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Blog Post

FERC Interprets NGA to Allow Condemnation of State-Owned Property, Sidesteps Constitutional Question

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On January 30, 2020, the Federal Energy Regulatory Commission (“FERC”), in a 2-1 vote, issued an [order](#) on condemnation rights of natural gas companies that hold a certificate of public convenience and necessity under section 7(h) of the Natural Gas Act (“NGA”),¹ which may have wide-reaching effects for interstate natural gas pipeline companies, end-users of natural gas, and their investors. On May 21, 2020, FERC upheld its interpretation by issuing an [order denying rehearing](#), in a 3-1 vote. As described below, FERC’s decision conflicts with recent court action and is being tested in pending litigation.

Background

In the latter part of 2019, the U.S. Court of Appeals for the Third Circuit issued an order barring PennEast Pipeline Company, LLC (“PennEast”) from condemning state-owned land in New Jersey to build an interstate natural gas pipeline.² FERC issued a certificate of public convenience and necessity to PennEast in early 2018,³ which automatically conferred federal eminent domain authority on PennEast under section 7(h) of the NGA. However, according to the Third Circuit decision, the eminent domain authority that section 7(h) delegates does not apply to land in which a state claims an interest. The court thus held that PennEast could not condemn any land in which New Jersey claims any kind of property interest.

In response to the Third Circuit decision, PennEast filed a Petition for Declaratory Order (“Petition”) in October 2019, asking FERC to address the scope of the condemnation power delegated to PennEast by NGA section 7(h).⁴ On February 18, 2020, the pipeline

also filed a petition for writ of *certiorari* seeking U.S. Supreme Court review of the Third Circuit decision.⁵

FERC Decision on Scope of Condemnation Rights

In its Petition, PennEast asked FERC to address the following specific questions of both statutory and constitutional interpretation:

1. whether a certificate holder's right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest;
2. whether NGA section 7(h) delegates the federal government's eminent domain authority solely to certificate holders; and
3. whether NGA section 7(h) delegates to certificate holders the federal government's exemption from claims of state sovereign immunity.

In response to PennEast's first question, FERC found that the statutory text, legislative history and precedent support the conclusion that NGA section 7(h) applies to state-owned property. FERC explained that the text of NGA section 7(h) is unambiguously expansive and includes no limitation concerning state-owned property. FERC also found that Congress's specific intent in enacting NGA section 7(h) was to prevent states from blocking certificate holders' use of eminent domain to construct federally approved, natural gas infrastructure. In addition, FERC found support for its conclusion in an analogous provision of the Federal Power Act that provides the power of eminent domain to entities that hold FERC-issued licenses to develop hydroelectric power projects, and also found that precedent and legislative history support the use of eminent domain to condemn state-owned property.

On PennEast's second question, FERC found that Congress delegated the federal government's eminent domain authority *exclusively* to certificate holders, and *not* to FERC. FERC, therefore, disagreed with the Third Circuit's suggestion that its decision would not necessarily disrupt the industry because the federal government could use a potential workaround, by allowing an "accountable federal official," such as FERC, to file condemnation actions against a state and subsequently transfer the property interests to a private pipeline developer.⁶ FERC found that the NGA does not permit such a workaround, because it permits only the certificate holder to file a condemnation action.

On PennEast's third question, FERC declined to address the constitutionality of Congress's delegation of the federal government's exemption from state sovereign

immunity claims to certificate holders under NGA section 7(h).FERC, therefore, denied in part PennEast's Petition with respect to the third, constitutional interpretation question.

Finally, FERC emphasized the crucial importance of a certificate holder's ability to utilize eminent domain authority to construct and operate interstate natural gas facilities. This last aspect of FERC's order provides a strident critique of the potential implications of the Third Circuit's decision and invites that decision to be tested in ongoing litigation.

Commissioner Glick's Dissents

Commissioner Richard Glick dissented from the majority opinions in the initial order and the rehearing order on both procedural and substantive grounds, arguing that the majority had impermissibly waded into a question that is currently being litigated in the federal courts. Commissioner Glick also argued that it was improper for the majority to opine on the text and legislative history of NGA section 7(h), because FERC has no role in administering certificate holders' eminent domain authority beyond issuing the certificates that confer such authority by operation of law. Finally, Commissioner Glick asserted that the evidence of Congressional intent is ambiguous.

Conclusion

FERC's order granting in part PennEast's Petition, as upheld in FERC's order denying rehearing, provides a reasoned alternative to the Third Circuit's interpretation of NGA section 7(h). However, as FERC acknowledged, its orders likely will not be the final word on this matter. PennEast filed a petition for writ of *certiorari* on February 18, 2020, and numerous energy industry groups, broader business groups and labor interests filed *amici* briefs supporting PennEast's petition. The *amici* briefs highlighted the profoundly disruptive impacts of the Third Circuit's decision on natural gas production, transportation, and end-use consumption by, among other things, noting that most FERC-approved interstate natural gas pipeline projects involve some location on state land interests. This issue also continues to be litigated in other jurisdictions and by other interstate natural gas pipeline certificate holders.⁷ Interstate natural gas pipeline companies, end-users of natural gas and their investors will all be watching such proceedings, to see whether the courts will defer to FERC's interpretation of NGA section 7(h) and whether they will agree or disagree with the Third Circuit's conclusion

that section 7(h) does not authorize eminent domain proceedings against property in which a state claims an interest.

1. 15 U.S.C. § 717f(h).↔

2. *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019).↔

3. *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018).↔

4. Petition for Declaratory Order and Request for Expedited Action of PennEast Pipeline Company, LLC, Docket No. RP20-41-000 (submitted Oct. 4, 2019).↔

5. Kirkland & Ellis is PennEast's counsel on the petition for writ of *certiorari*.↔

6. *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at P 53 (2020)↔

7. See, e.g., *PennEast Pipeline Co., LLC*, 170 FERC 61,064, at P 64 (2020) (describing a pending appellate proceeding before the U.S. Court of Appeals for the Fourth Circuit regarding another interstate pipeline's condemnation rights under NGA section 7(h)), *reh'g denied*, 171 FERC ¶ 61,135, at P 40 (2020) (same).↔

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