Condemnation for Energy Corridors:

Selected Legal Issues in Acquisitions for Pipeline, Transmission Line and Other Energy Corridors

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EXECUTIVE SUMMARY

There has been a resurgence in proposed energy corridor acquisitions across the United States in recent years, as energy companies invest in new corridors to transport electricity, natural gas, oil and other energy products. The demand for new corridors is fueled by many factors, including the price of energy, population growth, the demand for alternative and renewable energy sources, and the fact that existing utility corridors are overly congested and insufficient to handle anticipated demand. It is well documented that the power transmission grid that transmits electricity in most states cannot support current demand, let alone additional electricity generated by wind farms and other renewable sources. Indeed, the lack of sufficient transmission capacity is a major obstacle in the development of renewable energy sources such as wind, solar and others.

New demand for pipeline corridors—especially for oil and natural gas pipelines—is also growing. Utilities are, for example, converting coal-fired plants to run on cleaner natural gas, thereby increasing the demand for pipeline infrastructure to supply natural gas to these new users and to ensure proper service for existing users of natural gas.

Private energy companies using the power of eminent domain to acquire property for new corridors must confront complex legal issues, ranging from challenges to their authority to take private and public property to complicated valuation questions.

One major challenge involves the acquisition of government-owned property and property already dedicated to a public use, such as railroads, parkland and existing utility corridors. Energy companies are usually required to locate new corridors along the path of, or next to, existing energy or railroad corridors, which are often adjacent to less populated areas, such as parks and industrial properties. As a result, a private company seeking to establish a new corridor often must acquire easements from government entities and utilities with pre-existing property rights. These entities often have the power of eminent domain themselves.

A private company with the power of condemnation normally has the right to take property from private landowners when negotiations fail and possession of such property becomes necessary. With government property or property already dedicated to a public use, however, the right to condemn is not as clear-cut. Indeed, in certain cases, an energy company simply cannot exercise its condemnation power to take such property.

The general rule regarding the power of eminent domain over public property is the well-known doctrine of prior public use: A condemnor may not condemn public property or property already devoted to public use unless the authority to do so is expressly or impliedly granted by statute. The power to condemn under a general grant of eminent domain may be implied when the current owner has not put its land to public use. However, when the land is already dedicated to and actually used by the state or a governmental entity for a specific public use, mere general authority to condemn is insufficient to interfere. Further, under the prior public use doctrine, if the proposed new use will extinguish or materially impair the prior use, the proposed taking will be prohibited. This doctrine stems from the recognition that the legislature has delegated the power of eminent domain to many municipal and private corporations. If one such body could acquire land used or held for a public purpose by another corporation under a general power of condemnation, the latter would logically be free to re-acquire the same property.

For energy companies, the "consistent use" exception to the prior public use doctrine is often useful. It allows condemnation of property already dedicated to a public use if the two uses are compatible and can coexist on the same property. This exception is particularly useful when negotiating easement acquisitions along a pre-existing corridor. In most instances, the proposed use has little, if any, interference with another utility's use of its existing easements.

Some states have adopted statutes recognizing the doctrine of "higher" or "more necessary" public use. These statutes generally permit a subsequent taking of public use property upon a showing that the subsequent use is a higher or more necessary public use.

Because energy corridor projects are ordinarily subject to rigid timelines, companies may benefit by pursuing alternatives to condemnation. These options may include requesting consent from the public entity to be included in the private company's condemnation action, negotiating temporary encroachment agreements to allow immediate access, mediation and arbitration.

Perhaps the most effective way to reduce the risk of not being able to acquire easements is to engage in strategic analysis of the proposed route in the early stages. Companies and their legal counsel can assess the types of property along proposed routes so as to minimize legal challenges and reduce costly and unreasonable compensation claims. The goal is to identify problematic properties at an early stage. Early strategic analysis can help a company achieve a greater degree of project certainty.

Valuations are another important concern. Corridor acquisitions typically involve partial takings of property, as energy companies generally acquire only easement rights. As with partial takings for any other purpose, the "before and after" method is the predominant appraisal technique. The entire property is valued without the corridor easement (the "before" condition) and then with the corridor easement in the "after" condition.

A common method of appraising an existing corridor is the "across the fence" approach, in which appraisers determine the value of an easement by the price or value of land "across the fence" from the railroad, pipeline, highway or other corridor real estate.

Public fear of perceived safety hazards is often asserted as an element of damages in energy corridor condemnation cases. There are three distinct views on the admissibility of evidence of fear in eminent domain cases.

The majority view among courts is that evidence of fear in the marketplace is admissible without proof that such fear is reasonable. This approach focuses on the impact of the alleged fear on property value, and shields the court from having to analyze competing scientific views on issues where no scientific consensus exists, such as the link between electromagnetic fields and cancer. To be compensated for such fear, the property owner must prove a prevalent perception of danger emanating from the objectionable condition and that such perception has affected property values.

Some courts have adopted the view that evidence of fear is admissible on the issue of damages only if the fear is reasonable. A small minority excludes evidence of fear in the marketplace as too speculative to justify damages.

Private companies that transport natural gas in interstate commerce have the power of condemnation under the federal Natural Gas Act (NGA) to acquire corridors for pipelines. The NGA governs the transportation, storage and sale of natural gas in interstate and foreign commerce, reflecting Congress's judgment that these activities are of national importance and should be subject to federal regulation. A natural gas company seeking to construct or operate pipelines in interstate commerce must first secure a Certificate of Public Convenience and Necessity from FERC. The FERC Certificate establishes the location of the pipeline route and the public purpose and necessity for any taking of property along the route. Once FERC issues the certificate, the company cannot deviate from the approved route. The NGA preempts all state or local regulations that conflict with FERC's authority, including FERC Certificates.

