

 **DRAFT MINUTES**  
**NRPC ENERGY FACILITIES ADVISORY COMMITTEE SPECIAL MEETING**  
**12/11/15**

**MEMBERS PRESENT:**

Tad Putney, Town of Brookline  
Kat McGhee, Town of Hollis  
Tom Young, Town of Litchfield  
Steve Wells, Town of Mason  
Tim Thompson, Town of Merrimack  
Mark Bender, Town of Milford  
Sarah Marchant, City of Nashua  
Hal Lynde, Town of Pelham

**OTHERS PRESENT:**

David Beach, Amherst Resident  
John D'Angelo, Town of Amherst  
Colleen Mailloux, Town of Amherst  
Reed Panasiti, Town of Amherst  
Jim Battis, Town of Hudson  
Terry Silverman, Fitzwilliam  
Julia Steed Mawson, Pelham Resident  
Theresa Grant, Pelham Resident  
Lisa Murphy, SWRPC  
Stephen Buckley, NH Municipal Association

**STAFF PRESENT**

Tim Roache, Executive Director

Sara Siskavich, GIS Manager

Karen Baker, Program Asst.

**CALL TO ORDER, INTRODUCTIONS**

Roache called the meeting to order at 2:03 pm with introductions.

**APPROVAL OF THE MINUTES OF NOVEMBER 6, 2015**

The first order of business was to accept the draft EFAC minutes from November 6, 2015 meeting. After a brief discussion Thompson moved to approve the November 6<sup>th</sup> minutes as drafted with a second from Young. All were in favor with one abstention from Lynde.

**PRESENTATION: EMINENT DOMAIN AND THE KINDER MORGAN PIPELINE, STEPHEN C. BUCKLEY, LEGAL SERVICES COUNSEL WITH THE NEW HAMPSHIRE MUNICIPAL ASSOCIATION**

Roache commented that as the group considers EFAC's path forward, it has been very beneficial to have experts in certain topics present at EFAC. With that said, Roache introduced to the group Legal Counsel Services Stephen C. Buckley from the NH Municipal Association. Buckley passed around a handout that contained information on both federal and New Hampshire law regarding eminent domain for a natural gas pipeline (attached).

As Buckley reviewed points in the handout he took questions as they arose. McGhee requested clarification on how easement versus a whole taking would be handled under FERC process. Buckley clarified that both easement and whole taking represent ownership interest and are generally handled similarly.

Battis asked that, upon completion of condemnation, would it be appealable? Buckley said that yes, there is an appeals process but it would not necessarily prevent possession of property.

Beach presented a hypothetical scenario: say there was a disagreement between Kinder Morgan and a property owner over routing which lead to a negotiation impasse; would this give the property owner leverage in an eminent domain proceeding? Buckley suggested it might influence the calculation of severance damages, but that this was speculation.

Battis mentioned that conservation easements often contain clauses related to excavation and requested clarification on what weight these clauses might represent. Buckley stated that most conservation easement language he's seen in NH is modelled similarly, and he would expect that they would go into greater detail as to what would occur under a condemnation scenario. Buckley noted that Eric Tomasi reiterated to him that generally FERC takes a dim view of eminent domain.

Roache asked about property owners who are currently denying survey access. Buckley said that is perfectly within their right before condemnation, but then they have to let them on the property. He added that Eric Tomasi has indicated that applicants are increasingly relying on aerial technology where they cannot obtain survey access.

Battis asked about funds rebated in relation to conservation easements and property being taken. Buckley said that would be considered as part of the taking analysis, as would any protective covenants that are written in.

Lynde questioned on entry onto lands. Buckley stated that there are 2 ways and that to determine the value of the land and the position of the pipeline, statute dictates that KM can form a complaint and get permission from the courts, but not until legal condemnation of a piece of land. A certificate of assessment is needed before the condemnation process can start **(this needs clarification from EFAC)**.

Lynde asked about allowing/denying KM onto town-owned property. Buckley said that as towns are responsible for the management of public lands, they are within their right to deny survey access through an overarching BOS letter. Buckley also advised that any town board or committee that has a management interest in the parcel (e.g. Heritage Commission, Conservation Commission) should also write a letter denying access. Thompson commented that Merrimack and KM have still not come to an agreement on the surveying of all Merrimack town owned property.

McGhee questioned how we got to the point where private industry is able to secure property through eminent domain. Buckley speculated that its origins likely tie back to rail, telephone/telegraph industries.

