

NISKANEN

C E N T E R

Statement for the Record
House Oversight and Reform, Civil Rights and Civil Liberties Subcommittee
Hearing: “Pipelines Over People: How FERC Tramples Landowner Rights in Natural Gas
Projects”
December 9, 2020

The Niskanen Center is a 501(c)(3) think tank with strong interests in free markets and protecting Americans’ property rights. It is a fundamental matter of justice that government should forcibly take private property only as a measure of last resort, when truly for public use, and must sufficiently compensate the property owners to render them indifferent to the taking. Unfortunately, this framework for balancing government interests against private property ownership is not being followed by pipeline companies or the Federal Energy Regulatory Commission (FERC). The Niskanen Center applauds Chairman Raskin, Ranking Member Roy, and the Civil Rights and Civil Liberties Subcommittee for holding this hearing on FERC and balancing landowner rights against natural gas projects.

The Niskanen Center litigation department has worked tirelessly to defend landowner rights against the wanton use of eminent domain to deny due process and erode private property rights. Under the Natural Gas Act, FERC administers the pipeline permitting process. The current permitting process allows pipeline companies to use eminent domain to secure land rights without adequate protections for landowners’ rights. Two examples of this are the notice process and pre-construction activities.

FERC's regulations allow for notices that (1) do not provide sufficient notice to landowners that they must intervene in certificate proceedings to preserve their right to judicial review, (2) do not establish a fixed time to intervene, so that each notice contains an *ad hoc* intervention deadline, and one that is almost always arbitrarily brief, and (3) provide information about requirements to intervene that is inconsistent and confusing. The result is that landowners do not understand how, why, or when to intervene and they lose the opportunity to do so. FERC has the internal authority to implement a uniform and clear notice process, and to require all pipeline developers to use this form of notice with landowners. This simple step would preserve landowner rights without undue burden to FERC or pipeline companies.

Once FERC issues a Certificate of Public Convenience and Necessity, a pipeline company can get a court order to take private property and begin pre-construction activities even if the pipeline does not have all the necessary state and federal permits. Pre-construction activities can include digging the trench to house the pipeline, clearing trees, building roads, and otherwise disrupting the land. There are examples of property being damaged or destroyed in anticipation of a pipeline that never materializes because the company fails to secure the necessary permits. While the government is required to provide compensation when taking private through eminent domain, pipeline companies are not required to provide immediate compensation. As a result, landowners have lost the use of the property for no reason and may not be compensated for years. FERC could, as it has done in one recent Certificate of Public Convenience and Necessity, limit "pre-construction" activity to actions that do not cut trees or disturb vegetation, and then issue a notice to proceed only after the pipeline company secures all required state and federal permits.

These issues highlight the simple ways in which landowner rights are not currently being served by the overall process. By addressing these specific concerns, FERC would be better equipped to balance the rights of landowners against pipeline development. We encourage the subcommittee to continue this critical work.