I. Background leading to eminent domain proceeding

A. An interstate pipeline cannot build facilities, initiate a service, abandon facilities, or abandon a service without prior FERC authorization. The authorization to construct facilities or to initiate service is called a “certificate of public convenience and necessity” (hereafter, “Certificate”).


C. Certificate of Public Convenience and Necessity:

   i. Core requirements found at 15 USC 717f(c)

   ii. No interstate pipeline may provide jurisdictional services or construct, acquire, or operate jurisdictional facilities, without a lawful Certificate issued by FERC

   iii. 15 USC 717f(d): Certificate applications must be in writing and verified under oath

   iv. 15 USC 717f(e): FERC must issue the Certificate if it finds that the proposed facilities and/or service “is or will be required by the present or future public convenience and necessity.”

   a. Over the past 20 years or so, FERC has not required a showing of a market need for the gas. However, where the applicant fails to show such a need, FERC places the applicant “at risk” for the unsubscribed capacity, meaning that the costs of the unsubscribed facilities will be absorbed by the pipeline instead of by its captive customers. See, for example, El Paso Natural Gas Co., 70 FERC Rep. (CCH) 61,295 (1995) and El Paso Natural Gas Co., 71 FERC Rep. 61,028 (1995).


   v. FERC must ensure that the issuance of a Certificate and construction activities themselves are consistent with all applicable environmental laws. The Commission often issues two sets of orders in a certificate application involving substantial construction of new facilities: one covering non-environmental issues and one covering environmental issues. The Commission cannot issue a Certificate until all environmental reviews have been completed.

   vi. FERC may place reasonable conditions on any Certificate that it issues and thereby impact property owners. 15 USC 717f(e). Additionally, under section 401(d) of the Clean Water Act, state water quality requirements may be incorporated directly into a FERC Certificate. 33 USC 1341(d). FERC’s authority, though, does not extend to determination of valuation of easement interests [see, e.g., Young Gas Storage Company, 66 FERC (CCH) 61,280, 61,798 (1994)] of an “affected landowner” [defined at 18 CFR 157.6(d)(2) as “the owner of property interests, as noted in the most recent tax notice, whose property is (1) directly affected, crossed, or used, by the proposed project; (2) contains a residence within 50 feet of the proposed construction work area; (3) abuts the edge of a proposed facility site or right-of-way of the proposed project; or (4) within one-half mile of a compressor station or liquefied natural gas (LNG) facilities.”]

   (Miscellaneous note: A pipeline with available capacity must offer transportation service to all customers on a nondiscriminatory basis if potential customers abide by the rules of the pipeline’s tariff. So, if customers seeking
new or expanded service are willing to pay the cost of connecting facilities and the rate for transportation services under the tariff, the pipeline must provide service to them if capacity is available.

II. Eminent domain authority
The law: Natural Gas Act Section §7(h) [15 USC 717f(h)]: “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 USDCs shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.”


B. While FERC policy favors voluntary, versus compulsory, acquisition of easements, the statute’s language does not expressly oblige the Certificate holder to engage in good faith negotiations with landowners. Courts are split on whether there is an implied obligation to do so. See Lauren Mohr, “The Tangled Web: Regulation, Interstate Pipeline Companies, and Due Process Rights of Property Owners,” 26 ENERGY L.J. 191, 206-07 (2005). Federal courts in New York have not yet squarely addressed this issue, although it was raised, discussed, and then put aside in one case. 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, Nathaniel Hendricks, No. 13-696 (2nd Cir., 2014) (no precedential effect since ruling on summary order) (“Turning to the issue of just compensation, Hendricks argues that the district court improperly disregarded his evidence that the highest and best use of his property was as a pipeline corridor. The only "evidence" he offered in support of this position, however, were several scholarly works suggesting that real estate appraisers should take into account such factors when valuing a property. Significantly, he did not offer a competing appraisal of the property using the methods described in his proffered articles, nor did he even personally assign a dollar amount to the purported increase in value if the property were used as a pipeline corridor. In addition, although Hendricks offered evidence that he had agreed with another gas company to sell pipeline easements over a different property he owned for $28,400, that evidence does not create a genuine dispute of fact concerning the valuation of Hendricks's property at issue in this case because he gave no indication that the properties were comparable.”).

C. Congress may delegate authority to take to a private entity [Thatcher v. Tenn. Gas Transmission Co., 180 F.2d 644 (5th Cir. 1950), cert. den, 340 U.S. 829 (1950). See also Kelo v. City of New London, 545 U.S. 469 (2005) (indicating that Congress and the States have very great latitude in defining the types of public purposes that will be considered “public use” for purposes of the Fifth Amendment and exercise of eminent domain by public or private entities)].

