



MEMORANDUM

January 31, 2020

To: Subcommittee on Energy Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on “Modernizing the Natural Gas Act to Ensure it Works for Everyone”

On Wednesday, February 5, 2020, at 10 a.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Energy will hold a hearing entitled, “Modernizing the Natural Gas Act to Ensure it Works for Everyone.”

I. NATURAL GAS RATES

Congress enacted the Natural Gas Act (NGA) in 1938 to regulate the sale and transportation of natural gas in interstate commerce. Under current law, the Federal Energy Regulatory Commission’s (FERC) ability to protect natural gas customers against unjust and unreasonable rates is compromised by its inability to set a refund date, unlike the Commission’s ability to do so under the Federal Power Act (FPA) for electric utilities. Both the NGA and FPA outline the processes to deal with “over-collections”—instances in which entities transporting gas or electricity have charged an “unjust and unreasonable” rate.

For electric utilities, FERC or a customer can file a rate complaint under Section 206 of the FPA.¹ If FERC later finds an electric transmission entity has charged an “unjust and unreasonable” rate, it could order that entity to refund overcharged funds, from the time the complaint was filed to the conclusion of the rate case. Unlike the FPA, where FERC establishes a “refund date,” which generally is five months after the filing date, the NGA does not offer such protections to overcharged utilities.

Under section 5 of the NGA, entities believing they have been overcharged can still file a complaint against an interstate natural gas pipeline—just like the FPA.² However, FERC does not have the authority to establish a refund date and order refunds of over-collections. Customers are thus not able to recoup payments that are over-collected while the FERC complaint proceeding occurs for months or even years. As a result, interstate natural gas

¹ 16 U.S.C. § 824e(b)-(c).

² 15 U.S.C. § 717d.

pipelines have an incentive to prolong litigation, while making the process expensive for the customer filing a complaint because the pipelines get to keep the overcharges.

Additionally, without FERC authority to set a refund effective date upon the institution of a complaint or investigation under section 5, a pipeline can threaten to file a general rate case under section 4 of the NGA to increase rates arguing they have been undercharging customers.³ A section 4 case typically moves more quickly through the FERC approval process because there is no litigation over the rates like in a section 5 proceeding. Increased rates could possibly take effect prior to the conclusion of any ongoing section 5 proceeding. Such a scenario places the parties supporting the section 5 proceeding in a difficult situation in that they may be forced to pay even higher rates without refund relief for some period of time before FERC issues an order on the section 5 complaint proceeding. Thus, current law provides a perverse incentive for protracted litigation, creating an asymmetry of leverage between pipelines and complainants.

This inequity exists because Congress amended the FPA in 1988 to provide FERC with refund authority in electricity rate cases. It did not do so for the NGA because natural gas transmission pipelines were required to have their pipeline rates reviewed every three years. FERC Order 636, issued in 1992, ended this three-year review process and Congress has not passed a subsequent “fix” to the NGA to provide refund authority on par with the FPA.⁴

II. PIPELINE SITING UNDER THE NATURAL GAS ACT

Under section 7 of the NGA, FERC reviews applications for the siting, construction, and operation of interstate natural gas pipelines.⁵ An interstate pipeline can be constructed and operated only if it receives a certificate of public convenience and necessity from the Commission.⁶ FERC issues a certificate of public convenience and necessity upon a finding that the proposed project is needed and in the public interest. Under section 3 of the NGA, FERC is also responsible for issuing certificates for Liquefied Natural Gas (LNG) export and import facilities.⁷

The section 7 certificate establishes the terms and conditions for constructing and operating a pipeline, including those related to location, engineering, rates, and mitigation of potential environmental disruption.⁸ A certificate also requires a natural gas company to obtain

³ 15 U.S.C. § 717c.

⁴ Government Accountability Office, *Natural Gas: Costs, Benefits, and Concerns Relates to FERC’s Order 636* (Nov. 1993) (GAO/RCED-94-11).

⁵ Congressional Research Service, *Interstate Natural Gas Pipeline Siting: FERC Policy and Issues for Congress* (Jun. 2018) (R45239).

⁶ 15 U.S.C. § 717f(c).

⁷ 15 U.S.C. § 717b.

⁸ Pipeline Safety Trust, *Pipeline Safety New Voices Project—Briefing Paper #9: Pipeline Routing and Siting Issues* (www.pstrust.org/docs/PST_Briefing_Paper_09_1.pdf) (accessed Jan. 29, 2020).

all necessary federal and state permits and authorizations, if they have not done so already prior to the certificate authorization. State environmental agencies have delegated authorities under the Clean Water Act and Clean Air Act for water quality certifications, water pollution discharge permits, and air emissions permits. The U.S. Army Corps of Engineers issues wetlands permits under Section 404 of the Clean Water Act and authorizations affecting navigable waters under the Rivers and Harbors Act of 1989. Additionally, the U.S. Fish and Wildlife Service is generally responsible for administering the Endangered Species Act, while the Bureau of Land Management and National Park Service are primarily responsible for issuing right-of-way permits or authorizations for natural gas pipelines that cross Federal lands.