Under the NGA, the condemnor has a choice of a state or federal forum in which to commence condemnation and acquire property for a corridor. Federal court jurisdiction is limited to cases when the amount claimed by the property owner exceeds $3,000.

Section 717f(h) of the NGA explicitly states that federal courts should look to the "practice and procedure" of the state in which the subject property is located in resolving the rights and obligations of parties to an eminent domain action. A number of courts, following that explicit language, have applied state practices and procedural law in NGA condemnation cases accordingly. The majority, however, hold that Rule 71.1 of the Federal Rules of Civil Procedure governs federal eminent domain actions, including those under the NGA. These courts hold that Rule 71.1, which was adopted in 1951, supersedes Section 717f(h), which was enacted in 1938.

Unlike most state procedures, Rule 71.1 allows the condemning authority to join all the separate pieces of property in a single action, regardless of whether they are owned by the same persons or sought for the same use. Further, the Rule contains no express requirement that the condemnor meet and confer with the owner, obtain an appraisal of the property, or pay for an appraisal requested by the owner. Nor is there a right to a jury trial. If the parties are unable to agree, the issue of compensation can—at the court's discretion—be determined by a three-person commission. Also, unlike most state statutes, Rule 71.1 does not allow the owner to recover all his expenses, including attorneys' fees, from the condemnor.

The NGA does not give private natural gas companies the right of quick take. This lack of an explicit right of quick take poses a risk for pipeline companies by subjecting projects to significant delays while parties litigate just compensation. A number of courts have maneuvered around this perceived shortcoming by allowing immediate possession by exercise of the court's equitable powers. These courts hold that, upon satisfaction of the standard for injunctive relief, authorized pipeline companies holding FERC certificates may be granted immediate possession of the property prior to a determination of just compensation, thus allowing commencement of construction. This view has been criticized as circumventing the power of the legislative branch of government to grant condemnation power, including the power of quick take. The few courts that follow this opposing view hold that a court's inherent equitable powers cannot be used to unilaterally grant a private party the right of quick take.

Introduction

There has been a resurgence in proposed energy corridor acquisitions across the United States in recent years, as energy companies invest in new corridors to transport electricity, natural gas, oil and other energy products to customers.[1] The demand for new corridors is fueled by many factors, including the price of energy, population growth, the demand for alternative and renewable energy sources, and the fact that existing utility corridors are overly congested and insufficient to handle anticipated energy demand. With energy independence a major issue in the 2008 presidential campaign, and with President Barack Obama promising to increase support for renewable energy, there is good reason to expect such trends to continue or even increase.

It is well documented that the power transmission grid that distributes electricity in most states and across the country cannot support current demand, let alone additional electricity generated by wind farms and other renewable energy sources. Indeed, the lack of sufficient transmission capacity is a major obstacle in the development of renewable energy sources such as wind, solar and others. In Minnesota, for example, the growth of wind farms has overwhelmed the state's power transmission lines, and some wind-generated power goes to waste.[2] Similarly, in New York, regional electric lines "have been so congested," the New York *Times* reported last year, "that Maple Ridge Wind Farm [a $320 million wind farm in upstate New York] has been forced to shut down even with a brisk wind blowing."[3]

New demand for pipeline corridors—especially with respect to oil and natural gas pipelines—is also growing. Utilities are, for example, converting coal-fired

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[1] *See, e.g.*, H.J. Cummins, *Power Transmission Grid in Line for Major Overhaul*, STAR TRIBUNE (Minneapolis, Minn.), Oct. 18, 2008, http://www.startribune.com/business/31186769.html.

[2] Billy Steve Clayton, *An Interactive* Guide *to Minnesota's Wind Power*, STAR TRIBUNE (Minneapolis, Minn.), Sept. 11, 2008, http://www.startribune.com/business/28251514.html.

[3] Matthew Wald, *Wind Energy Bumps Into Power Grid's Limits*, N.Y. TIMES, Aug. 27, 2008, http://www.nytimes.com/2008/08/27/business/27grid.html?_r=1.

plants to run on cleaner natural gas.[4] This development has resulted in the construction of new pipeline infrastructure to supply natural gas to such new users and to ensure proper service to existing users of natural gas.

Private energy companies using the power of eminent domain to acquire property for new corridors face complex legal issues ranging from challenges to their authority to take private and public property to complicated valuation issues. This white paper addresses some of these legal issues, including (1) the challenges and options associated with acquisition of corridor property from public entities or other entities with condemnation authority; (2) the typical valuation issues in corridor cases, including the relevance of evidence of fear in determining just compensation; and (3) pipeline condemnation under the federal Natural Gas Act (NGA). The NGA—which applies to interstate natural gas pipelines—is quickly becoming a powerful tool for natural gas transmission companies in acquiring corridors for interstate natural gas pipelines. Significantly, while the statute does not authorize "quick take" condemnation, most courts agree that a private natural gas company can obtain immediate access to property by satisfying the requirements for injunctive relief under Rule 65 of the Federal Rules of Civil Procedure.

