

Reforms That Could Fix FERC's Pipeline Certificate Reviews

By **Monique Watson, James Barnette, Daniel Mullen and Steven Ross**

Why won't Lucy ever let Charlie Brown kick the football? That question has baffled "Peanuts" lovers for decades. The question baffling the U.S. Congress, courts and landowners alike is why the Federal Energy Regulatory Commission won't stop natural gas pipelines from exercising their eminent domain rights after they have been granted a certificate of public convenience pursuant to Section 7(c) of the Natural Gas Act, or NGA, and a rehearing request has been filed.

This article won't resolve the "Peanuts" question, but it will highlight recent actions that may impact the response to the eminent domain question.

What's the problem?

Landowners, environmentalists and others would say there are at least two problems. First, FERC issues NGA Section 7(c) certificates of public convenience and necessity before applicants have obtained all the necessary federal and state permits.

Second, FERC does not act on rehearing requests of its issuance of NGA Section 7(c) certificates within 30 days of rehearing requests being filed. Thus, landowners allege FERC has effectively deprived them of any ability to fight issuance of certificates, and the attached NGA Section 7(h) eminent domain rights.

Enter the U.S. Congress. In the latest development, on Feb. 18, Rep. Jamie Raskin, D-Md., the chairman of the Subcommittee on Civil Rights and Civil Liberties, sent FERC Chairman Neil Chatterjee a letter requesting details on the rights of NGA Section 7(c) certificate holders to exercise eminent domain "as they construct underground natural gas pipelines."^[1]

Raskin stated that "[p]ublic reporting indicates that FERC's procedures regarding these certificates may violate property owners' constitutional right to due process." Raskin seeks detailed statistics on FERC's certificate review and, as relevant here, how it informs landowners of their rights to intervene in FERC proceedings, and how FERC evaluates and processes landowner protests and rehearing requests.

Raskin's letter follows a hearing on the NGA held on Feb. 5 before a different House subcommittee, where a former FERC chairman, environmentalists and others argued that FERC is not meeting its statutory duty to evaluate landowner issues. At that hearing, former FERC chairman Cheryl LaFleur commented that FERC needs to "more carefully balance the need for pipeline construction with its environmental and landowner consequences."^[2]



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The Delaware Riverkeeper Network testified that FERC's use of tolling orders (to put off acting on rehearing requests) puts states and landowners in "legal limbo" while their rehearing requests are pending, and is "increasingly stretching the use of eminent domain authority in ways not intended by the [NGA]."[3]

That hearing continued many years of arguments before FERC and the courts where landowners and others have maintained that the NGA requires the commission to act on a request for rehearing within 30 days after it is filed. FERC's practice is to issue tolling orders to give it additional time to act beyond the 30 days provided under the statute.

In a pending appeals court case addressing the legality of tolling orders in the context of landowner rehearing requests, FERC has argued that landowners are not deprived of an opportunity to seek review of the controversial NGA Section 7(c) certificate orders, and that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." [4]

What's particularly interesting about the House activities, led by Democrat-controlled committees, is the creative use of a property rights theory. Raskin's not-so-hidden agenda is really about climate change, and the allegation that fossil fuel pipelines contribute to those concerns. The invocation of property rights, rather than just environmental rhetoric, could lead to some bipartisan support for legislation in this area — because Republicans traditionally hold those rights as sacred.

What's the solution?

On Jan. 31, Chatterjee reorganized FERC's Office of General Counsel "to more expeditiously process requests for rehearing of [NGA] section 7 certificate orders filed by affected landowners." According to a press release, Chatterjee has "designated attorneys in the rehearings group of [the Office of General Counsel's] Solicitor's Office to focus on rehearing requests involving landowner issues."

The landowner rehearing groups group "will give first priority to landowner rehearing requests ... [and] will help alleviate ... landowner concerns about timing and fairness in infrastructure cases implicating landowner rights."

Although the U.S. Court of Appeals for the D.C. Circuit reaffirmed its finding that the use of tolling orders is permissible under the NGA in a 2018 ruling,[5] an en banc panel of the D.C. Circuit will hold an oral argument on March 31 to evaluate landowners' and FERC's arguments about the use of tolling orders that arose from a 2019 D.C. Circuit ruling under the NGA.

