



## ESSAY

## The Public Use Clause in an Age of U.S. Natural Gas Exports

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### Introduction

In little more than a decade, the United States has gone from a nation with diminishing supplies of natural gas to one that is a net exporter. This new abundance is due to technological developments in hydraulic fracturing and directional drilling, allowing producers to access vast quantities of natural gas trapped in shale rock deep below the earth's surface. During that time, the natural gas industry has been on a massive building spree to create the pipelines needed to bring this energy resource from production sites to domestic and international markets. This national build-out, in turn, has created a groundswell of opposition. Landowners who don't want these pipelines running under their property have joined forces with environmental groups concerned about the climate impacts of long-lived fossil fuel infrastructure investments to challenge these projects in court on multiple legal grounds.<sup>1</sup>

One argument that project opponents have consistently raised in their lawsuits is that the Public Use Clause of the Fifth Amendment to the U.S. Constitution bars the taking of private property for these pipelines. The Public Use Clause states: "nor shall private property be taken for public use, without just compensation."<sup>2</sup> The problem with this argument, however, is that energy pipelines, like water pipelines, railroads, and electric transmission lines, have

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1. See, e.g., Niina H. Farah, *8 Energy Battles to Watch in 2020*, E&E NEWS: ENERGYWIRE (Dec. 23, 2019), <https://perma.cc/7USC-4PQB> (discussing high-profile lawsuits over energy issues, including pipelines); Pamela King, *Inside the D.C. Circuit's Pipeline Docket*, E&E NEWS: ENERGYWIRE (Mar. 5, 2019), <https://perma.cc/8CFT-D36P> (discussing lawsuits over natural gas pipelines); Phil McKenna, *2020: A Year of Pipeline Court Fights, with One Lawsuit Headed to the Supreme Court*, INSIDE CLIMATE NEWS (Jan. 3, 2020), <https://perma.cc/6RGW-CQAP>.

2. U.S. CONST. amend. V.

for decades been held out as the most fundamental of public uses, leading to consistent losses in the courts.<sup>3</sup>

This Essay explores how courts are beginning to grapple anew with the role of the Public Use Clause in an age of energy exports. It shows how industry's desire to take advantage of export markets for newly available U.S. natural gas resources is for the first time facing resistance from the courts, which results in a more careful judicial review of industry claims that energy projects serve a public use or public benefit. In doing so, this Essay focuses specifically on the potential for greater scrutiny in federal court review of decisions by the Federal Energy Regulatory Commission (FERC) under section 7 of the Natural Gas Act. Recent case law from the D.C. Circuit involving FERC's public use determinations as well as the agency's practice of delaying judicial review of its decisions through so-called "tolling orders" shows increasing discomfort in the federal courts with FERC's treatment of these projects.<sup>4</sup> Such discomfort has the potential to lead to real changes in the law governing public use for natural gas pipelines. Indeed, the growing opposition to interstate natural gas pipelines may soon create a new jurisprudence surrounding eminent domain—one that continues to support the use of eminent domain for natural gas pipelines proposed for domestic use but may not support the use of eminent domain for pipelines designed to transport natural gas for export.

## **I. The Exclusion of Energy Projects from Post-*Kelo* State Legislative Reforms**

The U.S. Supreme Court's controversial 2005 decision in *Kelo v. City of New London* reaffirmed a broad interpretation of the Public Use Clause.<sup>5</sup> In *Kelo*, the Court upheld a city's use of eminent domain in connection with an urban redevelopment plan that would include a research facility for Pfizer Corporation.<sup>6</sup> The Court held that economic development alone, including growing a community's tax base and spurring job growth, could constitute a public use for purposes of the Fifth Amendment, although states were free to provide additional protection for property rights in their own statutes and constitutions.<sup>7</sup>

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3. See James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 671, 682-83, 688-89 (2019) (discussing the use of eminent domain to construct oil and natural gas pipelines and longstanding state and federal policies making legal challenges to such projects difficult).

4. See *infra* notes 22-25, 35-38 and accompanying text (explaining FERC's use of tolling orders and judicial review of same).

5. 545 U.S. 469, 484-86 (2005).

6. *Id.* at 473-75, 490.

7. *Id.* at 483-86, 489.