A. Eminent Domain

In 1947, Congress amended the NGA to provide natural gas pipeline companies the power of eminent domain.⁹ Upon FERC's issuance of a certificate approving a pipeline project, the right of eminent domain is immediately granted to a natural gas company under Section 7(h) of the NGA.¹⁰ When an eminent domain proceeding commences, the federal district court's sole function under the NGA is to order condemnation in accordance with the FERC certificate. The district court lacks jurisdiction to review the validity or conditions of a FERC certificate.¹¹

In practice, this means that a natural gas company can go to court without delay and use its eminent domain authority to take property from landowners needed to construct and operate a pipeline project, often referred to as a "quick take."¹² Landowners in the path of a planned pipeline who refuse to negotiate or accept an offer from a natural gas company are often forced to give up their land through eminent domain. A natural gas company takes immediate possession of private land and can begin development long before paying the owner.

In recent years, natural gas companies have used their eminent domain authority to take property prior to receiving all required state and federal permits and authorizations, such as a Clean Water Act certificate or a biological opinion on endangered species.¹³ If a company does not get these authorizations the pipeline cannot be built as certificated, and potential route changes may be proposed to FERC.

B. Tolling Orders

Under the NGA, FERC must act within 30 days on a petitioner's request for rehearing of a pipeline certificate order. However, FERC routinely uses a procedural mechanism called a "tolling order" to give itself additional time to consider rehearing petitions, sometimes putting

⁹ 15 U.S.C. § 717f(h).

¹⁰ *Id.*

¹¹ Review of the FERC certificate is within the exclusive jurisdiction of federal courts of appeals.

¹² *Supreme Court deals blow to 'quick take' challenges*, E&E News (Oct. 8, 2019).

¹³ *Va. widow leads eminent domain fight at Supreme Court*, E&E News (Aug. 13, 2019).

parties on hold for years before an order on rehearing is issued.¹⁴ A challenger, many times a landowner or environmental organization, must wait for the rehearing order before pursuing judicial review, while a pipeline can proceed with eminent domain and pipeline construction.

This scenario could change pending the outcome of the Atlantic Sunrise Pipeline case. In December 2019, the U.S. Court of Appeals for the D.C. Circuit granted a petition for rehearing *en banc* to address whether FERC's use of tolling orders is allowable under the NGA.

C. Climate Analysis

FERC's authority over the consideration of climate change in natural gas pipeline siting has become an increasingly high-profile issue and been the center of significant litigation in recent years. Because the environmental impacts of a potential pipeline must factor into the Commission's section 7 determination, FERC must analyze those effects under both the NGA and the National Environmental Policy Act (NEPA). However, there is disagreement among FERC Commissioners, stakeholders, and natural gas pipeline companies as to what extent, if at all, FERC must consider the climate impacts of pipelines (including the project's upstream and downstream greenhouse gas (GHG) emissions) as part of its determination that a project is or is not in the public interest.¹⁵

In the 2017 *Sierra Club v. FERC* case about the Sabal Trail pipeline, the U.S. Court of Appeals for the D.C. Circuit held that FERC must consider the downstream GHG emissions of pipelines it authorizes.¹⁶ Since that case, individual FERC Commissioners have disagreed as to how to apply the court's holding to other pipeline and LNG certificate proceedings.

III. WITNESSES

The following witnesses have been invited to testify:

Panel 1

Cheryl LaFleur

Chairman (Former)
Federal Energy Regulatory Commission

Susan Tierney

Senior Advisor
Analysis Group, Inc.

¹⁴ *D.C. Circuit to review 'Kafkaesque' FERC process*, E&E News (Dec. 6, 2019).

¹⁵ *This federal agency is quietly, profoundly shaping climate policy*, Vox (May 22, 2019).

¹⁶ 867 F.3d 1357 (D.C. Cir. 2017). *See e.g. Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019) (the court expounded on its *Sierra Club v. FERC* holding by admonishing the Commission for the arguments it continues to present for why it cannot consider the climate impacts of proposed pipelines).

Richard Worsinger
Treasurer, Board of Directors
American Public Gas Association

Michael E. McMahon
Senior Vice President, General Counsel and Secretary
Boardwalk Pipelines, LP
On behalf of the Interstate Natural Gas Association of America

Panel 2

N. Jonathan Peress
Senior Director, Energy Markets and Utility Regulation
Environmental Defense Fund

Jennifer Danis
Staff Attorney, Environmental Law Clinic
Columbia University School of Law

Maya van Rossum
Leader
Delaware Riverkeeper Network

David Bookbinder
Chief Counsel
Niskanen Center

David Mallino
Legislative and Political Director
Laborers International Union of North America

Gene Barr
President and CEO
Pennsylvania Chamber of Business and Industry