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House of Representatives

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February 18, 2020

The Honorable Neil Chatterjee
Chairman
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Dear Chairman Chatterjee:

The Subcommittee requests information about the process at the Federal Energy Regulatory Commission (FERC) for granting private energy companies the right to use eminent domain, a power typically reserved for government agencies, as they construct underground natural gas pipelines.

FERC has the authority to grant pipeline companies a "certificate of public convenience and necessity," which allows them to exercise the right of eminent domain and seek the involuntary transfer of private property rights.[1] Public reporting indicates that FERC's procedures regarding these certificates may violate property owners' constitutional right to due process. In determining whether to grant these certificates, FERC follows guidelines in a 20-year-old policy statement first released in 1999.[2]

FERC often grants certificates without waiting for companies to receive prerequisite permits from other federal and state agencies. This allows companies to file federal condemnation actions and claim access to rights-of-way across privately owned land. Federal courts then routinely grant preliminary injunctions that give companies i.nmediate possession to rights-of-way across private land.[3]

Though construction cannot begin until companies receive all their permits, FERC authorizes these companies to start preparing the rights-of-way through non-mechanized tree felling and other preparatory activities. One particularly egregious example of this was the

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[1] 15 U.S.C. § 717f(h).

[2] Federal Energy Regulatory Commission, *Statement of Policy on Certification of New Interstate Natural Gas Pipeline Facilities*, PL99-3-000 (Sept. 15, 1999) (online at www.ferc.gov/legal/maj-ord-reg/PL99-3-000.pdf).

[3] *Landowners Ask Justices to Nix Companies 'Quick Take' Power,* E&E News (July 2, 2019) (online at www.eenews.net/stories/1060682949).

destruction of half of the 200-year-old trees that made up a maple syrup farm in New Milford Township in March 2016 for the Constitution pipeline, which still has yet to be built.[4]

Landowners are effectively barred from challenging these injunctions because they are forced to exhaust their administrative remedies by first appealing the grant of the certificate with FERC. Though the law mandates a resolution to the appeal within 30 days, FERC reportedly reflexively grants "tolling orders" extending the appeal review time by several months for "the limited purpose of further consideration."[5] While individual landowners await FERC's review, FERC may issue orders authorizing pipeline construction to begin.[6]

In a judicial opinion about this process, District of Columbia Circuit Court Judge Patricia Millet called it "a Kafkaesque regime" in which FERC "can keep homeowners in seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop."[7]

The Due Process Clause of the Fifth Amendment states: "No person shall be deprived of life, liberty, or property, without due process of law."[8] The Subcommittee is concerned that FERC's process for handling challenges to pipeline construction, and its allowance of some construction-related activity before all state requirements have been met, denies individual landowners a meaningful opportunity to be heard before irrevocable harm is done to their property.

To assist the Subcommittee's investigation, I request that you provide the information and documents below by March 3, 2020. Unless otherwise stated, the timeframe for the requested information is from September 19, 1999, when the current policy statement governing FERC certificates was released, to the present.

1. The number of requests for certificates of public convenience and necessity for the construction of natural gas pipelines FERC has granted;

2. The number of requests for certificates of public convenience and necessity for the construction of natural gas pipelines FERC has granted while other federal agency or state permits were still pending;

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[4] *A Company Cut Trees for A Pipeline That Hasn't Been Approved. The Landowners Just Filed for Compensation*, StateImpact Pennsylvania (July 12, 2018) (online at https://stateimpact.npr.org/pennsylvania/2018/07/12/a-company-cut-trees-for-a-pipeline-that-hasnt-been-approved-the-landowners-just-filed-for-compensation/).

[5] *Federal Judge Rebukes FERC's 'Kafkaesque Regime,"* E&E News (Aug. 2, 2019) (online at www.eenews.net/stories/1060831203).

[6] Allegheny Defense Project, et al. v. FERC, 932 F. 3d 940, 945 (D.C. Cir. 2019).

[7] Allegheny Defense Project, et al. v. FERC, 932 F. 3d 940, 948 (D.C. Cir. 2019) (Millet, J., concurring).

[8] U.S. Const. amend. V

3. The number of requests for notices to proceed or partial notices to proceed with tree felling or other preparatory activities FERC has granted when other federal agency or state permits were still pending;

4. A description of how FERC defines pre-construction activities allowed under a conditional certificate before other state and federal agency permits are received;

5. The number of requests for certificates of public convenience and necessity for the construction of natural gas pipelines FERC has denied, and the reason for each denial;

6. The average length of time FERC gives a landowner to intervene in the certificate process and the methodology for deciding how much time to give;

7. All guidance FERC gave landowners on how to intervene;

8. The number of petitions for rehearing related to the construction of natural gas pipelines FERC has received from landowners, as well as:

    a. The number of cases FERC has granted a landowner's petition for rehearing for purposes other than "the limited purpose of further consideration";
    b. The number of cases FERC has issued a tolling order that granted rehearing "for the limited purpose of further consideration";
    c. The criteria FERC uses to determine whether to grant a rehearing or issue a tolling order;
    d. The number of cases FERC has issued a tolling order for but later granted a petition for rehearing on the merits;
    e. The number of cases that are currently pending "further consideration" under a tolling order;
    f. For cases in which FERC issued a tolling order but later denied a petition for rehearing and the length of time that elapsed, on average, between these tolling orders and the denials;

9. The number of cases FERC has issued a "Notice to Proceed" authorizing construction of the pipeline in question before adjudicating the merits of a request for rehearing;

10. A description of how FERC ensures that landowners are justly compensated for property rights transferred pursuant to a FERC certificate of public necessity and convenience;

11. A description of the ability of a landowner to terminate a pipeline company's right-of-way if the pipeline is rerouted or never built;

12. A description of the steps FERC has taken to revise the 1999 policy statement before and after it issued a Notice of Inquiry for comments on April 19, 2018;

13. All documents related to cases in which FERC denied an application for a certificate of public convenience and necessity for the construction of natural gas pipelines;

14. All documents related to cases in which FERC granted a petition for rehearing in a case related to pipeline construction for a purpose other than "the limited purpose of further consideration"; and

15. All documents related to cases in which the Commission granted a "Notice to Proceed" authorizing construction of a natural gas pipeline before adjudicating the merits of a request for rehearing.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. An attachment to this letter provides additional instructions for responding to the Committee's request. If you have any questions regarding this request, please contact Committee staff at (202) 225-5051.

Sincerely,

Jamie Raskin
Chairman
Subcommittee on Civil Rights and Civil Liberties

Enclosure

cc: The Honorable Chip Roy, Ranking Member
Subcommittee on Civil Rights and Civil Liberties