D. NGA §7(h)’s delegation is similar to and was based on the language of Federal Power Act §21 [see H.R. REP. NO. 80-695 (1947), reprinted in 1947 U.S. Code Cong. Serv., 1477. Decisions under similar provisions of either of these two statutes may be used in construing comparable provisions of the other. See also Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981); Federal Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956), motion den, 351 U.S. 956 (1956)].
E. While, given the plain language of NGA §7(h), it is questionable whether FERC can generally prohibit the exercise of eminent domain by a Certificate holder, FERC can condition a FERC Certificate and thereby specify the type of property interest that may be taken pursuant to that Certificate. Columbia Gas Transmission Corp. v. Gas Storage Easement, 776 F.2d 125 (6th Cir. 1985). FERC may also limit construction timing, impose operational or environmental restraints, and specify the location in which property rights may be taken either generally or specifically. See Kern River Gas Transmission Co. v. Clark County, 757 F. Supp. 1110, 1116 (D. Nev. 1990).

F. While NGA §7(h) specifies that the procedures to be used in administering the exercise of federal eminent domain authority shall conform to the practice and procedure used in applicable state courts, federal courts in New York appear to adhere to the view that FRCP Rule 71A(a) (“The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule”) supersedes the practice and procedure clause of section 717f(h).


So, for example, landowners cannot raise in the eminent domain proceedings in federal court such FERC jurisdictional issues as whether notice of the FERC proceedings to property owners has been adequate, Tennessee Gas Pipeline, 749 F. Supp. at 430; whether the project has been improvidently located, Kern River Gas Transmission Co. at 1116 (D. Nev. 1990); and whether state law prohibitions against takings of property apply to the project, Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth., 2 F. Supp. 2d 106, 110 (D. Mass. 1998). At least one federal court has characterized such takings as “enforcement of the FERC” Certificate: Williams Natural Gas Co., 890 F.2d at 265. Thus, a federal district court cannot review the findings and conditions of a FERC order.

H. In the eminent domain proceeding, then, USDC review authority is generally limited to:

• determining whether the amount in controversy in the taking is in excess of $3,000 (i.e., how much must the pipeline company pay the landowner for the use of his or her land),
• determining whether the Certificate holder has failed to contract or agree with the property owner on a price for the taking,
• assuring that the FERC order is effective and covers the property that is to be taken (In this regard, the Certificate helps define the scope of the rights that may be taken by the Certificate holder and jurisdictionally limits the issues that a landowner may successfully raise in defense of a taking).

See, e.g., Kern River Gas Transmission Co. v Clark County, Nevada, 757 F.Supp. 1110 (D.Nev. 1990); Williams Natural Gas Co.); Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County, 550 F.3d 770, 776 (9th Cir. 2008) (quoting National Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F.Supp.2d 405, 416 (W.D.N.Y.2000). Thus, “[o]nce a [certificate] is issued by the FERC, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking.” Maritimes & Northeast Pipeline, L.L.C. v. Decoulos, 146 Fed. Appx. 495, 498 (1st Cir. 2005),” cited in 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, Nathaniel Hendricks, 777 F.Supp.2d 475 (USDC WDNY, 2011).

I. In the case of an easement, “the measure of just compensation is the difference between the fair and reasonable market value of the land immediately before the taking and the fair and reasonable market value of the

Eminent Domain Q&As:

1. What is "eminent domain?":
   The right of government to take land, or an interest in land, owned by another.

2. Must compensation be given to the landowner whose land has been taken?:
   Yes

3. Can eminent domain be exercised to take an easement on land, as opposed to the whole title to the land?:
   Yes

4. Can a private party exercise eminent domain powers?:
   Yes if government gives that power to the private party

5. Has that happened in the case of interstate pipeline system construction and operation?:
   Yes, under section 7(h) of the federal Natural Gas Act.

6. Who has this power under federal law?:
   The holder of a Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission, otherwise called “FERC”

7. How does the holder get such a certificate?:
   By going through a procedure that gives landowners and others a right to be heard

8. Is there such a proceeding pending in the case of the Northeast Energy Direct project?:
   Yes, FERC docket no. PF 14-22

9. What must a certificate holder do in order to exercise the power of eminent domain?:
   FERC policy encourages the certificate holder to attempt a voluntary creation of an easement through the provision of compensation satisfactory to the landowner. “Compensation” in this case means money, certain actions by the certificate holder that the landowner wants done (for example, to defend and indemnify the landowner against property damage/loss and personal injury/death claims associated with the pipeline), or a combination of the two. If voluntary agreement cannot be obtained, the certificate holder can go to federal court and exercise eminent domain authority.

10. What are the issues before the federal court sitting in New York in an eminent domain proceeding?:
    Once a certificate is issued by FERC, and the certificate holder is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking. So, in general terms, the issues are limited to:
• assuring that the FERC order is effective and covers the property, and the property interest, that is to be taken
• determining whether the certificate holder has failed to contract or agree with the property owner on a price for the taking
• determining how much must the certificate holder pay the landowner for the use of his or her land

11. What is the measure the court will use in determining “just compensation” in trade for the taking of an easement?

The measure of just compensation is the difference between the fair and reasonable market value (rather than the value to the certificate holder or the owner of the land) immediately before the taking and the fair and reasonable market value of the portion that remains after the taking.

12. Can the landowner challenge the FERC proceeding, or any portion of it, in the eminent domain proceeding as a way to stop that proceeding?

No. Challenges to the adequacy of the FERC proceeding are brought separately from the eminent domain proceeding.