Putney asked if multiple cases of eminent domain could be consolidated for efficiency or would each be a discrete case in court. Buckley said how cases are handled is determined by whether the proceeding follow federal or state process, but he suggested that cases would be handled by county and would be overseen by a Commission. He added that it could also go by way of RSA 371:15 and go through superior court but that process would take longer. Putney also asked if individual landowners should have representation and secure land appraisals to make their case and felt this could get costly. Buckley thought that attorney fees were reimbursable.

Beach asked if KM can make blind offers on property. Buckley said there is nothing forbidding them to do so. Buckley added that he believed there is a provision in the law, state he thought, that contains info on the condemnation process and this should all be in the application to FERC. Putney said he recalled that FERC's Notice of Application indicated state process would be used.

Marchant asked about the advantage of using a local court in terms of value determination. Buckley agreed that it's generally advantages to be in a home court vs state court.

Silverman asked if a property can petition for severance. Buckley if it is filed in Superior Court, then court could be prepared to sever cases if different.

Battis asked about landowner deals with KM when there are separate conservation easement holders. Buckley said both parties have a legal stake and both would be entitled to compensation.

Bender asked how to apply this to land owned by a group of property owners. Buckley said it depends on the form of ownership; for example joint tenants or a trust. In a hypothetical scenario where there are 40 homeowners for the land, all homeowners would have to be dealt with.

Silverman asked about the handling of state parks and lands. Buckley said the State generally has the same rights as a private owner.

**UPDATES:**

**Executive Committee Update** – Roache has conferred with the NRPC Executive Committee on the future of EFAC. The Committee feels that the work of the group is not yet done and they have given Roache authorization to file a motion for intervenor status. Roache reported that several affected RPAs in MA were going to do so. There was discussion on the associated administrative burden if every party on the service list was required to file hard copies of all correspondence. Mailloux said that Amherst filed motion to intervene last week and everything was electronic and very easy. She added that FERC still needs to approve the motion, but the Town has been added to the service list regardless.

**FERC Application Filing** – As an FYI, Roache briefly updated the group regarding NRPC’s joint letter to FERC filed with the MA RPAs questioning the suitability of KM’s application and the insufficient timelines for all parties involved to review.

**Status Report Update** – Roache suggested that a viable strategy to update the status report is to continue to have expert speakers present to EFAC. Future topics could include experts on LNG and other alternatives to natural gas. Roache informed the group that Venu Rao of Hollis would be presenting at the Commission meeting on energy and invited all to attend.

McGhee volunteered to provide her running list of NED developments since September. Putney suggested there be a standing agenda item for the Commission to provide an update to them at each meeting.

**Update on BIA Energy Symposium**– Siskavich informed the group she attended the day-long BIA Energy Symposium, which is essentially an industry event. She was told that compared to years past there were many state legislators present at the event. One talk discussed the draft rulemaking relative to evaluation criteria used by the Site Evaluation Committee to assess impacts of energy projects. Siskavich circulated draft orderly development criteria and reminded the group that regional planning commissions are expected to articulate their views on this matter in writing during the SEC process. She recommended interested EFAC members review the slides at <http://www.biaofnh.com/energy-seminar.html>.

**Update on PHMSA Grant** – Siskavich informed the group that NRPC was awarded a grant which would consist of three components, one of which would be to create an open data portal on GIS land use database. Another piece would be training for emergency responders, and the final component will be on land use planning around pipelines. Siskavich thanked Pelham, Brookline, the City of Nashua, and the NH congressional delegation for their letters of support. Putney asked if Nashua was going to be involved even though they are not affected by the pipeline route, and their emergency response supports the region. Siskavich said yes, they had plans to work closely with Justin Kates, the new fire chief in Nashua, and the entire LEPC.

Silverman asked if we were systematically fact-checking the KM statements. Roache said no and asked if there was an issue he was referring to. Silverman said there is an issue with every sentence.

Putney asked if Southwest RPC was thinking of becoming an intervenor. Lisa Murphy of SWRPC said that it was on the agenda for their board meeting.

Thompson motioned to adjourn with a second from Putney. The meeting adjourned at 3:24pm.



## Energy Facilities Advisory Committee (EFAC) Nashua Regional Planning Commission



### PART I- FEDERAL LAW AND EMINENT DOMAIN FOR A NATURAL GAS PIPELINE

*What does the Natural Gas Act provide on questions related to eminent domain for proposed construction of a pipeline?*

#### **15 USC §717f (h):**

Right of eminent domain for construction of pipelines, etc.