I. CONDEMNATION OF PROPERTY ALREADY DEDICATED TO A PUBLIC PURPOSE

One major challenge for private energy companies seeking to acquire property for new corridors involves the acquisition of government-owned property and property already dedicated to a public use, such as railroads, parkland and previously developed utility corridors. More often than not, energy companies are required by regulatory authorities to locate new corridors along the path of, or next to, existing energy or railroad corridors. These existing corridors are often adjacent to less populated areas, such as parks and industrial properties. As a result, a private company seeking to establish a new corridor must acquire easements from government entities and other utilities with pre-existing property

[4] Matthew Wald, *Utilities Turn From Coal to Gas, Raising Risk of Price Increase*, N.Y. TIMES, Feb. 8, 2008, http://www.nytimes.com/2008/02/05/business/05gas.html?_r=1.

rights along the path of the new corridor. These entities often have the power of eminent domain themselves.

A private company with the power of condemnation normally has the right to take property from private landowners when negotiations fail and possession of such property becomes necessary to meet construction or other regulatory deadlines. With respect to government property or property already dedicated to a public use, however, the right to condemn is not as clear-cut. Indeed, in certain cases, an energy company simply cannot exercise the condemnation power to take property already dedicated to a public use. A careful review and understanding of the relevant law is critical in such situations.

A. Prior Public Use Doctrine

The general rule regarding the power of eminent domain over public property is the well-known doctrine of prior public use: A condemnor to whom the right of eminent domain has been delegated may not condemn public property or property already devoted to public use unless the authority is expressly or impliedly granted by statute.[5] The power to condemn under a general grant of eminent domain may be implied when the current owner has not put its land to public use.[6] However, when the land is already dedicated by the state or one of its governmental entities for a specific public use and is actually used for such specified purpose, mere general authority to condemn is insufficient to interfere with the existing use.[7] Further, under the prior public use doctrine, if the proposed new use will extinguish or materially impair the prior public use, the proposed taking for the new use will be prohibited.[8]

In other words, the prior public use doctrine "exempts from condemnation, under a mere general power to condemn, property previously appropriated to another public use,

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[5] *In re City of Shakopee*, 295 N.W.2d 495, 498 (Minn. 1980); *see also Weehawken v. Erie R.R. Co.*, 120 A.2d 593, 596-97 (N.J. 1956); *Town of Fayal v. City of Eveleth*, 587 N.W.2d 524, 526 (Minn. Ct. App. 1999); *Williams Pipeline Co. v. Soo Line Railroad Company*, 597 N.W.2d 340, 345 (Minn. Ct. App. 1999); JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.2 (3d ed. 2006) (collecting cases).

[6] *See City of Eveleth*, 587 N.W.2d at 526.

[7] *See Minn. Power & Light Co. v. State*, 79 N.W. 315, 317-18 (Minn. 1929).

[8] *See Nw. Tel. Exchange Co. v. Chi., Milwaukee & St. Paul Ry.*, 79 N.W. 315 (Minn. 1899).

which has been actually put to such prior use, but does not exempt from condemnation property which has not been actually put to the prior public use, at least unless it should be shown that the property is in fact needed for the prior public use and that effective measures are being taken to apply it thereto without undue delay."[9] The doctrine is most commonly applicable in cases involving condemnation of public property by private entities and local government authorities with the power of condemnation.[10] The doctrine stems from the recognition that the legislature has delegated the power of eminent domain to many municipal and private corporations. If one such body could acquire land used or held for a public purpose by another corporation under a general power of condemnation, the latter would logically be free to re-acquire the same property.[11]

B. Consistent Use Exception to the Doctrine of Prior Public Use

For energy companies, a useful exception to the prior public use doctrine is the consistent use exception, which allows subsequent condemnation of property already dedicated to a public use if the two uses are compatible and can coexist on the same property. Under this exception, a grant of general condemnation authority is adequate to permit a subsequent condemnor to condemn property of a previous public user. In *Town of Fayal v. City of Eveleth*, the Minnesota Court of Appeals articulated the exception as follows:

> The rule against taking property already devoted to a public use, in the absence of express authority, generally does not apply when the second use does not materially or seriously interfere with the first use, or, when the second use is consistent and the two uses may be enjoyed together without interference with the first use.[12]

This exception is particularly useful when negotiating easement acquisitions from other utilities with pre-existing easement rights along a designated corridor. In most instances, the proposed use has little, if any, interference with the other utility's use of its

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[9] *In re City of Shakopee*, 295 N.W.2d at 498 (quoting *Bd. of Water Comm'rs v. Roselawn Cemetery*, 165 N.W. 279, 281 (Minn. 1917)).

[10] Generally, the prior public use doctrine does not apply if the condemning authority is the federal or state sovereign.

[11] *See Weehawken*, 120 A.2d at 596-97.

[12] 587 N.W.2d 524, 529.

existing easements. Under Minnesota law, the existing utility must show that the subsequent use will "materially or seriously interfere" with its use of the corridor before it may successfully invoke the prior public use doctrine to prevent subsequent condemnation. Thus, assuming no explicit statutory limitation, the consistent public use exception may allow the subsequent condemnor to initiate condemnation to acquire easements from certain uncooperative public use landowners.

