Institute for Energy Economics and Financial Analysis
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IEEFA Energy Finance Conference 2020 (online)

Tuesday, July 29

Under Pressure: The Impetus for Over-Building Pipelines and How to Stop It

Legal and policy experts discussed issues related to pipeline projects, including: opposition to the use of eminent domain, strategies to reform federal energy law, the intersection between environmental interests and property rights, economic forces and information wars. New York's recent decision to reject the Williams pipeline will be highlighted.

Speakers:

David Bookbinder, Chief Counsel, The Niskanen Center

Alexandra Klass, Distinguished McKnight University Professor, University of Minnesota Law School

Suzanne Y Mattei, Energy Policy Analyst, IEFFA

Moderator:

Rebekah Sale, Executive Director, Property Rights and Pipeline Center

Video: youtube.com/ieefa_org

Q & A*

1. *Gas pipelines have become a flash point for grassroots opposition and organizing. Does this trend influence pipeline developers and investors in any way? If so, how?* (Bryndis Woods, Researcher, Applied Economics Clinic)

Suzanne Mattei

Pipeline developers and investors should certainly be paying attention to the growing opposition to building of pipeline infrastructure. Projects that might have sailed through the permit process a couple decades ago are now subject to much more scrutiny, and even a permit approval does not guarantee that the project will actually get built. The end users, the consumers, are moving away from oil and gas to energy alternatives.

2. *Is there any danger of an impending U.S. Supreme Court ruling that would allow eminent domain for gas? Also, is there any legal basis for defining 'public benefit' that includes environmental and public costs?* (Vanessa Warheit, Executive Director, Fossil Free California)

David Bookbinder

There already is eminent domain for pipelines, under both state and federal law. I'm not aware of any pipeline statute that defines "public benefit" to include environmental and public costs.

Alexandra Klass

The Natural Gas Act [NGA] and some state laws take environmental and other costs into account in evaluating whether a certificate of public convenience and necessity (or equivalent state permit) should be granted. Once that is issued, there is no additional evaluation of environmental and public costs in the eminent domain determination.

3. *To what degree, if any, does the economic viability of a pipeline factor into its invocation of eminent domain? i.e., does a pipeline have to demonstrate (or could a challenger rebut a presumption of) profitability?* (Steven Feit, Attorney, Center for International Environmental Law [CIEL])

David Bookbinder

Economic viability is not a factor; the presumption is that the certificate applicant would not be building it if it couldn't make money. And FERC will accept contracts for the gas as evidence of market demand.

Alexandra Klass

Similar to the above question, the economics are taken into account at the certificate of public convenience and necessity stage. No additional evaluation of those factors for eminent domain.

Suzanne Mattei

Pipelines, if permitted and built, will be profitable to the builder and investors because the rate-paying public is ultimately shouldering the cost. The economic issue that must be raised is the impact on that rate-paying public compared with more reasonable alternatives, and this issue must be raised and addressed at the state or local level before the agency that regulates the utility serving the area -- the utility that would be the official customer for the gas.

4. *Could you speak more to the legal and regulatory tools to use against CO^2 pipelines, especially as the industry sees carbon capture, utilization, and storage (CCS) as another lifeline and CO^2 pipelines as necessary to transfer captured CO^2 to facilities to then create products with that CO^2?* (Nick Thorpe, Climate & Energy Program Associate, Earthjustice)

David Bookbinder

CO^2 pipelines are (at least for now) creatures of state law, so the most logical way to prevent them using eminent domain would be to show that they are not "common carriers", i.e., that they are open to anyone who wants to ship CO^2. Since CO^2 from CCS will almost always be generated from a single facility, that will be a significant hurdle for them. At least until state legislatures start saying that the transport of CO^2 for purposes of sequestration is in the public interest, at which point they would not need common carrier status.

5. *For conservative states like Louisiana that were part of the Kelo [*v. City of New London*] backlash but that lack regulations on eminent domain use by pipelines, would you have suggestions for tweaks to the law that might be appealing to property rights activists more broadly?* (Mike Brown, Earthjustice)

David Bookbinder

Given the truly abysmal Louisiana situation, where the pipeline company does not even have to tell the state what it is doing, but just starts condemning whatever land it wants, anything would be an improvement. But the chances of getting the Louisiana legislature to take on the oil & gas guys are zero.

Alexandra Klass

In states like Louisiana and Texas, with economies dependent in large part on oil and gas extraction and processing, legislative reform is unlikely. However, other states (Georgia and South Carolina) imposed moratoria on the use of eminent domain for oil and NGL pipelines and then created stricter requirements for the use of eminent domain. Other states, like Illinois, have done the same.

