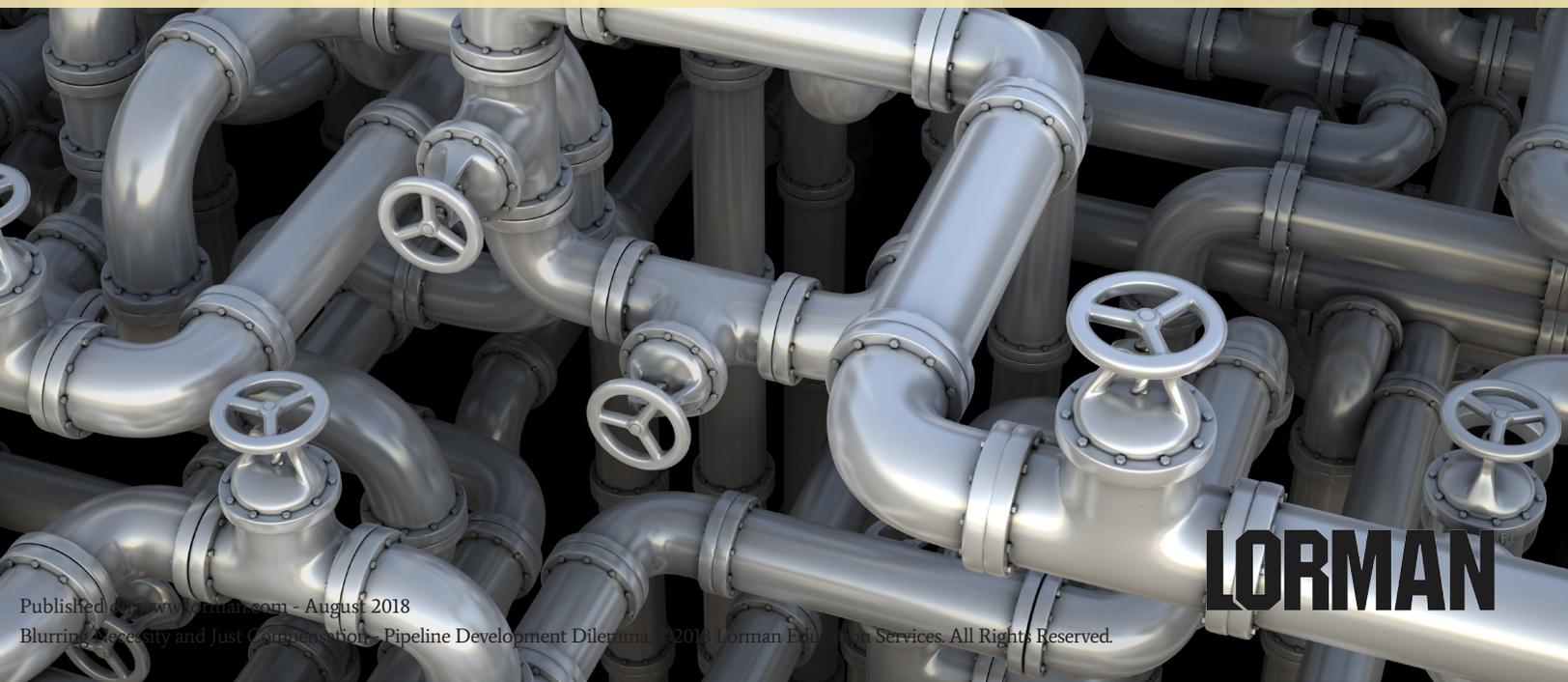




# Blurring Necessity and Just Compensation *Pipeline Development Dilemma*

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## **BLURRING NECESSITY AND JUST COMPENSATION – PIPELINE DEVELOPMENT DILEMMA**