C. Statutory Prohibition

In some cases, a private company's authority to condemn public use property is restricted by the relevant statute containing the grant of eminent domain power. For example, Minn. Stat. Section 117.48, which grants the power of eminent domain to companies engaged in the transport of crude petroleum, oil, related products or natural gas by pipeline in Minnesota, contains the following restrictions:

> Any corporation or association qualified to do business in the state of Minnesota engaged in or preparing to engage in the business of transporting crude petroleum, oil, their related products and derivatives including liquefied hydrocarbons, or natural gas by pipeline as a common carrier, is authorized to acquire, for the purpose of such business, easements or rights-of-way, over, through, under or across any lands, ***not owned by the state or devoted to a public purpose*** for the construction, erection, laying, maintaining, operating, altering, repairing, renewing and removing in whole or in part, a pipeline for the transportation of crude petroleum, oil, their related products and derivatives including liquefied hydrocarbons, or natural gas. . . . ***Nothing herein shall be construed as authorizing the taking of any property owned by the state, or any municipal subdivision thereof, or the acquisition of any rights in public waters except after permit, lease, license or authorization issued pursuant to law.***[13]

D. Higher or More Necessary Use Doctrine

Some states have adopted statutes recognizing the doctrine of "higher" or "more necessary" public use. These statutes generally permit a subsequent taking of public use

[13] Minn. Stat. § 117.48 (emphasis added).

property upon a showing that the subsequent use is a higher or more necessary public use than that to which the property is currently devoted.[14]

E. Alternatives to Condemnation to Avoid Costly Project Delays

Energy corridor projects are ordinarily subject to rigid timelines. Delays in securing necessary easements for a proposed corridor can have a significant impact on the timing and cost of the project. Attorneys for private energy companies need to be aware of all available options if they are to ensure timely acquisition of property, especially with respect to those properties that are beyond a company's eminent domain power. These options may include requesting consent from the public entity to be included in the private company's condemnation action, negotiating temporary encroachment agreements to allow immediate access to the property with provisions for final agreement at a later date, mediation and arbitration.

Perhaps the most effective way to reduce the risk of not being able to acquire necessary easements is to engage in strategic analysis of the proposed corridor route in the early stages of the project. The involvement of eminent domain counsel at this early stage is critical. Eminent domain counsel, along with other experts, should engage in critical analysis of the types of property along the proposed routes and consider options to minimize legal challenges by public use landowners and other parties with condemnation power, and to reduce costly and unreasonable compensation claims. This type of analysis will allow the energy company to identify problematic properties at an early stage and to develop appropriate strategies to deal with them. The ultimate goal of this early strategic analysis is to help the company identify specific ways to achieve a greater degree of project certainty.

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[14] *See Freeman Gulch Mining Co. v. Kennecott Copper Corp.*, 119 F.2d 16, 20 (10th Cir. 1941) (noting Utah's "more necessary" doctrine); *Mesa v. Salt River Project Agric. Improvement & Power Dist.*, 373 P.2d 722, 731 (Ariz.1962) (discussing the state's codification of the "more necessary" doctrine); *Montana Talc Co. v. Cyprus Mines Corp.*, 229 Mont. 491, 748 P.2d 444, 451 (Mont.1987) (delineating factors under Montana statute for determining whether proposed public use is more necessary).

II. VALUATION ISSUES

A. Partial Takings

Corridor acquisitions typically involve partial takings of property. Energy companies generally acquire only easement rights for a proposed energy corridor and very rarely acquire fee interests. In some cases, private energy companies will accept simple licenses to construct their corridors on public property or railroad property.

As with partial takings for any other purpose, the "before and after" method is the predominant appraisal technique used in energy corridor takings. The entire property is valued without the corridor easement in the "before" condition and then valued with the corridor easement in the "after" condition.

B. Across the Fence Approach

Proposed routes for new corridors often run beside existing rights-of-way or utility corridors. The alignment of the new corridor may require condemnation of a portion of an existing corridor. A common method of appraising an existing corridor is the "across the fence" approach (ATF), which is a variation of the sales-comparison approach. Under ATF, appraisers determine the value of an easement by the price or value of land across the fence from the railroad, pipeline, highway or other corridor real estate. Thus, if the use across the fence is commercial retail worth $20 per square foot, then the corridor receives a value of $20 per square foot.

C. Admissibility of Evidence of Fear in the Marketplace

Public fear of perceived safety hazards associated with natural gas pipelines, oil pipelines, high-voltage transmission lines or electromagnetic fields (EMF) is often asserted as an element of damages in energy corridor condemnation cases. There are basically three distinct views on the admissibility of evidence of fear in eminent domain cases.

1. Evidence of Fear in the Marketplace May Be Considered Without Proof of Reasonableness

The majority view among courts is that evidence of fear in the marketplace is admissible with respect to the value of the property taken without proof of the

reasonableness of the fear.[15] This appears to be the best approach because it appropriately places the focus on the impact of the alleged fear on property value, and shields the court from having to engage in analysis of competing scientific views on issues where no scientific consensus exists, such as the link between EMF and cancer and other health issues.

These issues were addressed by the New York high court in *Criscuola v. Power Authority of the State of New York,* as follows:

> The issue in a just compensation proceeding is whether or not the market value has been adversely affected. [Citations omitted.] This consequence may be present even if the public's fear is unreasonable. Whether the danger is a scientifically genuine or verifiable fact should be irrelevant to the central issue of its market value impact. Genuineness and proportionate dollar effects are relevant factors, to be sure, but in the usual evidentiary framework. Such factors should be left to the contest between the parties' market value experts, not magnified and escalated by a whole new battery of electromagnetic power engineers, scientists or medical experts. Adverse effects *vel non* is not the issue in eminent domain proceedings: full compensation to the landowner for the property taken is.[16]

Similarly, the Ninth U.S. Circuit Court of Appeals recently stated the following in *United States v. 87.98 Acres More or Less*:

> Wholly apart from evidence of actual health risks, evidence of public perceptions of health risks—even irrational public perceptions—may properly establish an impact on market value. "[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by the fear may be recoverable as part of just