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 United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

*Do federal courts use federal common law or state law to determine just compensation damages in eminent domain matters?*

*Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, 962 F. 2d 1192 (6<sup>th</sup> Cir., 1992)*

This appeal requires us to address whether this circuit should develop a federal common-law rule as the standard of valuation, or rather, whether the Act requires that we adopt the law of the state in which the property is situated as the appropriate federal standard. For the reasons that follow, we hold that the federal standard should incorporate the law of the state in which the condemned property is located. Because the court below did not follow Ohio law in making its determinations, we reverse and remand for further proceedings.



***In sum, we conclude that, although condemnation under the Natural Gas Act is a matter of federal law, § 717f(h) incorporates the law of the state in which the condemned property is located in determining the amount of compensation due. Accordingly, we next consider whether the Commission below adopted a measure of compensation that conformed with the law of Ohio.***

***What is the law in the First Circuit on whether state law or federal common law will be used to determine the measure of damages in a pipeline eminent?***

***Portland Natural Gas Transmission v. 19.2 Acres of Land, 318 F. 2d 279 (2003)***

The land taken by the Pipeline Companies is in Massachusetts, and the district court applied Massachusetts law to determine the just compensation to which WBC was entitled. As the parties do not contest this choice of law and there is no indication that it makes any difference as to any of the contested issues, ***we accept this premise without necessarily endorsing it.*** The federal eminent domain statute involved here provides that “[t]he practice and procedure in any action or proceeding for [eminent domain] 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.” 15 U.S.C. § 717f(h). Perhaps surprisingly, several circuits have read the phrase “practice and procedure” to encompass state substantive law as well as formal practice. See, e.g., *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1194–99 (6th Cir.1992). For the reasons indicated, we need not pursue this interesting subject in the present case.

***Under federal common law can the amount paid in other eminent domain cases be used to demonstrate value?***

***Portland Natural Gas Transmission System v. 4.83 Acres More or Less, 230 F.3d 1347, 2000 WL 1425761, at \*2 (1st Cir.2000)*** (district court was correct in precluding property owner from using the awards in eighteen eminent domain cases to explain how he had reached the conclusion that certain portions of his property had lost half their value due to the presence of the plaintiff’s pipeline, “on the ground that eminent domain awards could not be used in determining fair market value”)

***Does any policy of FERC address whether the use of eminent domain authority by a pipeline proponent will have an impact on whether FERC grants a certificate of need?***

***Arlington Storage Company LLC, 125 FERC ¶ 61,306, No. CP08-96-000, December 18, 2008***

The Commission's September 15, 1999 Certificate Policy Statement provides guidance as to how it will evaluate proposals for certificating new construction. The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. Our goal is to give



appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, ***and the avoidance of the unnecessary exercise of eminent domain or other disruptions of the environment.***

***Does FERC have a policy on whether a natural gas pipeline company can petition for eminent domain under state law before a certificate of need has been issued?***

***Mississippi Hub, LLC, 128 FERC ¶ 61,254, No. CP09-110-000, September 17, 2009***

The Websters are concerned that MS Hub will utilize eminent domain before it has obtained its certificate. ***Depending on individual state law, pipeline companies may petition for eminent domain under state jurisdiction prior to the issuance of a Commission certificate. However, a pipeline does not have the authority under the NGA to use eminent domain to take property, nor may it commence construction, prior to obtaining a certificate from the Commission.*** MS Hub states that it is committed to using all reasonable efforts to reach mutually acceptable easement agreements with the affected property owners before exercising its right of eminent domain.

***When a pipeline company commences a taking action under eminent domain in federal court can the pipeline company enter and take possession of the property before the condemnation proceedings are completed?***

***Transwestern Pipeline Company, LLC v. 17.19 Acres of Property, 550 F.3d 770 (9<sup>th</sup> Cir., 2008)***

Transwestern Pipeline Co. (Transwestern) appeals the district court's denial of its preliminary injunction motion seeking immediate possession of appellee landowners' parcels of land. As a holder of a valid Federal Energy Regulatory Commission (FERC) certificate, Transwestern claims it is entitled to condemn appellees' land pursuant to § 717f(h) of the Natural Gas Act (NGA). The district court denied the injunction, holding that, until condemnation proceedings are completed, Transwestern maintains no substantive right of possession and therefore the district court lacked authority to grant preliminary equitable relief. The district court had jurisdiction pursuant to 15 U.S.C. § 717f(h) and 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). ***We affirm and hold that, until an order of condemnation issues pursuant to the requirements of 15 U.S.C. § 717f(h), Transwestern has no substantive right of possession.***

***Alliance Pipeline L.P. v. 9.654 Acres of Land, Civil No. 4:12-cv-145 (D. N.D.) decided December 18, 2012***

The Court has carefully considered the evidence submitted by the parties. As determined above, Alliance Pipeline has established that it has a right to condemn the property in question pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h). The record before the Court reveals that Alliance Pipeline has met the equitable considerations needed to warrant immediate use and possession of the land at issue. See *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109,



