



## 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.