CLIENT ALERTS & INSIGHTS

Divided FERC Finds Pipeline Companies Can Seize State-Owned Interests

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On Thursday, January 30, 2020, a divided Federal Energy Regulatory Commission (the "Commission" or "FERC") issued a declaratory order proclaiming that the Natural Gas Act[1] (the "NGA") allows private pipeline companies operating under a FERC certificate to take state-owned land by eminent domain. FERC determined it had the right to issue the declaratory order because it has the authority to interpret the NGA.

The declaratory order stands in direct contradiction to the opinion of the U.S. Court of Appeals for the Third Circuit in *In re PennEast Pipeline Co., LLC, 938 F.3d 96* issued on September 10, 2019. There, the Third Circuit ruled that pipeline developer PennEast could not seize property interests owned by the state of New Jersey because the NGA does not trump a State's 11th Amendment sovereign immunity from condemnation by private companies.

PennEast's Petition

On October 4, 2019, after the Third Circuit issued its opinion, PennEast petitioned the Commission (the "Petition") to issue a declaratory order on three issues:

- Whether a certificate holder's right to condemn land pursuant to NGA § 7(h) applies to property in which a state holds an interest;
- Whether NGA § 7(h) delegates the federal government's eminent domain authority solely to certificate holders; and
- Whether NGA § 7(h) delegates to certificate holders the federal government's exemption from claims of state sovereign immunity.

PennEast argued that FERC's interpretation of the NGA's eminent domain authority could help courts decide whether or not state-owned land was up for the taking.

Supporters of the Petition included natural gas transporters, local distribution companies, and associations within the natural gas industry who asserted that the text and legislative history of NGA § 7(h) demonstrated that Congress intended to delegate federal eminent domain authority to certificate holders against *all* owners of property needed for a project with whom a certificate holder could not reach agreement - including states.

Opponents of the Petition included environmental groups, conservation foundations, U.S. Senator Cory A. Booker, the Environmental Defense Fund, and the State of New Jersey, among others. Opponents argued that it would be inappropriate for the Commission to issue a declaratory order when the Third Circuit had already spoken on the matter. Further, some opposed the issuance of a

declaratory order on separation of powers grounds and argued that it is the role of the judiciary - not the Commission - to decide sovereign immunity issues and to interpret the law.

The FERC Declaratory Order

On January 30, 2020, FERC's Republican majority issued a declaratory order granting the Petition in part and denying in part. The Commissioners explained their authority to issue the Order as follows:

- "[T]his declaratory order sets forth the Commission's interpretation of the NGA, and thereby does not implicate any separation of powers concerns." Order at ¶ 15.;
- "It is well within our authority to interpret the NGA and our own regulations, particularly when we issue our interpretation in the form of a declaratory order." Id;
- "Our interpretation of NGA section 7(h) merits deference." Id; and
- "The Third Circuit's ruling does not diminish the Commission's authority to speak on a statute that we administer." Id.

The Commission granted the Petition in part, finding that:

- NGA § 7(h) does not limit a certificate holder's right to exercise eminent domain authority over state-owned land. See Order at ¶ 25.
- NGA § 7(h) delegates eminent domain authority solely to certificate holders and not to the Commission. See Order at ¶ 26.

The Commission also denied the Petition in part, stating:

- "[We agree] NGC section 7(h) necessarily delegates the federal government's exemption from state sovereign immunity[,] . . . that is how the statute reads and was intended to operate." Order at ¶ 27.
- "[B]ut we deny PennEast's petition to the extent that it would require the Commission to evaluate the constitutional sufficiency of NGA section 7(h) for purposes of abrogating state sovereign immunity or delegating federal authority under the Eleventh Amendment." Id.

FERC Chairman Neil Chatterjee and Commissioner Bernard McNamee (both Republican), supported their findings on a plain reading of the NGA's § 7(h), its legislative history, and record.

Commissioner Richard Glick (Democrat) dissented on procedural and substantive grounds, concluding that there was "no need for the Commission to insert itself into what is primarily a constitutional question that is being litigated where those questions belong: The federal courts." Dissent ¶ 1. Glick also disagreed that Congress "unambiguously intended section 7(h) to apply to state lands," stating, "the evidence simply is not clear one way or the other." Dissent at ¶¶ 2 and 23.

For more information on this topic, contact a member of Benesch's Energy Practice Group.

[1] 15 U.S.C.S. §§ 717-717z.