

Statement for the Record before the U.S. Senate

Committee on Energy and Natural Resources

Full Committee Hearing To Review Administration Of Laws Within FERC's Jurisdiction

Tuesday, September 28, 2021

Submitted by the Niskanen Center¹

Introduction

Energy and Natural Resources Chairman Manchin, Ranking Member Barrasso, and Members of the Committee, thank you for holding this important hearing to assess how the Commission is meeting its goals.

The Niskanen Center represents landowners whose property is threatened by natural gas pipelines across the country in court and in FERC's administrative proceedings, and is significantly involved in developing national policy options for the next generation of electrical transmission infrastructure. Niskanen appreciates this opportunity to bring to the Committee's attention some specific concerns regarding two issues: (1) how poorly landowners are treated under the Natural Gas Act when pipelines seek to take their property for interstate natural gas pipelines, and (2) the need for Congress to create federal electric transmission siting authority.²

FERC Should Properly Address Adverse Impacts to Landowners

FERC is engaged in three processes affecting landowners that deserve Congressional attention: creation of the Office of Public Participation, which FERC delivered to Congress the required

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² Congress is considering both stand-alone and backstop federal transmission siting authority in the SITE Act (H.R.4971/S. 2651, To amend the Federal Power Act to establish a procedure for the siting of certain interstate electric transmission facilities, and for other purposes) and in H.R.3684, the Infrastructure Investment and Jobs Act (Section 40105, siting of interstate electric facilities).

report on in June; review of FERC’s Certificate Policy Statement, which describes how FERC performs the “public convenience and necessity” analysis required to certify new natural gas pipelines; and Order 871, clarifying the Commission’s rehearing process.

Landowners face something in FERC’s pipeline proceedings that no other stakeholder does: the potential permanent taking of their land, home, and/or livelihood.³ Despite these incredibly high stakes, landowners currently experience an overwhelming number of obstacles throughout FERC’s process, which is largely a rubber stamp exercise: FERC has denied only 6 certificates out of more than 1,000 proposals over the past 20 years, and has denied every single landowner appeal in the last 12 years.⁴

Office of Public Participation. Niskanen commends FERC for making the Office of Public Participation (OPP) a top priority following the Consolidated Appropriations and Covid Relief Act of 2020⁵, and for giving affected landowners’ feedback and experiences serious consideration.⁶ FERC’s June 24th OPP report to Congress conveys that it generally understands the needs of various stakeholders, but the details of OPP operations are left to the Director’s discretion. The Commission’s plan for the OPP includes the appointment of a Director, staff, and brief timeline for growth over the next four years, but the report did not include any benchmarks for determinations of success, firm plans for stakeholder engagement, or any agenda or details on how the OPP would implement commenters’ proposed improvements in public participation in any of the Commission’s processes. If properly planned and staffed, the OPP could address many of the issues that arise from FERC’s authority under the Natural Gas Act, including the extraordinary power to confer eminent domain authority. Unfortunately, Section 4202 of H.R. 3684, the Infrastructure Investment and Jobs Act, amends the provision that originally called for the OPP enacted more than 40 years ago⁷, eliminating the four year term for the Director and granting the Chairman unilateral oversight over the role which effectively politicizes the position and constricts the OPP’s independence.

³ See *The Niskanen Center’s Comments on FERC’s Creation of the Office of Public Participation*, Accession No. 20210423-5052, Docket No. AD21-9 (April 23, 2021) (“Niskanen OPP Comments”)

⁴ House Committee on Oversight and Government Reform, Subcommittee on Civil Rights and Civil Liberties, [“Subcommittee Releases Preliminary Findings Showing FERC Pipeline Approval Process Skewed Against Landowners”](#) 116th Congress (April 28, 2020).

⁵ 166 CONG. REC. H8378 (daily ed. Dec. 21, 2020) (explanatory statement submitted by Mrs. Lowry, Chairwoman of the House Committee on Appropriations).

⁶ Federal Energy Regulatory Commission, [Office of Public Participation Report](#), Accession No. 20210624-3028, Docket No. AD21-9-000 (June 24, 2021).

⁷ Pub. L. 95–617, title II, §212, Nov. 9, 1978.