114 (8th Cir. 1981) (outlining four (4) factors to be considered when determining whether a party is entitled to injunctive relief). The Court expressly finds that there is urgency and a need on behalf of Alliance Pipeline for the immediate possession. Alliance Pipeline has demonstrated that it would suffer immediate and irreparable harm if construction crews do not have immediate access to the entire route of the Tioga Lateral Project. Hutton would suffer no additional harm if Alliance Pipeline took immediate possession of the property in question as the company has clearly proven it has the right to condemn the property in question. In addition, Alliance Pipeline has committed to deposit the sum of \$3, 000 per acre of land to be condemned with the Clerk as a condition of immediate use and possession. *The Court further finds that it would be in the best interests of the public to grant immediate possession of the properties to Alliance Pipeline and that the public interest will be prejudiced by any delay in granting such possession.*



## **PART II – NEW HAMPSHIRE LAW AND EMINENT DOMAIN FOR A NATURAL GAS PIPELINE**

*What NH statute directly addresses the manner of eminent domain proceedings for natural gas pipeline companies?*

**371:15 By Pipeline Companies.** – Whenever any business entity organized under the laws of this state, another state, or the United States to construct and operate a natural gas pipeline holds a certificate of public convenience and necessity issued under the federal Natural Gas Act, authorizing it to construct and operate a natural gas pipeline or pipelines and appurtenant facilities within this state, or any petroleum pipeline company doing exclusively an interstate business, shall be unable to acquire necessary lands by purchase, lease or otherwise, it *may* institute condemnation proceedings as follows:

I. Said pipeline company shall cause a plan or location of the real estate proposed to be taken to be prepared and a copy thereof filed with the clerk of the superior court for each county in which any of such real estate is located and shall apply by petition to the superior court for the county in which such real estate is located to acquire said real estate for the purposes of such pipeline and to have assessed the damages occasioned by the taking. Such petition shall state the name and residence so far as known to said pipeline company of all persons claiming ownership of or interest in the real estate proposed to be taken. Where such real estate is located in more than one county the petition may be filed in either county.

II. The superior court, upon the filing of any such petition, shall order notice thereof to be given, by publication, to all persons claiming ownership of or interest in such real estate to appear and present their claims at a time and place to be stated in the notice; and an attested copy of such notice



shall be given in hand to, left at the usual place of residence or business of, or sent by registered mail to the last known address of all claimants whose names appear in the petition at least 14 days before the said date of hearing. The superior court, after notice to all parties interested, shall hear the preliminary questions, if any, and all issues relating to title, and shall determine the rights and interests of any and all parties, and the findings and decree relating to such issues shall be final and subject to review only upon questions of law.

III. Upon final determination of any and all of said questions, the superior court shall, unless the parties elect a trial by jury, appoint a commission consisting of 3 suitable persons to assess the damages occasioned by the taking. The commissioners, upon reasonable notice to all interested parties and after hearing, shall assess the damages and make report of such assessment to the superior court, and such action shall be taken thereon as justice may require. If either party shall so elect, before reference of such petition to a commission, the damages occasioned by the taking shall be assessed by jury.

IV. In trying any question of damages before said commissioners or by jury, the appraisal for taxation of such real estate, and, in cases where less than the whole interest in real estate is sought to be acquired, the appraisal for taxation of such whole interest, by the selectmen or tax assessors for the tax year in which such application shall have been filed, and for as many preceding years as the commissioners or the court may consider relevant, shall be competent as evidence of value. The damages as determined shall be awarded to the owner or apportioned among the several owners in accordance with their several interests as determined and judgment shall be entered accordingly.

V. Said pipeline company at any time after filing such petition may enter upon and take possession of the real estate upon providing such security as justice may require to pay any damages occasioned by the entry or to satisfy any judgment which may be rendered on the petition. The amount of the security and all questions relating thereto may be determined by the superior court upon application of either party. The title to the real estate shall, upon payment or tender of the damages occasioned by the taking, be vested in the pipeline company. For purposes of surveying and other investigation, said pipeline company shall be entitled to enter upon any real estate, doing no unnecessary damage; and the owner thereof may, if the parties are unable to agree, recover any damages sustained by him by reason of any preliminary entry authorized by this section by action at law against said pipeline company.