*Written by Mark Lansing – 5/2/18*

As renewable energy increases, and with coal being phased out, landowners and environmental advocacy groups have begun to focus on pipeline development, concentrating on the “need” to account for downstream greenhouse gas emissions and pipeline developers’ use of condemnation powers. For eminent domain, the argument includes that its application against landowners may be “improper”, even raising constitutional claims once thought previously addressed. Such arguments have blurred the line between the public necessity of a pipeline project—the constitutional prerequisite for a valid taking—and the appropriate just compensation due a landowner. For natural gas pipelines and other pipelines subject to federal regulation, the pipeline company’s eminent domain authority arises after the necessity determination (conditional or otherwise) by the Federal Energy Regulatory Commission (“FERC”).<sup>[i]</sup> Thus, a landowner’s rights are not “jeopardized.” Instead, the landowner is, ultimately, paid just compensation for the taking. Thus, necessity for the pipeline project, arguably, has nothing do with what just compensation should be paid or, thereby, the exercise of eminent domain. Moreover, eminent domain litigation most often arises when the landowner seeks to preclude access to their property for testing and studies or to simply maximize their just compensation (whether state or federal court). Once necessity has been determined, state and federal courts lack authority to consider whether the pipeline route is appropriate or not.<sup>[ii]</sup>

Recently, the Pennsylvania Supreme Court has rejected a number of landowner applications seeking to preclude the application of eminent domain authority for a pipeline project. The landowners argued that the pipeline developer lacked such authority. Rejecting the argument, the Court found that the pipeline developer was a public utility empowered to exercise eminent domain.<sup>[iii]</sup>

This attack has not been limited to state courts. In challenging the PennEast Pipeline Company, LLC's pipeline project from Pennsylvania to New Jersey, an argument was asserted that granting the certificate of necessity (with conditions) would create an "improper" authority in PennEast to exercise eminent domain over landowners that had refused to reach an agreement as to either access for testing and studies or the appropriate just compensation they were entitled for the right of way acquisition. In dissenting against the FERC's determination granting the certificate of necessity (which necessarily rejected the landowners' contentions by its very finding of necessity), Commissioner Glick stated:

*I recognize that the courts have upheld the Commission's authority to issue conditional certificates. Nevertheless, doing so comes with significant consequences for landowners whose properties lie in the path of the proposed pipeline. Although the certificate is conditional, it gives the pipeline developer the authority to exercise eminent domain and condemn land as needed to develop the pipeline. In my view, Congress did not intend for the Commission to issue certificates so that certificate holders may use eminent domain to acquire the information needed to determine whether the pipeline is in the public interest. Further, under the Natural Gas Act, this eminent domain authority is not limited to the extent needed to complete the surveys and other assessments used to satisfy the conditions imposed in the Commission's order. As a result,*

there will not necessarily be any restriction on a pipeline developer's ability to exercise eminent domain while the Commission waits to confirm that the pipeline is in the public interest.

I recognize that part of the reason that the record in this proceeding is incomplete is that *landowners have denied PennEast access to their land for the purpose of conducting the necessary studies and assessments.* However, the question whether landowners should be required to provide pipeline developers with access to their property for the purpose of determining whether it is suitable for a proposed pipeline is one that is and *should be left to the states to decide.*<sup>[iv]</sup>

Both federal and state courts have the authority in eminent domain proceedings to grant access for testing and studies. The right to exercise eminent domain in federal courts is granted for interstate pipeline projects under the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(h), which provides:

(h) Right of eminent domain for construction of pipelines, etc.

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 when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

Thus, it appears that Congress had a concern that leaving eminent domain authority solely in state courts could obstruct the development of interstate natural gas pipelines. Accordingly, pipeline companies were provided a second forum, seeking eminent domain authorization in federal courts, including when landowners sought to preclude the access and testing that was “*the reason* that the record in [the FERC] proceeding is incomplete”. Such potential obstruction was found in the Millennium Pipeline Company project that sought to construct a short pipeline to facilitate delivery of natural gas to a new combined cycle gas turbine project. The United States Court of Appeals for the Second Circuit agreed with FERC that the New York State Department of Environmental Conservation had inappropriately delayed proceedings on its deliberation of the water quality certification by violating the one year provision of Section 401 of the Clean Water Act.<sup>[v]</sup> Similarly, a town in Massachusetts attempted to preclude the construction of a FERC approved compressor station, but its attempts were found to be pre-empted by the NGA.<sup>[vi]</sup> Landowners sought to preclude the exercise of eminent domain relative to the Mountain Valley Pipeline.<sup>[vii]</sup>

In proceedings under the NGA, federal courts often grant the requested right-of-way acquisition with the just compensation determination, or may grant summary judgment for the taking.<sup>[viii]</sup> Prior thereto, the pipeline developer, normally, has been limited to right of access to either

conduct tests or to move forward with the construction approved by FERC. By allowing the landowner to delay a project's development based on eminent domain considerations, arguably, the tail wags the dog, resulting in potential unduly delays in a pipeline's construction.