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[15] *See, e.g., Ryan v. Kansas Power & Light Co.*, 815 P.2d 528 (Kan. 1991) (evidence of fear in the marketplace is admissible with respect to the value of property taken without proof of the reasonableness of the fear); *San Diego Gas & Elec. Co. v. Daley, 253 Cal. Rptr. 144, 152* (Cal. Ct. App. 1988) (reasonableness is not a factor that need be considered in determining whether the fear of the danger existed and would affect market); *Florida Power & Light Co. v. Jennings*, 518 So.2d 895, 897 (Fla. 1987) (the public's fear is a factor which may be relevant to the issue of just compensation and may be utilized as a basis for an expert's valuation opinion regardless of whether this fear is objectively reasonable); *Western Farmers Elec. Co-op. v. Enis*, 993 P.2d 787 (Okla. Ct. App. 1999) (loss in value of property as a result of high-voltage electric transmission lines erected on property based on fear of dangers posed by lines without proving the reasonableness of the fear).

[16] 621 N.E.2d 1195, 1197 (N.Y. 1993) (quoting *Fla. Power & Light Co.*, 518 So. 2d at 897) (citations omitted).

> compensation." [Citations omitted.] A party may therefore introduce evidence to show how public fears of EMFs, even if they are unreasonable, adversely affect value.[17]

To be compensated for such fear in the marketplace, the property owner must prove the existence of a prevalent perception of a danger emanating from the objectionable condition and that such perception has impacted property values. Although a witness's personal fear can't be used as a basis for testifying about fear in the marketplace, any other credible evidence that fear exists in the public may be admissible.[18] According to one court, evidence of results of a public opinion poll on the subject is an effective and relevant way of showing public perception.[19] However, evidence tending to prove safety aspects of the proposed power line or pipeline is not relevant and is, therefore, typically rejected by courts following this approach.[20]

2. Evidence of Fear in the Marketplace May Be Considered if Reasonable

Some courts have adopted the view that evidence of fear due to construction of power lines or pipelines is admissible on the issue of damages if the fear of danger is reasonable. These courts recognize that a diminution in value due to reasonable fears of prospective buyers is compensable in eminent domain.[21]

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[17] 530 F.3d 899 (9th Cir. 2008), *cert. denied,* 2008 WL 4326465 (U.S. 2008).

[18] *Criscuola,* 621 N.E.2d at 1197.

[19] *City of Santa Fe v. Komis,* 845 P.2d 753 (N.M. 1992).

[20] *See, e.g., City of Santa Fe v. Komis,* 845 P.2d at 760 ("Whether the transportation of hazardous nuclear materials actually is or is not safe is irrelevant; the issue is whether public perception of those dangers has a depressing effect on the value of the property not taken."); *San Diego Gas & Elec. Co.*, 253 Cal. Rptr. at 152 (refusing to admit evidence that electromagnetic radiation from overhead utility lines would not be harmful because that evidence had no bearing on whether public perception of harm has a depressing effect on property value).

[21] *See, e.g., Arkansas Power & Light Co. v. Haskins,* 528 S.W.2d 407 (Ark. 1975) (apprehension of danger from a transmission line carrying approximately 500,000 volts of electricity was reasonable; the court noted that a potential buyer considering the use of the property for residential purposes could be concerned that the towers' attached ladders might attract the attention of small children); *Phillips Pipe Line Co. v. Ashley,* 605 S.W.2d 514 (Mo. 1980) (fears regarding a pipeline held by prospective purchasers could be compensable if there were a basis in reason or experience for such fears, and if fears caused a diminution in the fair market value of the property); *Northeastern Gas Transmission Co. v. Lapham*, 117 A.2d 441 (Conn. 1955) (holding that a well-founded public fear which caused a diminution in the market value of a property was a legitimate element of compensation); *All American Pipeline Co. v. Ammerman,* 814 S.W.2d 249 (Tex. Ct. App. 1991) (finding reasonable fear in connection with a crude-oil pipeline).

3. Evidence of Fear Excluded Regardless of Reasonableness

A small minority of courts follows the exclusionary approach, which excludes evidence of fear in the marketplace as too speculative to justify damages.[22]

III. CONDEMNATION UNDER THE NATURAL GAS ACT

Private companies that transport natural gas in interstate commerce have the power of condemnation under the federal Natural Gas Act (NGA) to acquire corridors for natural gas pipelines. Section 717f(h) of the NGA provides:

> 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.[23]

To condemn property under the NGA, a private natural gas pipeline company must show that: (1) it holds a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) authorizing the relevant project; (2) the land to be taken is necessary to the project; and (3) the company and landowners have failed to agree on a price for the taking.[24] In addition to the above factors, some courts require that

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[22] *See Ala. Power v. Keystone Lime Co.*, 67 So. 833, 836-37 (Ala. 1914) (finding that fear is based on pure speculation by an ignorant public and can never be an element of damages even if it affects the market value of the land); *see also Cent. Ill. Light Co. v. Nierstheimer*, 185 N.E.2d 841 (Ill. 1962); *Trunkline Gas Co. v. O'Bryan*, 171 N.E.2d 45 (Ill. 1960) (determining that the mere fear of gas transmission line was not compensable).

[23] 15 U.S.C. § 717f(h).

[24] *National Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000).

the private company establish that it engaged in good-faith negotiations with the landowner.[25]

A. FERC Certificate of Public Convenience and Necessity

The NGA—which governs the transportation, storage and sale of natural gas in interstate and foreign commerce—reflects Congress's judgment that these activities are of national importance and should be subject to federal regulation.[26] It does not apply to intrastate transportation of natural gas.[27] A natural gas company seeking to construct or operate pipelines in interstate commerce must first secure a Certificate of Public Convenience and Necessity from FERC.