VI. No lands or rights of way or easements therein shall be taken by eminent domain under the provisions of this chapter in any public property, or within the location of any railroad or other public utility company; provided that such pipeline or pipelines may be constructed under or through any public highway or street, public park or reservation or other public property if the method of such construction, compensation, if any, and the plans and specifications therefor have been approved by the authority having jurisdiction over the maintenance of such public highway or street, public park or reservation or other public property; and provided further that such pipeline



or pipelines may be constructed over or across the location of any railroad or other public utility company by agreement with such railroad or other public utility company or, in the event of failure so to agree, then with the approval of the public utilities commission and in such manner as may be determined by said commission. Provided, however, that nothing herein shall be deemed to repeal any of the provisions of this chapter relative to acquisition of rights in public waters and on public lands.

***Does NH law regulate the manner of how a pipeline company negotiates with property owners to obtain a right of way for a natural gas pipeline?***

**§ 371:1-b. Acquisition Negotiations; Reference to Eminent Domain Prohibited**

No public utility, predecessor development entity, or agent of either, shall refer to the use of eminent domain in any landowner negotiations, unless the commission has first specifically authorized its use under this chapter with respect to the affected landowner. Any landowner may file a complaint with the commission under RSA 365:1 alleging violation of this section. Upon a finding of violation, after notice and hearing, the public utility or project-sponsoring affiliate shall be fined up to \$25,000 which shall be deposited in the general fund. If a landowner makes an inquiry concerning eminent domain, the public utility, predecessor development entity, or agent of either, may provide the landowner with the commission's contact information without violating this section.

***What is the manner of calculating just compensation when property is taken by eminent domain under NH law?***

***NH Dept. of Transportation v. Franchi, 163 NH 797 (2012)***

In an eminent domain proceeding, the preferred method for determining condemnation damages for a partial taking is the "before and after method, whereby the value of the remainder of the tract after the taking is deducted from the value of the whole tract before the taking." *Daly v. State*, 150 N.H. 277, 280, 837 A.2d 340 (2003) (quotation omitted). The owner is entitled to have the land appraised at the most profitable or advantageous use to which it could be put on the day of the taking. *Id.* at 279, 837 A.2d 340. The landowner is compensated "not only [for] the fair market value of the property actually taken, but also ... for the effect of the taking, if any, on the entire property, which is referred to as severance damages." *Id.* at 280, 837 A.2d 340 (quotation omitted). Use of the "before and after" method automatically accounts for severance damages. *Id.*

***Can the effects of a declining market in real estate values play a role in eminent domain just compensation cases?***

Although the property is to be valued as of the date of the taking, market data does not necessarily need to be excluded merely because it is data from sales occurring subsequent to the



taking. Cf. *Manning v. Redevelopment Agency of Newport*, 103 R.I. 371, 238 A.2d 378, 380-82 (1968) (rejecting "a hard and fast exclusionary rule" which would prohibit post-taking data for a more flexible approach giving the trial judge discretion to allow post-taking data). The landowner argues that the trial court's instruction "was in essence a carte blanche instruction to the jury to consider the abnormal collapse of the real estate market ... without any limitation whether the same would have been reasonably given substantial weight in [the fictional] bargaining that [would] have taken place prior to [the date of the taking]." However, both appraisers properly valued the property as of the date of the taking and the trial court repeatedly instructed the jury to value the property as of the date of acquisition. Moreover, the pre-trial instruction did not give the jury any indication that it should base its fair market value determination on the post-taking data. ***Rather, to the contrary, it accurately instructed the jury to consider post-taking data only to the extent that it assisted the jury in valuing the property on the date of the taking, and we presume the jury followed these instructions. State v. Smith, 149 N.H. 693, 697, 827 A.2d 985 (2003). This was not an unsustainable exercise of discretion.***

***Is there a right of entry prior to commencement of eminent domain procedures:***

**371:2-a Right to Enter.** – When ownership of land, upon or over which a public utility desires to erect facilities, cannot be ascertained without entry to do survey work, or, a public utility shall have filed a petition under RSA 371:1 with respect to a particular tract of land, in either case a public utility shall have the right to enter upon such land for the purpose of surveying and making such other investigation as is necessary to determine the locations of the boundaries of such land and of the facilities it desires to erect thereon or thereover, and to determine the title to, description of, or nature of such land. A public utility desiring to enter land in pursuance of this section shall notify by certified mail the owner or probable owner or owners thereof of its desire to enter for the purposes aforesaid at least 30 days prior to entry. Notification shall include identification of the utility seeking to enter the land, the time and date of the proposed entry, and the portion or section of land to be surveyed or investigated. Upon the date specified for entry, the persons conducting the survey or investigation shall present themselves to the property owner and show identification. The public utility shall pay the owner or owners of any land it shall enter in pursuance of the provisions of this section for any actual damage done upon entry.