Niskanen also believes that one of the OPP's responsibilities should be providing notice to landowners. While the Constitution (and Natural Gas Act⁸) require that FERC provide such notice, FERC instead delegates this task to the pipeline companies, the entities with the least possible interest in providing it effectively or with care.⁹ Even more troubling is that FERC has admitted that it does not bother to confirm whether pipeline companies ever provide any such notice, and the Commission has gone so far as to affirmatively deny that either the Fifth Amendment or the Natural Gas Act requires that the federal government be the one to inform landowners that a federal agency is considering whether to grant a pipeline the authority to take their property.¹⁰

FERC should also use OPP as an opportunity to completely overhaul the information provided to landowners in such notices, as the current notice format is notoriously vague and confusing.¹¹ Information provided must be clear, time between notice and the intervention deadline must be standardized and extended, and support provided for intervenors should be considerate of what they have at stake.¹² Finally, FERC should grant automatic party status for affected landowners and streamline proceedings.¹³

At a minimum, OPP should assist landowners in overcoming the continuous obstacles over the entirety of FERC's multi-year proceedings. Assistance with filing, improving use of FERC's eFiling system, elimination of overly burdensome service requirements, as well as providing some level of intervenor funding will be necessary for the OPP's success. FERC will also need to undertake a rulemaking in order to provide the necessary intervenor funding that would enable landowners the opportunity to participate in those legal proceedings.

⁸ 15 U.S.C. 717f(c)(1)(B) (requiring FERC to provide notice to all "interested persons").

⁹ 18 CFR 157.6(d)(1) (delegating FERC's landowner notice responsibility to certificate applicants); 18 CFR. 157.6(d)(3) (describing the information applicants are required to provide affected landowners).

¹⁰ Because "a pipeline applicant, not FERC, is the party that may ultimately have statutory eminent domain authority, and [*sic*] thus the notice obligations are the applicant's." Final Brief of Appellee, ECF No. 1897604, p. 48, *Niskanen Center v. FERC*, No. 20-5028 (oral argument scheduled held September 13, 2021). The only FERC oversight mechanism in place over the pipeline sending affected landowners notice is the requirement that Certificate applicants submit a list of the names and addresses of the landowners it allegedly notified. 18 CFR 157.6(d)(5). FERC has taken the position that these lists are "confidential" and not disclosable under FOIA, an issue now before the D.C. Circuit in *Niskanen Center v. FERC*. These lists should be made public and readily available to any interested party who requests a copy.

¹¹ Niskanen OPP Comments at 3-6.

¹² *Id.* at 7-10.

¹³ *Id.* at 11.

Certificate Policy Statement. FERC’s pending update of its Certificate Policy Statement will outline how the Commission will make future needs determinations for natural gas pipelines, and Niskanen hopes that it will give landowners appropriate consideration in this analysis. Niskanen also hopes that the Commission actually implements any such changes, because FERC’s historic practice has been to cite the current Policy Statement only when convenient. For example, the current Policy Statement warns against accepting precedent agreements as the sole evidence of market need and giving affiliate precedent agreements equal weight as precedent agreements with third parties; it also encourages FERC to look behind such affiliate precedent agreements to see whether in fact they show genuine market demand.¹⁴ Yet FERC routinely ignores each of these provisions, a practice that recently caught up with the Commission in *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021).

Niskanen would also like to see a revised Policy Statement that articulates a coherent test to balance a pipeline’s public benefit against its impacts on landowners (as well as other adverse impacts, such as environmental concerns). It is impossible for the Commission to properly determine whether a pipeline is necessary for “the public convenience and necessity” if the Commission continues to ignore adverse impacts on landowners. This includes the Commission’s misguided belief that landowners who sign easements under duress (*i.e.*, the threat of eminent domain), do so “voluntarily.” Furthermore, its policy of not considering how extensively a pipeline will use eminent domain, FERC elides in favor of its invented metric of “avoided adverse effects” on landowners; in other words, FERC’s analysis of impacts on landowners is limited entirely to “here’s how it could have been worse.”

Order 871. Niskanen applauds FERC’s recent Order 871 (and subsequent revisions in Orders 871-A through 871-C), which established that FERC will not allow pipeline certificate holders to exercise eminent domain or begin construction before landowners can seek judicial review of FERC’s certificate decision. Still, FERC has not defined what “construction” and “pre-construction” activities are, preferring to make this a pipeline-by-pipeline determination. This has resulted in including clear-cutting trees and digging pipeline trenches under the rubric of “pre-construction” activities. This practice causes unnecessary irreparable harm, particularly when FERC subsequently reroutes the project or the pipeline company abandons the project entirely, as has happened recently with the Constitution and Atlantic Coast Pipelines.

¹⁴ The Niskanen Center and Affected Landowners’ Motion to Intervene and Joint Comments on the Commission’s Renewed Notice of Inquiry on the Certification of New Interstate Natural Gas Facilities. 174 FERC 61,125. Docket PL18-1-000 (Feb.18, 2021).

As Chairman Raskin of the House Civil Rights and Civil Liberties Subcommittee stated, FERC is supposed to *protect* the people.¹⁵ Niskanen is glad to see so much Congressional attention, via a multitude of committee hearings and legislative proposals, focused on FERC and its pipeline review processes. Niskanen further hopes that this attention continues to better protect landowners as the Constitution, the Natural Gas Act, and fundamental fairness dictate as FERC implements the Office of Public Policy, its revised Certificate Policy Statement, and Order 871.