Eminent domain, following FERC's determination of necessity (including with conditions), merely addresses the appropriate just compensation due the landowner.<sup>[ix]</sup>

**About the Author:** Mark Lansing focuses his practice on property tax & condemnation matters with respect to energy, industrial and commercial properties. He achieves significant property tax savings and assessment reductions for his clients through litigation, negotiations (settlements), due diligence reviews and alternative agreements (e.g., PILOTs). Mark assists clients with their valuation of complex property, and through real property tax management. Mr. Lansing also works with energy, industrial and commercial companies in buying, building and operating facilities to effectively manage their property taxes, including due diligence review in the purchase or development phase, and representation before administrative agencies. As an experienced trial lawyer, Mark has successfully represented clients in settlement negotiations, motions, trials and appeals at all levels of state and Federal Courts (including, Circuit Courts of Appeal). Mark is also well published in property tax and condemnation valuation matters. Mark may be reached in our Washington, D.C. office at 202.466.5964, or via email at [mlansing@dickinsonwright.com](mailto:mlansing@dickinsonwright.com) and you may visit his bio [here](#).

<sup>[i]</sup> See e.g., *Berkley v. Mountain Valley Pipeline LLC*, Civil Action No. 7:17-cv-00357 (USDC WDVA 2017), Case No. 18-1042 (4th Cir. 2018) (All Writs Act Claim rejected); *Millennium Pipeline Company, L.L.C v. Certain Permanent and Temporary Easements in (No Number) Thayer Road, S.B.L. No. 63.00-1-24.1, Town of Erin, County of Chemung, New York, Defendant, Unknown Owners, Defendants, Nathaniel Hendricks, 777 F.Supp.2d 475 (USDC WDNY 2011).*

<sup>[ii]</sup> *Natural Gas Act* (15 U.S.C. §717); *Williams Natural Gas Co. v. Okla. City*, 890 F.2d 255, 264 (10th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *Hardy Storage Co., LLC v. An Easement to Construct, Operate and Maintain 12-Inch and 20-Inch Gas Transmission Pipelines Across Properties In Hardy County*, No. 06-7, 2006 WL 1004719, at \*7 (N.D.W.V. Apr. 12, 2006); *Millennium Pipeline Company, L.L.C v. Certain Permanent and Temporary Easements in (No Number) Thayer Road, S.B.L. No. 63.00-1-24.1, Town of Erin, County of Chemung, New York, Defendant, Unknown Owners, Defendants, Nathaniel Hendricks, supra; Berkley v. Mountain Valley Pipeline LLC, supra.*

<sup>[iii]</sup> *In re Condemnation by Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1016 (Pa. Cmwlth. 2016) (Sunoco certificated as a public utility in Pennsylvania, and the existence of CPCs to Sunoco was prima facie evidence that Sunoco was a public utility under the Code.”).

<sup>[iv]</sup> 162 FERC ¶ 61,053 (Glick, Comm’r, dissenting) (emphasis added).

[v] See *NYS Dep't of Env. Conservation v. Federal Energy Regulatory Commission*, (2<sup>nd</sup> Cir. 2018).

[vi] *Algonquin Gas Transmission, LLC v. Weymouth Conservation Comm'n*, 2017 WL 6757544 (D. Mass Dec. 29, 2017) (*slip op.*). See prior *Energy Blog*, *Natural Gas Act Preempts Local Efforts To Preclude Construction Of Compressor Station*, posted March 19, 2018.

[vii] *Berkley v. Mountain Valley Pipeline LLC*, *supra*.

[viii] *Millennium Pipeline Company, L.L.C v. Certain Permanent and Temporary Easements in (No Number) Thayer Road, S.B.L. No. 63.00-1-24.1, Town of Erin, County of Chemung, New York, Defendant, Unknown Owners, Defendants, Nathaniel Hendricks*, *supra*.

[ix] In a News Release, dated December 21, 2017, "*FERC to Review its 1999 Pipeline Policy Statement*", it stated, "The Federal Energy Regulatory Commission (FERC) will review its policies on certification of natural gas pipelines, Chairman Kevin J. McIntyre said today. The policy governs how the Commission evaluates natural gas pipeline proposals that come before it."

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