



The Eminent Domain Manifesto

Northwest Property Rights Coalition

A guide to reforming pipeline siting under FERC

Executive Summary

The Northwest Property Rights Coalition (NWPRC) was formed by landowners in 2007 in response to proposals for three LNG terminals and four pipelines in the northwest. As we experienced first hand the Federal Energy Regulatory Commission's (FERC) process we were in turn mystified, incredulous and finally outraged.

NWPRC does not challenge the Fifth Amendment to the Constitution affirming the government's right to condemn property. We do question the way FERC wields this awesome power granted it by Congress. We call for a wide range of reforms in six areas to help level the playing field for small, private landowners facing giant corporations armed with eminent domain authority. Briefly they are:

1. Make the initial "baseline route" a corridor; not a line.
2. We call on FERC to create more written policies, procedures and criteria for route changes, right-of-way agreements, etc.
3. Compensation for landowners during the "limbo period."
4. Eminent domain not granted as a matter of course, but only if mandatory negotiations and arbitration fail.
5. Engage a third party to monitor landowner satisfaction and pipeline company performance.
6. Change FERC's approach to licensing by applying open market principles before the application phase instead of during or after the approval process.

All the documents referenced in this report may be found at www.nwprc.org/reform

1. Make the Initial “Baseline Route” a Corridor; Not a Line

FERC Chair, Kelliher states, “One can be assured that the proposed route in an application will not be the route finally approved by FERC” and points with satisfaction to the number of route changes on three projects he cites.¹ We argue this is evidence of a failed system. In his three examples, 178 consequential route changes were made in only 656 miles of pipeline; an average of one significant change every 3.7 miles. Yet, the crucial bit of information is missing; what was the average offset distance from the baseline route?²

Associated Reforms

1.1. Since FERC knows, indeed “assures” us, the initial route is only a placeholder; we submit that the initial route should be a corridor reflecting the average deviation from the baseline route based on prior experience; not a line. This would have several salutary effects:

- It would increase the notification area; decreasing the need for later notification as the route shifts.
- This in turn would decrease the number of landowners caught by surprise when adjustments drag them into a process that is already underway.
- Ensure the impacts are fully studied so that post-approval route changes are less likely to be in unstudied areas.³

2. We Call On FERC to Create More Written Policies, Procedures and Criteria For Route Changes, Right-Of-Way Agreements, Etc.

FERC references *Ideas for Better Stakeholder Involvement in the Interstate Natural Gas Pipeline Planning Pre-Filing Process* (FERC, December 2001) as its process for dealing with landowners, but a phone conversation with a FERC representative on 1/30/2008, could not confirm if this was or was not FERC policy or if it had been updated. Nonetheless, it says in part,

Pipeline companies are encouraged to seek out greater involvement from the various groups early in the planning so those who are interested can participate in the decision-making process. Agencies and citizens are encouraged to get involved early and make their views known to the companies as soon as they learn about a potential project. The goal is to achieve consensus and settlements among the groups and the company about an acceptable project design [emphasis added]. FERC staff has been asked to offer assistance early in the process to support all stakeholders. Earlier and more productive involvement will lead to better project designs and less contentious applications to FERC and other agencies.⁴

It seems from this that FERC has been “asked” to provide greater assistance in reaching “consensus,” but it is not clear that FERC has accepted this role, and if so, what the process is for developing consensus.

¹*Myths Regarding Federal Electric Transmission Siting*, Kelliher, Joseph T., 1.22.,2008

² Busting the Myth Busters, NWPRC Letter, 2.12.08, NWPRC.org : Our Agenda : Myths 2

³ *Ibid.* In it we show, using FERC’s own citation that significant route changes occur even after FERC’s final order.

⁴ *Ideas for Better Stakeholder Involvement in the Interstate Natural Gas Pipeline Planning Pre-Filing Process*, FERC, 12.2001

Further FERC states, “In fact, the examination and adoption of alternative routes and alterations in the proposed route of a project is at the very heart of the National Environmental Policy Act.”

Considering the time, expense and expertise required to propose a route, we submit that it is only possible for the applicant to develop alternative routes of any consequence, and as a rule, FERC does not demand anything other than minor route variations.