The FERC Certificate establishes the location of the pipeline route and the public purpose and necessity for any taking of property along the approved route. Once FERC issues the certificate, the pipeline company cannot deviate from the approved route. The requirements for the FERC application are found in the Code of Federal Regulations. The application process is extensive and includes public hearings, rehearings and the opportunity for court review in the federal court of appeals.

A party seeking to challenge the proposed route or any aspect of the FERC Certificate must follow the procedures outlined in 15 U.S.C. Section 717r. The challenger must file an application for rehearing before the FERC within 30 days of the issuance of the certificate.[28] FERC's action on rehearing thereafter may be reviewed by the court of

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[25] *Id.*

[26] *See* 15 U.S.C. 717(a) ("it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest").

[27] *See id.* § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."); *see also id.* § 717(c) ("The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.").

[28] *See* 15 U.S.C. §717r(a).

appeals in any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. An appeal must be filed within 60 days after FERC issues its decision on the application for rehearing. No attack can be made in subsequent proceedings outside the parameters of 15 U.S.C. Section 717r(b).

B. Preemption

The NGA "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale."[29] As a result, the NGA preempts all state or local regulations that conflict with FERC's authority, including FERC Certificates.[30]

The FERC Certificate is not subject to collateral attack in federal district courts or in state courts. Landowners in a condemnation action under the NGA cannot use the condemnation proceeding as a forum for challenging FERC's decision to authorize construction of a proposed pipeline or the taking of property for such pipeline.[31] U.S. district courts (as well as state courts) have a limited scope of review in condemnation proceedings brought under the NGA. The district court's role is to: (1) determine whether, under the terms of the FERC Certificate, the condemnor has authority to condemn the specific properties at issue; and (2) determine the amount of just

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[29] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1987).

[30] *See, e.g., id.* at 310-11 (holding that, due to federal preemption, Michigan could not impose regulations on the issuance of securities by a natural gas company); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of the State of N.Y.*, 894 F.2d 571, 576-77 (2d Cir. 1990) (holding that FERC regulations preempted the New York regulatory scheme governing the construction of natural gas transmission lines); *Columbia Gas Transmission Corp. v. An Exclusive Gas Easement*, 747 F. Supp. 401, 404 (N.D. Ohio 1990) (holding that state has no power to regulate a natural gas storage field certificated by FERC); *Natural Gas Pipeline Co. of Am. v. Iowa State Commerce Comm'n*, 369 F. Supp. 156 (S.D. Iowa 1974) (finding that state statutes requiring informational meetings before the filing of an application for state permit did not apply to federal eminent domain actions under the NGA); *Kern River Gas Transmission Co. v. Clark County, Nev.*, 757 F. Supp. 1110 (D. Nev. 1990).

[31] *See Williams Natural Gas Co. v. City of Okla. City*, 890 F.2d 255, 264 (10th Cir. 1989) ("The eminent domain authority granted the district courts under . . . [the NGA] does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function under the statute is not appellate but, rather, to provide enforcement."); *Guardian Pipeline, LLC v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002) ("The validity and conditions of the FERC Certificate cannot be collaterally attacked in district court.").

compensation to be awarded to the landowners.[32] Courts routinely deny challenges to necessity, public purpose, safety, or routing of the pipeline because they constitute impermissible collateral attacks.[33] Similarly, claims based on trespass or failure to follow certain state regulatory requirements are preempted in condemnation actions under the NGA.[34]

C. Federal or State Court

Under the NGA, the condemnor has a choice of a state or federal forum in which to commence condemnation and acquire property for natural gas corridors. The NGA provides that a private pipeline company may acquire the corridor property "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."[35] Federal court jurisdiction, however, is limited to cases "when the amount claimed by the owner of the property exceeds $3,000."[36]

At times, landowners have invoked this provision of the NGA establishing a minimum value to defeat federal jurisdiction in condemnation cases under the NGA and thereby take advantage of state court condemnation procedures, which are often viewed as more favorable to landowners. For example, in *ANR Pipeline v. 62.026 Acres of Land*,[37] the landowners tried to defeat federal jurisdiction by refusing to specify the amount that they were claiming. In rejecting landowners' claim, the *ANR Pipeline* court noted that

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[32] *See Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F.Supp. 427 (D.R.I. 1990) (finding that district courts have limited jurisdiction to order condemnation of property in accord with a facially valid certificate).

[33] *See Williams Natural Gas Co.*, 890 F.2d 255 at 264 (finding that the state-court injunction against the exercise of rights under FERC Certificate constituted an impermissible collateral attack).

[34] *Columbia Gas Transmission Corp. v. An Exclusive Gas Easement*, 747 F. Supp. 401, 404 (N.D. Ohio 1990) (holding that state has no power to regulate, directly or indirectly, a natural gas storage field certificated by the Federal Energy Regulatory Commission; also rejecting a state claim for trespass as preempted by the NGA).

[35] 15 U.S.C. § 717f(h) (2006).

[36] *Id.*

[37] 389 F.3d 716, 718 (7th Cir. 2004).