Transmission Siting

Expanding and updating America’s electric transmission system is critical to powering the 21st century economy. The difficulty of planning and siting interstate transmission is the largest issue facing the development of otherwise economically viable generation projects. High voltage transmission capacity delivering electricity over long distances is a critical and cost-effective mechanism in decarbonizing our electricity sector and modernizing the grid.¹⁶

The changing energy landscape must include streamlining transmission siting and planning, as the decentralized siting and permitting process for transmission lines is the single most significant cause of project delays and cancellations. With FERC’s focus on reliability and economic value in decision-making, new technologies clearly can thrive but will only be able to do so when they are connected to end users. Clear and consistent guidelines and evaluation metrics can only come from a single governing agency, and would have the valuable impact in allowing transmission developers, utilities, and generators to gain the benefits of distributed energy resources available now and in the future.¹⁷

The Energy Policy Act of 2005, now Sections 216 and 219 of the Federal Power Act, granted FERC “backstop” siting authority when State approval is withheld for a project within a National Interest Electric Transmission Corridor (NIETC, a region or regions identified by the Department

¹⁵ Rep. Raskin, “Pipelines Over People: How FERC Tramples Landowner Rights in Natural Gas Projects.” Opening Statement, Civil Rights and Civil Liberties Subcommittee Hearing (December 9, 2020), note 4.

¹⁶ Aaron Bloom et al., The Value of Increased HVDC Capacity Between Eastern and Western U.S. Grids: The Interconnections Seam Study, NREL/JA-6A20-76580 (National Renewable Energy Laboratory, October 2020); Patrick Brown and Audun Botterud, “The Value of Inter-Regional Coordination and Transmission in Decarbonizing the US Electricity System,” *Joule* 5, no. 1 (December 2020): 115-134.

¹⁷ Reed, Liza. “[Transmission Stalled: Siting Challenges for Interregional Transmission](#),” Niskanen Center (April 2021), p. 9.

of Energy following a congestion study.)¹⁸ This authority has been substantially undercut by the Fourth Circuit decision that “withheld” does not include denial, in effect neutering FERC’s ability to hold any power in navigating the dynamic and time consuming requirements involved in interstate transmission coordination.¹⁹ Niskanen respects FERC’s and the States’ carefully balanced interests, as well as the Department of Energy’s authority to designate NIETCs in areas where it determines there are transmission constraints or congestion. Still, there are reasons Congress initially provided transmission siting authority in NIETCs to FERC, which has relevant siting experience in interstate natural gas pipelines, including coordinating various permitting requirements across agencies. Congress should reaffirm and strengthen this authority as well as exploring additional avenues such as new federal eminent domain authority for transmission siting, including characteristics of transmission lines that are primarily in the federal interest due to the regional nature of benefits provided. Establishing a clear authority and set of characteristics would alter the balance of State and Federal interests while still maintaining the appropriate State authority over local transmission projects. Were the Commission afforded expanded authority for transmission, either through backstop²⁰ or plenary authority similar to what the Commission has for pipelines, Congress should also make sure to furnish landowners with protections such as those suggested in S. 2651, the Streamlining Interstate Transmission of Electricity Act.

Niskanen applauds FERC and the National Association of Regulatory Utility Commissioners for announcing the formation of a federal-state task force to address and identify barriers that inhibit planning and development of optimal transmission to achieve federal and State policy goals.²¹ This will be helpful in addressing these issues, as well as discovering new mechanisms to enhance federal-State coordination on new projects, but Niskanen still looks to Congress to help grant limited primary interstate siting authority to FERC as the solution to the current patchwork system.²² The highly variable interpretations of public necessity in State permitting and siting means there will never be enough coordination to target national needs in addressing this problem. FERC is clearly aware that national transmission needs are not sufficiently met, as demonstrated in its July 15, 2021 Advanced Notice of Proposed Rulemaking,²³ the first time in

¹⁸ 16 U.S.C. 824(p) and 16 U.S.C. 824(s). See Reed at p.7.

¹⁹ *Piedmont Environmental Council v. FERC*, 558 F. 3d 304 (4th Cir. 2009).

²⁰ as proposed in H.R. 3684 Infrastructure Investment and Jobs Act

²¹ FERC, “[NARUC to Establish Joint Federal-State Task Force on Electric Transmission.](#)” AD21-15-000. FERC (June 17, 2021).

²² See Reed, p.11.

²³ FERC, “[Advance Notice of Proposed Rulemaking: Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection.](#)” Docket No. RM21-17-000 (July 15, 2021).

ten years that the Commission has considered large-scale changes to the regional transmission planning, cost allocation, and generator interconnection processes.

Niskanen strongly urges the Senate Energy and Natural Resources Committee to consider any and all opportunities available to assist FERC legislatively and collaboratively in taking on these important challenges facing landowners and the expansion of our energy grid, as well as continuing to evaluate FERC's efforts in meeting its goals.