Over forty states responded to *Kelo* by prohibiting the use of eminent domain solely for economic development or otherwise limiting its use.<sup>8</sup> Notably, these laws generally did not include energy projects within the scope of their reform.<sup>9</sup> In part, this was because the post-*Kelo* reforms took place soon after the case was decided, just before the widespread use of hydraulic fracturing, beginning in 2007, set the stage for the massive infrastructure build-out in the natural gas industry. Thus, the post-*Kelo* legislative reforms focused on *government* use and alleged abuse of eminent domain authority, reflecting the facts of *Kelo* itself. These reforms therefore had little impact on private companies exercising statutory eminent domain rights to build energy projects, which were not yet on the political radar.<sup>10</sup> Moreover, these state reforms had no impact at all on the use of eminent domain under federal law—like interstate natural gas pipelines approved under the Natural Gas Act of 1938, to which *Kelo* continues to apply. Thus, it has been nearly impossible for natural gas pipeline opponents to establish that such projects do not constitute a public use. Since virtually all U.S. citizens use natural gas for their electricity and heating needs, and thus benefit from lower fuel prices, courts have consistently held that such projects are a public use.<sup>11</sup> But what if the gas in question is exclusively, or even primarily, destined for export to other countries? Is there still a public use that justifies eminent domain? The need for answers to these questions is made more urgent by the fact that the United States is expected to be the world's biggest natural gas exporter by 2024, creating significant industry pressure to build the transport infrastructure necessary to support these exports.<sup>12</sup>

## II. A New Age of U.S. Natural Gas Exports and Pipeline Expansion

Until 2007, U.S. natural gas production was declining rapidly, with industry and the federal government focused on the need to import liquefied natural gas (“LNG”) from overseas to satisfy the growing domestic demand for

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8. Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NAT'L COUNCIL OF STATE LEGISLATURES (Jan. 1, 2012), <https://perma.cc/B7LM-J54B> (detailing post-*Kelo* state reforms).

9. Coleman & Klass, *supra* note 3, at 673.

10. For a discussion of how the interest groups behind the *Kelo* case shaped the litigation and post-decision narrative to focus on the government use and alleged abuse of eminent domain, see *id.* at 670-74.

11. *Id.* at 682-89 (discussing failure of landowners to stop use of eminent domain for natural gas pipelines).

12. See Elizabeth Caldwell, *Report: The United States Will Be the World's Top LNG Exporter in the Next Five Years*, ENERGY IN DEPTH (June 10, 2019), <https://perma.cc/KPM3-475R> (discussing International Energy Agency projections); *U.S., China, Will Be World's Biggest LNG Exporter and Importer in 2024*: IEA, REUTERS (July 16, 2019 11:54 AM), <https://perma.cc/E4SE-NAYW> (same).

natural gas to meet electricity, heating, and industrial needs.<sup>13</sup> With the advent of hydraulic fracturing, however, U.S. natural gas production rose dramatically. With shale gas resources now widely available in Texas, Pennsylvania, and neighboring states, the United States became the world's largest producer of natural gas in 2009 and became a net exporter of natural gas in 2017.<sup>14</sup> To take advantage of these new domestic and international markets, pipeline companies have spent \$56 billion in less than a decade to expand the U.S. natural gas pipeline network.<sup>15</sup> This expansion has, in turn, faced opposition from a growing number of landowners who do not want their homes and farms impacted by the large-scale land disturbances and ongoing risks associated with a natural gas pipeline that will remain part of their properties for fifty years or longer.<sup>16</sup> Some of these landowners have refused to enter into easement agreements with pipeline companies for any price and have raised public use challenges when those companies have brought eminent domain actions in federal and state courts to acquire the property needed to build the pipeline.

### **III. Interstate Natural Gas Pipelines and Public Use: A Changing Landscape**

In the United States, different regulatory regimes govern the permitting and eminent domain for different types of pipelines. Under section 7 of the Natural Gas Act of 1938, a company wishing to build an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC, which is granted if the project "is or will be required by the present or future public convenience and necessity."<sup>17</sup> As the D.C. Circuit Court of

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13. MICHAEL RATNER, ET AL., CONG. RESEARCH SERV., R42074, U.S. NATURAL GAS EXPORTS: NEW OPPORTUNITIES, UNCERTAIN OUTCOMES 2-3 (2015), <https://perma.cc/Y3CL-RYV6> (discussing focus on need for LNG imports prior to latter half of the 2000s).