> The [landowners] are trying to defeat the pipeline company's right to invoke federal jurisdiction by pretending not to claim the jurisdictional amount, when really they are claiming more but hoping to vindicate the claim more effectively by proceeding in state court, or perhaps just by thwarting the federal suit in order to induce ANR to come up with a richer offer rather than go to the bother of suing in state court.[38]

D. Federal or State Condemnation Law

The NGA explicitly states that federal courts should look to the "practice and procedure" of the state in which the subject property is located in resolving the rights and obligations of parties to an eminent domain action brought under section 717f(h).[39] A number of courts, following the explicit language of the NGA, have applied state practices and procedural law in NGA condemnation cases accordingly.[40]

The majority of courts, however, hold that Rule 71.1 of the Federal Rules of Civil Procedure governs the practices and procedures of federal eminent domain actions, including those filed under the NGA.[41] These courts, while acknowledging the explicit

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[38] *Id.* at 718.

[39] *See* 15 U.S.C. § 717f(h) (2006).

[40] *See, e.g., Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992); *Miss. River Transmission Corp. v. Tabor*, 757 F.2d 662, 665 n.3 (5th Cir. 1985) (applying Louisiana law to a condemnation action pursuant to section 717f(h)); *Portland Natural Gas Transmission System*, 195 F. Supp 2d 314, 319 (D. Mass. 2002), *aff'd*, 318 F.2d 279 (2d Cir. 2003) ("[S]tate law governs compensation issues in eminent domain proceedings involving private interests."); *Portland Natural Gas Transmission Sys. v. 4.83 Acres of Land*, 26 F. Supp. 2d 332 (D.N.H. 1998) (holding that a state statute allowing a pipeline company to immediately enter and take possession of real estate after initiating an eminent domain proceeding provided the same substantive right to a "quick take" regardless of forum); *Spears v. Williams Natural Gas Co.*, 932 F. Supp. 259 (D. Kan. 1996) (applying the state statutory interest rate (9.25%), instead of federal uniform interest rate (5.6%), to a condemnation award under the NGA); *Algonquin Gas Transmission Co. v. 60 Acres of Land*, 855 F. Supp 449 (D. Mass. 1994) (finding that state law governed the admissibility of expert testimony); *Tenn. Gas Pipeline Co. v. 104 Acres*, 780 F. Supp. 82 (D.R.I. 1991) (applying Rhode Island condemnation law in evaluating damages and determining the rate of prejudgment interest).

[41] *See, e.g., N. Border Pipeline Co. v. 64.111 Acres of Land*, 344 F.3d 693, 694 (7th Cir. 2003); *S. Natural Gas Co. v. Land Cullman County*, 197 F.3d 1368, 1375 (11th Cir. 1999); *Transwestern Pipeline Co. v. 9.32 Acres*, 544 F. Supp. 2d 939 (D. Ariz. 2008) ("[P]ractice and procedure in federal court cases brought pursuant to the NGA's delegation of eminent domain powers is governed by the federal rule, not state practice and procedure."); *Guardian Pipeline, LLC v. 295.5 Acres of Land*, 2008 WL 1751358 (E.D. Wis. Apr. 11, 2008) (holding that Fed. R. Civ. P. 71.1 applies in cases filed under the NGA); *Kansas Pipeline Co. v. A 200 Foot By 250 Foot Piece of Land*, 210 F. Supp. 2d 1253 (D. Kan. 2002) (finding that Rule 71A

language in section 717f(h), hold that Rule 71.1, which was adopted in 1951, supersedes Section 717f(h), which was enacted in 1938.[42]

Rule 71.1 provides that "[the Rules of Civil Procedure for the United States District Courts] govern the proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise."[43] Although Rule 71.1 does not explicitly overrule or supersede the state conformity language in the NGA, courts following this view hold that "Rule 71A [now 71.1] was promulgated to override a number of confusing federal eminent domain practice and procedure provisions, such as that of [Section] 717f(h), and to provide a unified and coherent set of rules and procedures to be used in deciding federal eminent domain actions."[44] These courts also note that, although the U.S. Supreme Court has not addressed this issue in the context of the NGA, it has held that Rule 71.1 nullifies similar conformity clauses of other federal condemnation statutes.[45]

Generally, pipeline companies would prefer the procedures of Rule 71.1 over most state condemnation procedures. Conversely, landowners would prefer state procedures because they tend to be more beneficial to landowners. Unlike most state procedures, Rule 71.1 allows the condemning authority to join all of the separate pieces of property in a single action, regardless of whether they are owned by the same persons or sought for the same use. Notice of the action is then served on those persons having any interest in the property to be taken. Further, the Rule contains no express requirement that the

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governs the practices and procedures of federal eminent domain actions and does not allow landowner to assert counterclaims for trespass and damages to property and holding that a holder of a FERC Certificate need not negotiate in good faith before acquiring land by exercise of eminent domain).

[42] *See, e.g., E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004) ("Courts agree that this state procedure requirement [under the NGA] has been superseded by Rule 71A."); *National Fuel Gas Supply Corp. v. 138 Acres*, 84 F. Supp. 2d 405, 411-15 (W.D.N.Y. 2000) (finding that "Rule 71A supersedes the practice and procedure clause of section 717f(h) and that it is federal, not state, procedural law that governs the present condemnation proceeding").

[43] Fed. R. Civ. P. 71.1(a).

[44] *S. Natural Gas Co.*, 197 F.3d at 1375.