In our experience the baseline is drawn without much regard, if any, for dwellings and property lines. This results in much unnecessary angst and ire when initial lines transect properties or pass through homes.

Finally, it is irresistible to not comment on FERC’s self-congratulatory reference to CP07-44 which we quote in full.

The proposed route of a pipeline would have crossed the property of an elderly couple. The landowners participated in the FERC proceeding, protesting the proposed route, which would have crossed through their yard. The husband had hand-built their “dream home” with timber he cut himself on the property. The husband had a serious illness, and he attended the FERC community meeting with IV ports in his arms from a recent hospitalization. Intercession by FERC staff and an environmental condition in the order encouraged the pipeline to settle on a route off the property, avoiding treasured wet meadows and stands of mature trees.⁵

What brutal insult compels an ill person to rise up from their hospital bed, and trundle down, IV in tow, to protest and in the end only “encourages” the property to be avoided?

What are we to infer from this meretricious story? Are “treasured” lands *de facto* to be saved or only in conjunction with an intravenous-drip? Are hand-built homes exempt or only ones surrounded by mature trees? Who decides and when? What are the rules; what is the process?

Associated Reforms

- 2.1. FERC should establish a formal hierarchy of preferred routes:
 - 2.1.1. existing rights-of-way,
 - 2.1.2. undeveloped areas,
 - 2.1.3. lands without dwellings,
 - 2.1.4. willing landowners
 - 2.1.5. unwilling landowners
- 2.2. True priority should be given to existing rights-of-way (i.e. their study as alternate routes should be both mandatory and serious).
- 2.3. FERC should require the applicant to conduct a marketing survey along the route corridor to ascertain the willingness of landowners to host the pipeline.
- 2.4. FERC should establish formal procedures for landowners to negotiate and appeal the baseline route with the applicant.
- 2.5. FERC should establish a written process, procedure and criteria for granting route changes. The National Energy Board of Canada (NEB) is a good model.
- 2.6. The baseline route must take all reasonable steps to respect property lines and dwellings.
- 2.7. FERC should establish a minimum separation distance of 1500 feet between interstate pipelines and dwellings.

⁵ *Myths Regarding Federal Electric Transmission Siting*, Kelliher, Joseph T., 1.22.,2008

3. Compensation for Landowners During the “Limbo Period.”

The “limbo period,” is the time between when the line is drawn and when an easement is in place. The limbo period is an extremely stressful period for landowners. In addition to the palpable emotional costs there are the very real costs in time and energy to get involved, and for businesses uncertainty that may future investment decisions. During this period, of unknown duration, there is the possibility that landowners, for any number of reasons – health, financial, or otherwise – may have to sell their land. If they can sell at all under the cloud of a potential pipeline, it would likely be at a reduced price.

By its very nature, a pipeline is strung-out over tens if not hundreds of miles. Affected landowners are similarly dispersed. Yet it is precisely access to other landowners that would help level the playing field and provide needed support.

Associated Reforms

- 3.1. Option agreements should be offered to all affected landowners prior to filing.
- 3.2. Include financial compensation for the “limbo period.”
- 3.3. Option agreement terms not to exceed 10-years and may not auto-renew.
- 3.4. Includes ultimate compensation package (i.e. applicant’s idea of compensation is spelled out during pre-filing).
- 3.5. Terms cannot be made confidential.
- 3.6. Affected landowners should have ready access to the names of other affected landowners.

4. Eminent Domain Not Granted as a Matter-of-Course, But Only If Mandatory Negotiations and Arbitration Fail.

A major cause of anxiety is the uncertainty over the nature of any future easement agreement. The lack of guidance on this subject is especially troublesome. FERC says only,

If the Commission authorizes the project and the necessary easements cannot be negotiated, an applicant is granted the right of eminent domain (section 7(h) of the Natural Gas Act and the procedures set forth under the Federal Rules of Civil Procedure (Rule 71A)). Under these conditions, the landowner could receive compensation as determined by the courts.⁶

In essence FERC has been granted the authority to give private companies the right to take people’s property for the greater good, relying solely on state condemnation court to protect the interests of the landowner. We find this manifestly unfair and insufficient. It is unfair because it pits large corporations, who negotiate contracts every day, against small landowners for whom this is likely a once in a lifetime event. It is insufficient in that the government is asking landowners to sacrifice for their country, but also provides an unfair playing field where a landowner cannot hope to negotiate a fair deal.