On Feb. 10, FERC's Solicitor's Office filed a brief with the D.C. Circuit in Allegheny Defense Project et al. v. FERC, addressing claims that FERC's issuance of tolling orders may not be consistent with NGA Section 19(a), which provides that "[u]nless the Commission acts upon the application for rehearing within thirty days," it may be "deemed to have been denied." The brief also addresses whether FERC's authorization of construction to commence while agency rehearing is pending comports with due process.

On both questions, FERC has argued that it is in full compliance with the NGA. The commission has pointed out that every appeals court that has reviewed the issue of tolling orders has found that the term "acts upon" encompasses action short of a final resolution on

the merits.

Nevertheless, in recognition of the furor around eminent domain, the commission has also noted that it has revamped its internal structure and processes to provide landowners facing the prospect of an eminent domain taking with a final decision on their rehearing requests within 30 days, if possible.

Prior to the March 31 oral argument, we anticipate FERC will provide a response to Raskin's questions (FERC has not historically publicly posted its congressional correspondence, nor did we find such correspondence on its website). FERC's Rehearing Group may also issue orders on rehearing, and FERC may issue certificate orders.

Depending on the timing, the roster of FERC commissioners may change as well, as James Danly's nomination for FERC commissioner passed out of the U.S. Senate Energy and Natural Resources Committee on March 3.

If the D.C. Circuit overturns its prior rulings and finds that FERC's use of tolling orders does not meet the NGA's rehearing requirements, we anticipate such a ruling would have both immediate and long-term impacts.

First, FERC will need to ensure that its initial orders comprehensively address and grapple with any challenging policy calls or thorny comments. By doing so in initial orders, the commission will increase the odds that it can resolve any rehearing requests in 30 days. The shortened rehearing time period will inevitably lead to more appellate review, and possibly longer periods between the time a filing is made and the commission's initial order on such filing.

Second, if the commission is prohibited from issuing a tolling order, there will likely be an increase of matters denied by operation of law — because in the absence of commission action within 30 days from the date a rehearing request is filed, the request for rehearing (and any timely requests for rehearing filed subsequently) are deemed denied.

Third, if the court rules that tolling orders are invalid, the commission may ask Congress for a legislative fix: perhaps tolling orders that meet the NGA's and Federal Power Act's rehearing requirements, if, for example, FERC acts on rehearing within a designated period, or an increase in the time for acting on rehearing.

Stay tuned: Decisions on FERC's certificate powers and rehearing obligations are still being written. All three branches of government are now focused on the issues presented. One of them can hopefully provide us an answer on Lucy's thinking.

Does FERC need to change its certificate practices to ensure landowner's rights are protected in a timely manner? Or can FERC continue issuing conditional certificates with a new emphasis on timely review of rehearing requests? If FERC doesn't have an answer, watch for Congress or the courts to step in and provide one.

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[1] Letter from Congressman Jamie Raskin, Chairman, Subcommittee on Civil Rights and Civil Liberties to Chairman Neil Chatterjee at 1 (Feb. 18, 2020).

[2] Written Testimony of Cheryl A. LaFleur, Before the Committee on Energy and Commerce, Subcommittee on Energy, U.S. House of Representatives, Hearing on Natural Gas at 2 (Feb. 5, 2020).

[3] Testimony of Delaware Riverkeeper Network, Before the Committee on Energy and Commerce, Subcommittee on Energy, U.S. House of Representatives, Hearing on Natural Gas at 4-6 (Feb. 5, 2020).

[4] Transcontinental Gas Pipe Line Co. LLC, 161 FERC ¶ 61,250, at P 39 (2017) (citing Phillips v. Internal Revenue Comm’r, 283 U.S. 589, 596-97 (1931)).

[5] Delaware Riverkeeper Network v. FERC, 895 F.3d 102, 113 (D.C. Cir., 2018) (citing Cal. Co. v. FPC, 411 F.2d 720, 722 (D.C. Cir. 1969) (per curiam)).