation. The U.S. Court of Appeals for the First Circuit, which includes New Hampshire, has held that companies do not need to show good faith in their negotiations with land owners, as the language of the NGA does not include such a requirement.<sup>vi</sup> Therefore, a gas pipeline company need not prove that its negotiations with a property owner in New Hampshire were conducted in good faith to obtain the property through eminent domain.

*Compliance with FERC certificate conditions.* A pipeline company with a FERC-approved project may proceed with an NGA condemnation even if it has not yet complied with the pre-conditions of its FERC certificate, such as obtaining environmental permits. The only prerequisite for filing for condemnation is the company’s inability to acquire the land in question.<sup>vii</sup> The District Court of Rhode Island held that “absent a stay of the FERC order ... the lack of a required permit does not prevent condemnation of land in preparation for construction.”<sup>viii</sup> This holding was echoed by the District Court of New Hampshire in *Portland Natural Gas Transmission System v. 4.83 Acres of Land*, which reiterated that “a landowner cannot use a FERC certificate-holder’s alleged non-compliance with the conditions in the certificate to prevent a taking of private property by eminent domain.”<sup>ix</sup>

### *Summary*

Where a pipeline company has been granted a certificate of public convenience and necessity by FERC and has unsuccessfully approached a landowner to negotiate a purchase, it will likely be granted the right of eminent domain and may even have the right to obtain immediate possession of the land depending on the circumstances. Federal law governs any condemnation proceedings by a pipeline company and allows pipeline companies a great deal of control over land acquisition in cases where the property and the company’s proposed activity on that property are necessary and integral to the pipeline project.<sup>x</sup>

<sup>i</sup> See e.g. *Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land in Springville*, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000) (holding that "Rule 71A supersedes the practice and procedure clause of section 717f(h) and that it is federal, not state, procedural law that governs the present condemnation proceeding"). See also *Guardian Pipeline, LLC v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002) (holding that federal law preempted state law with respect to the pipeline project, so the fact that some of the easements were on state land was not a defense); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (holding that Michigan Act 144 was preempted by federal regulations promulgated by FERC pursuant to the Natural Gas Act, as Act 144 impinged on the field occupied by the federal regulatory scheme); *Tennessee Gas Pipeline Co., v. Massachusetts Bay Transp. Auth.*, 2 F. Supp. 2d 106, 111 (D. Mass. 1995) (rejecting defendant's claim that state statute prevented the taking of property within a local railroad and holding that the NGA "occupies the field" in the area of natural gas regulation, including both rates and facilities). But see *Humphries v. Williams Natural Gas Co.*, 48 F. Supp. 2d 1276, 1282 (D. Kan. 1999) ("In short this court does not believe that Congress intended the condemnation authority granted by §717f(h) to cloak holders of certificates of public convenience and necessity with impunity to commit trespasses and other civil wrongs.").

<sup>ii</sup> *Guardian Pipeline*, supra, at 975.

<sup>iii</sup> See e.g. *Hellenic Cntr., Inc. v. Washington Metro. Area Transit Auth.*, 815 F.2d 982, 984 (4th Cir. 1987) (holding "[a]s a general rule, just compensation reimburses an owner only for the value of the property take; [and not] indirect costs to the owner resulting from the taking"); *U.S. v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). (recognizing the Fifth Amendment "does not undertake, however, to socialize all losses").

<sup>iv</sup> *Northern Border Pipeline Co. v. 127.79 Acres of Land*, 520 F. Supp. 170, 172 (D.N.D. 1981) (granting immediate possession in light of potential for great delay and expense); see also *E. Tennessee Gas Co. v. Sage*, 361 F.3d 808, 824-25 (4th Cir. 2004) (holding that a gas company may apply under FRCP 65(a) for a preliminary injunction awarding immediate possession as long as it has established that it is entitled to equitable relief).

<sup>v</sup> *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 776 F.2d 125, 129 (6th Cir. 1985) (holding that condemnation under the NGA applies to all developments that are "necessary and integral" to the pipeline construction or maintenance). See also *Northwest Pipeline G.P. v. Franciscos*, 2008 U.S. Dist. LEXIS 83566, 16 (W.D. Wash. 2008) (holding that any activity "necessary and integral" to the completion of a pipeline project may properly be the subject of condemnation proceedings, including an environmental restoration project which is a condition precedent to state permitting required by a FERC certificate).

<sup>vi</sup> *Maritimes and Northeast Pipeline, L.L.C. v. Decoulos*, 146 Fed. Appx. 495, 497-98 (1st Cir. 2005) (stating that good faith negotiations are not an NGA requirement where the defendant alleged that plaintiff pipeline company engaged in bad faith negotiations).

<sup>vii</sup> *Northwest Pipeline*, supra, at 8.

<sup>viii</sup> *Tennessee Gas Pipeline v. 104 Acres of Land*, 749 F. Supp. 427, 433 (D.R.I. 1990).

<sup>ix</sup> *Portland Natural Gas Transmission System v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 335 (D.N.H. 1998) (finding authority to grant gas company's motion for immediate entry onto and possession of land without reference to whether it had complied with FERC's preconditions).

<sup>x</sup> For more information, please consult the following resource, which was very helpful in preparation of this fact sheet: Carolyn Elefant, [Memo: Condemnation Proceedings Under the Natural Gas Act](http://lawofficesofcarolynelefant.com/wp-content/uploads/2010/06/FINALTAGguide.pdf), 40-64, Knowing and Protecting Your Rights When an Interstate Gas Pipeline Comes to Your Community, May 17, 2010, <http://lawofficesofcarolynelefant.com/wp-content/uploads/2010/06/FINALTAGguide.pdf>.