⁶ *An Interstate Natural Gas Facility on My Land? What do I Need to know?*, FERC

Why should the applicant get a blank check to exercise eminent domain? Why are there not any guidelines at all for an agreement? What goes in the easement and what goes in a side agreement? Why is the length of the agreement, including in perpetuity, up to the company? How is it that a claim in excess of a mere \$3000 moves hearings to federal court? Why are not other avenues, such as arbitration, available?

It is instructive to compare FERC's, 13-page, *An Interstate Natural Gas Facility on My Land? What do I Need to Know?* to the National Energy Board of Canada's (NEB) thorough, 98-page booklet. NEB's is longer in no small part because it describes protections for landowners not available in the United States.⁷ Some verbatim highlights:

- Section 86 of the NEB Act sets out the required clauses to be included in the easement or option agreement. These clauses include:
 - review of compensation every five years for annual or periodic payments;
 - review of amount of compensation every five years with respect to the amount of annual or other periodic payments that have been selected;
 - compensation for all damages caused by the company;
 - protection from all liabilities, claims or suits caused by the company's operations, but not from liabilities, damages, claims or suits filed as a result of the gross negligence or willful misconduct of the landowner; and
 - restriction of land use to the line of pipe for which the land is specifically required, unless the landowner agrees to further use.
- Before the company signs an option or easement agreement with you, it must first deliver a "Section 87 notice" to you that must describe:
 - what land is needed for the part of the pipeline that will cross your property;
 - how the company plans to compensate you for the land it needs;
 - a statement of the value of the required land;
 - the NEB's process for consideration of the detailed route of the pipeline; and
 - the options of negotiation or arbitration that are available if you and the company cannot agree on compensation.
- If landowners or others who are affected raise valid objections about the specific details of the pipeline route or about the methods or timing of the construction, the NEB must conduct a detailed route hearing.
- Compensation claims for land use or for damage resulting from construction are handled by the federal Minister of Natural Resources.
- If the company and you do not finalize an easement agreement, the company may apply in writing to the NEB asking for a right of entry order that would allow the company to have an immediate right to enter your land. If the NEB grants the right of entry order, the company has to register that order at the local land titles or registry office. The company then has the right to enter your land for the purposes stated in the order. The NEB may place any conditions on the order that it considers to be appropriate.

In Washington State residents are protected by the Washington Utilities and Transportation Commission, which gained the authority to oversee pipeline installation following the 1999 disaster in Bellingham involving the Olympic pipeline. Such protection should be available to all citizens of the United States.

⁷ *Pipeline Regulation in Canada A Guide for Landowners and the Public*, NEB, ISBN 0-662-32151-0

Associated Reforms:

Process

- 4.1. FERC should establish a formal system to arbitrate route change requests.
- 4.2. Eminent domain should not be granted as a matter of course, but only if negotiations and arbitration fail.
- 4.3. No “blanket” authority should be granted.
- 4.4. FERC certificates should expire after 10 years if construction has not commenced. Recertification is *de novo*.

Protections and Resources for Landowners

- 4.5. Applicants should provide sample right-of-way agreement made available at pre-filing
- 4.6. Terms of the easement agreement should be regulated to include the following:
 - 4.6.1. Reviewed every 5 years.
 - 4.6.2. Maximum term 99 years
 - 4.6.3. Compensation includes:
 - Diminished value
 - Future loss
 - Rent
 - pro rata share of taxes if not waived by locality
 - 4.6.4. Annual payment option
 - 4.6.5. Applicant or FERC pays for arbitration
- 4.7. FERC should establish a policy delineating what is in the easement and what should be in a separate agreement (e.g. lay-down sites, temporary work area).
- 4.8. Terms of all side agreements should be made available to be public.
- 4.9. FERC should establish a system for guaranteeing funds available to deal with abandonment.
- 4.10. The trigger for hearing condemnations in federal court should be raised from \$3,000 to \$5 million and indexed.
- 4.11. Landowner should have the right to require non-chemical means of maintaining the right-of-way.
- 4.12. A performance bond, payable to the landowner, shall be obtained by the applicant and held during the entire term of the easement.
- 4.13. Every state should create an entity like the Washington Utilities and Transportations Commission for oversight of pipeline installation and maintenance.