[45] *Guardian Pipeline, LLC*, 2008 WL 1751358 at *12 (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4 n.2 (1984) (noting that condemnation proceedings brought pursuant to section 257 of Title 40 of the U.S. Code are no longer controlled by the state-law conformity clause because "[t]he adoption in 1951 of Rule 71A [now 71.1] capped an effort to establish a uniform set of procedures governing all federal condemnation actions"); *United States v. 93.970 Acres of Land*, 360 U.S. 328, 333 n.7 (1959) (holding that "federal law was wholly applicable" to federal condemnation proceedings because the state-law conformity clause found in section 171 of Title 50 of the U.S. Code "was clearly repealed by Rule 71A").

condemnor meet and confer with the owner, obtain an appraisal of the property, or pay for an appraisal requested by the owner. Nor is there a right to a jury trial. If the parties are unable to agree, the issue of compensation can—at the court's discretion—be determined by a three-person commission with the powers of a Master appointed under Rule 53(c) of the Federal Rules of Civil Procedure. Also, unlike most state statutes, Rule 71.1 has no fee-shifting provision that allows the owner to recover all of his expenses, including attorneys' fees, from the condemnor.

E. Immediate Possession Under the Natural Gas Act

The NGA does not give private natural gas companies the right of quick take.[46] This lack of an explicit right of quick take poses a risk for pipeline companies by subjecting pipeline projects to significant delays while the parties litigate just compensation. A number of courts have maneuvered around this perceived shortcoming by allowing immediate possession by exercise of the court's equitable powers. These courts hold that, upon satisfaction of the standard for injunctive relief, authorized pipeline companies holding FERC certificates may be granted immediate possession of the property to be condemned prior to a determination of just compensation, thus allowing the commencement of construction on the pipeline.[47] This view has been criticized as

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[46] Similarly, Rule 71.1 does not give condemnors the right to immediate possession once the condemnor has fulfilled all of the Rule's procedural requirements.

[47] *See, e.g.*, *Guardian Pipeline, LLC*, 2008 WL 1751358 at *23; *Se. Supply Header, LLC v. 40 Acres in Forrest County, Miss.*, 2007 WL 4459092 at *2 (S.D. Miss. Dec. 14, 2007); *see also Nw. Pipeline Corp. v. The 20' by 1,430' Pipeline Right-of-Way*, 197 F. Supp. 2d 1241, 1245 (E.D. Wash. 2002) ("Where there is no dispute about the validity of [the gas company's] actual right to the easement, denying authority to grant immediate possession would produce an absurd result."); *N. Border Pipeline Co. v. 64.111 Acres of Land*, 125 F.Supp. 2d 299, 301 (N.D. Ill. 2000) (finding immediate possession to be proper when a condemnation order has been entered and preliminary-injunction standards have been satisfied); *Humphries v. Williams Natural Gas Co.*, 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999) ("[I]t is apparently well settled that the district court does have the equitable power to grant immediate entry and possession [under the NGA]."); *USG Pipeline Co. v. 1.74 Acres in Marion County, Tenn.*, 1 F.Supp. 2d 816, 825-26 (E.D. Tenn. 1998) (granting immediate possession, even though the FERC Certificate was contested, when the pipeline company risked substantial financial losses and potential job loss due to the delay); *Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc*., 6 F. Supp. 2d 102, 104 (D. Mass. 1998) ("[T]he district court does have the equitable power to grant immediate entry and possession where such relief is essential to the pipeline construction schedule."); *Portland Natural Gas Transmission System v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 336 (D.N.H. 1998) (granting immediate possession when the gas company had complied with state condemnation procedures); *Kern River Gas Transmission Co.*, 757 F. Supp. at 1116 (granting immediate occupancy of the parcel when the defendants conceded that they had no defense to taking); *N. Border Pipeline Co., v. 127.79 Acres of Land*, 520 F. Supp. 170, 172 (D.N.D. 1981) (holding that the plaintiff would suffer economic harm from delay, national interest supported immediate possession, and "[t]he only

circumventing the power of the legislative branch of government to grant condemnation power, including the power of quick take.[48] The few courts that follow this opposing view hold that a court's inherent equitable powers cannot be used to unilaterally grant a private party the right of quick take.[49]

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legal remedy available to the plaintiff is the condemnation proceeding itself which, under the circumstances of this case, is inadequate").

[48] *See* Jeremy P. Hopkins and Elisabeth M. Hopkins, *Separation of Powers: A Forgotten Protection in the Context of Eminent Domain and the Natural Gas Act*, 16 Regent U. L. Rev. 371, 405 (2004) ("In deciding eminent domain cases under the [NGA], district courts across the country have taken unbelievable action. They have interpreted the Act and found that neither the Act nor any other federal law gives private gas companies the quick-take power of eminent domain. They have also acknowledged that Congress has withheld such power and that private gas companies have no legal right or entitlement to quick-take power. Amazingly, these same courts then invoke their 'inherent equitable powers' to grant private gas companies the quick-take power that Congress specifically chose to withhold.").

[49] *See Northern Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998); *Transwestern Pipeline Co. LLC v. 9.32 Acres More or Less*, 544 F. Supp. 2d 939 (D. Ariz. 2008).

Conclusion

The need for new energy corridors to accommodate projected energy demands and development of new and clean energy sources in this country is well documented. Private energy companies and government entities are pursuing plans to acquire energy corridors to meet this need. The eminent domain power, which is available to most private energy companies (either through state or federal law), can be a useful tool in private corridor acquisitions. An energy company considering eminent domain as a tool in new corridor projects must carefully consider the scope and limitations of the eminent domain authority available to it and how that power may be effectively employed to meet the project goals. Failure to understand the limitations of the eminent domain power and the rules governing its use may result in significant project delays and losses. Involving experienced eminent domain counsel at the early stages of a corridor project is one way to ensure that the condemnation power is used correctly and effectively to meet the goals of a given corridor project.

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