6. *Natural gas is often considered a "transition fuel" in moving towards renewable energy, to what extent are alternate energy sources considered in pipeline decisions? How far ahead into the future do stakeholders weigh both the public benefits and costs?* (Sagal Alisalad, Applied Economics Clinic)

David Bookbinder

It would be great if FERC [the Federal Energy Regulatory Commission] were to consider whether alternative energy sources could fill whatever future need the pipeline company identifies, but they do not see that as part of their mandate. As far as FERC is concerned, as long as there are binding contracts for shipping/purchasing the gas, that satisfies the "market demand" criterion; it is really up to state PUCs/PSCs [Public Utility/Public Service Commissions] to find that alternatives are a better means of meeting any alleged needs.

Alexandra Klass

FERC could make some changes in this area and, of course, Congress could require FERC to evaluate alternative energy sources in pipeline decisions. Many states already do that for oil pipelines and other pipelines under state jurisdiction.

Suzanne Mattei

This is an effort that can most fruitfully take place at the state or local level. Local agencies that regulate utilities must require them to develop energy plans that give full consideration to alternative energy and energy efficiency while also giving full scrutiny to predictions of future increases in demand.

7. *What role can divestment by large-scale investors play in changing the profitability calculus for pipelines? How much $$ would have to be restricted to make a difference?* (Vanessa Warheit, Executive Director, Fossil Free California)

Suzanne Mattei

I can't speak to that directly, but if a pipeline can make money, there will be investors. The solution is pressure at the other end, the consumer end, of the pipeline. If communities, as captive ratepayers, demand alternatives to pipelines, and prevent utilities from signing on as customers, the pipeline project will not be viable.

8. *[Many have called use of] the term "natural" gas — as misleading — "fossil gas" is growing in popularity as a preferred term. Does anyone want to comment?* (Kjell Kühne, Leave it in the Ground Initiative [LINGO])

David Bookbinder

“Fossil gas” as opposed to biogas, etc., is a better term, but not many people use it.

Suzanne Mattei

“Fossil gas” definitely is a more accurate term to use. There is nothing natural about digging deep into the ground, pulling up gas, and either venting it, flaring it, or sending it for burning in a power plant.

9. *What will it take to change FERC guidelines? Is this a corruption problem?* (Vanessa Warheit, Executive Director, Fossil Free California)

David Bookbinder

Congress needs to revisit the Natural Gas Act; FERC, even with a majority of Commissioners appointed by an administration more attuned to the concerns of individual landowners and the environment, will never be able to do the total overhaul that is necessary to get away from the mentality that has solidified over the 80+ years, since the NGA was enacted.

Alexandra Klass

FERC can take some steps through how it evaluates environmental impacts of pipelines, but for wholesale change, Congress should revise the Natural Gas Act.

Suzanne Mattei

I agree with both David's and Alexandra's statements. I would also add that political pressure today on government agencies is so strong and pervasive that it approaches corruption even if no money or benefit changes hands.

10. *Could you comment on how FERC's approach may change if it comes under Democratic leadership after the next election?* (Maya Weber, Journalist, S&P Global)

David Bookbinder

If a majority of commissioners is appointed by an administration more concerned about individual landowners and the environment, FERC will be somewhat more sympathetic to landowners and environmental concerns, but they will still be constrained by the decades of their own NGA precedent.

11. *Here in Canada, the failing Trans Mountain Pipeline was bought by the federal government. Is there any way its financial non-viability can be explained to the public?* (Chris Peter, Canada)

[IEEFA has produced several reports about the financial pitfalls of the Trans Mountain pipeline purchase. See: *IEEFA report: Canada Trans Mountain Pipeline financials provide few clues on actual price tag and future costs*
https://ieefa.org/ieefa-report-canada-trans-mountain-pipeline-financials-provide-few-clues-on-actual-price-tag-and-future-costs/

Trans Mountain Pipeline Financials: Built on Quicksand and Clear as Mud
https://ieefa.org/wp-content/uploads/2019/04/Trans-Mountain-Pipeline-Financials_April-2019.pdf

IEEFA report: Additional $320 million in subsidies used to finance Trans Mountain Pipeline in first half of 2019
https://ieefa.org/ieefa-report-additional-320-million-in-subsidies-used-to-finance-trans-mountain-pipeline-in-first-half-of-2019/

Trans Mountain Pipeline Financials Suggest Taxpayer Dollars at Risk
https://ieefa.org/wp-content/uploads/2019/11/Trans-Mountain-Pipeline-Financials-Suggest-Taxpayer-Dollars-at-Risk_November-2019.pdf]

12. *I'd love to know more about the 'cozy happy family' of owners that David referred to. Since the oil industry in general is in such dire financial straits, I'm curious about the role that pipelines play in the money flows.* (Vanessa Warheit, Executive Director, Fossil Free California)

David Bookbinder

FERC guarantees pipelines a 14% return on equity, so there is tremendous incentive to overbuild, and with profit margins like that (and state PUCs and PSCs that allow these costs to be passed on to consumers), things are not going to change until there is a significant drop in demand for gas.

**Note that questions were submitted by attendees online during the live Q & A session. Answers were provided post-event by presenters. For further information, please contact IEEFA Strategic Communications Director Vivienne Heston (vheston@ieefa.org).*

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