5. Engage a Third Party to Monitor Landowner Satisfaction and Pipeline Company Performance.

Ultimately how does one know if the compensation is just; if the system is fair? FERC thinks it is. How do they know? As a proxy measurement, they asked the pipeline companies how often they had to go to court to exercise eminent domain.⁸ As would be expected it was only a small percentage. But, this is akin to asking only prison guards if the prisoners are feeling mistreated.

⁸ *Myths Regarding Federal Electric Transmission Siting*, Kelliher, Joseph T., 1.22.,2008

Associated Reforms

- 5.1. The Federal Government should establish ongoing quality control measures via routine surveying of landowners to measure their experience of the process and outcome. Such surveying should be handled by an independent body such as the GAO, and the findings made public.
- 5.2. Applicants shall file all easements and related agreements as part of the FERC public record. Surely if this is done in the name of “public use” should not the details be public?

6. Change FERC’s Approach to Licensing By Applying Open Market Principles Before The Application Phase Instead of During or After the Approval Process

As chair Kelliher describes it, FERC considers each facility in isolation on a first-in basis. Regional demand for that facility is considered, but as if it might be the only facility ever built.⁹ Under this logic, even approved, but not yet operational facilities would be ignored in evaluating a new application. If there are too many projects planned, the market is left to determine which one gets built. No regional planning is done because it might delay the consideration of individual applications.¹⁰

We have grave concerns about this model.

FERC has authority to turn an unlimited number of private properties over to private industry. The refusal of FERC to do regional planning in favor of expediting and approving more applications than will ultimately be necessary, needlessly abuses this authority. The “market” it creates is a slave market built on the backs of conscripted lands.

Imagine if we built roads this way. You wake up one morning to find a private company planning to put a boulevard through your yard. Another company is planning one two blocks away. You are told by the roads department, “Don’t worry, we know we don’t need all these roads; only one will ever get built. “Which one? We don’t know; and by the way, for the next four to six years, they will be surveying on your land, holding public meetings and negotiating an easement agreement just in case.”

The absence of regional planning, and reliance on after-the-fact market forces, means that much time, energy and resource at all levels of government, by organizations, and by private parties, is expended on projects that will ultimately go nowhere.

The project that succeeds might do so, not on the merits, but on luck, timing and deep pockets. It may thus fail to maximize the societal benefit. This system fails to maximize the public benefit and leaves the public’s money on the table.

⁹ Letter from FERC chair Kelliher to Oregon Governor Kulongoski, April 2, 2008

¹⁰ Statement of Chairman Joseph T. Kelliher on Broadwater Energy, LLC, March 20, 2008

Associated Reforms

- 6.1. FERC should take greater responsibility for the use of the power of eminent domain. At a minimum, it should consider the aggregate impacts of proposed facilities proximate in time and space.
- 6.2. FERC should do regional and even national needs analysis.
- 6.3. FERC should investigate using an auction system in which FERC identifies a distribution, supply or other challenge and auctions the right to provide the solution (i.e. apply market forces upfront) in much the same way the FCC licenses broadcast spectrum. This would have several salutary benefits:
 - Exposes the applicants to market forces upfront rather than later.
 - Would enable the winning bidder to concentrate on the best solution and location for facilities.
 - Helps reduce the private benefit of the use of eminent domain by having the market establish the benefit through the bidding process.
 - Minimizes redundancy, workload and wasted effort on duplicate projects.

Conclusion

The reforms we call for are wide-ranging and extensive, but commensurate with the scope of our grievances. We think it is shameful that Americans are not afforded world class protections from eminent domain abuse. Some ideas, such as defining a corridor, are simple, common sense reforms. Others, such as an auction system are more far reaching. They are designed not to simply improve the outcome for affected landowners but for the country as a whole. Pipelines will never be a pleasant experience, but with enactment of these reforms, they can be more fair, just and humane.