14. Linda Doman & Ari Kahan, *United States Remains the World's Top Producer of Petroleum and Natural Gas Hydrocarbons*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY (May 21, 2018), <https://perma.cc/954C-S53M>; *Natural Gas Explained: Natural Gas Imports and Exports*, U.S. ENERGY INFO. ADMIN., <https://perma.cc/5V47-NTBT> (last updated Apr. 30, 2019).

15. See Coleman & Klass, *supra* note 3, at 680 (citing U.S. DEP'T OF ENERGY, NATURAL GAS INFRASTRUCTURE, app. B, at 28 (2015), <https://perma.cc/PJ9G-2Z8C>).

16. See, e.g., FERC, AN INTERSTATE NATURAL GAS FACILITY ON MY LAND? WHAT DO I NEED TO KNOW? (2015) (detailing the impacts from construction and installation of natural gas pipelines and landowner limitations with regard to work near pipeline easements); Sara Gosman, *Justifying Safety: The Paradox of Rationality*, 90 TEMPLE L. REV. 155, 163-67 (2018) (discussing hazards associated with pipeline construction and operation).

17. 15 U.S.C. § 717f(c)-(e) (2018). By contrast, state law governs the permitting and use of eminent domain to build intrastate natural-gas pipelines; all oil pipelines (both intrastate and interstate); and pipelines that transport natural gas liquids ("NGLs") such as butane, ethane, and propane. For a discussion of the history behind these different permitting regimes, see Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 980-99 (2015).

Appeals stated in 2019, in enacting the Natural Gas Act, Congress intended to encourage “orderly development of plentiful supplies of . . . natural gas at reasonable prices” and to “protect[] consumers against exploitation at the hands of natural gas companies.”<sup>18</sup> Under a FERC-issued 1999 Certificate Policy Statement, in order to obtain a certificate under section 7, an applicant must show that it can develop the project without “relying on subsidization by the sponsor’s existing customers,” and that the “project’s public benefits (such as meeting unserved market demand) outweigh its adverse effects (such as a deleterious environmental impact on the surrounding community).”<sup>19</sup>

Once an applicant for a natural gas pipeline receives a certificate from FERC under section 7, it has the right to exercise eminent domain to acquire any land it needs to complete the project. FERC has consistently maintained that a finding that a project meets the public convenience and necessity requirements under section 7 and its Certificate Policy Statement *conclusively* determines that the project is also a public use for purposes of exercising eminent domain under both the Natural Gas Act and the Fifth Amendment.<sup>20</sup> In other words, there is no potential for FERC to find that some projects for which it grants certificates are public uses eligible to exercise eminent domain and others are not. FERC has cited the *Kelo* case to justify this position, stating that the “congressional recognition that natural gas transportation furthers the public interest is consistent with the Supreme Court’s emphasis on legislative declarations of public purposes in upholding the power of eminent domain.”<sup>21</sup>

As a procedural matter, before an aggrieved party can challenge FERC’s grant of a pipeline certificate in federal court, it must seek rehearing from FERC, which must respond to the rehearing request within thirty days.<sup>22</sup> However, FERC has a practice of issuing “tolling orders,” in which it grants the request for rehearing “for the limited purpose of further consideration” and then waits several months or even a year or more to decide the rehearing request.<sup>23</sup> This delays the ability of aggrieved parties to obtain judicial review of FERC’s certificate grant. During this time, however, the pipeline company, which now has a certificate in hand, can begin eminent domain proceedings

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18. *City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019) (citations omitted) (quoting *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014)).

19. *Id.* (quoting *Certification of New Interstate Nat’l Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 28, *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 ¶ FERC 61,094 (July 28, 2000) [hereinafter “Certificate Policy Statement”]).

20. *Order on Reh’g, Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250, at 15-16 (Dec. 6, 2017) (“The Commission, having determined that the Atlantic Sunrise Project is in the public convenience and necessity, was not required to make a separate finding that the project serves a ‘public use’ to allow the certificate holder to exercise eminent domain.”).

21. *Id.* at 16-17 (citing *Kelo v. City of New London*, 545 U.S. 469, 479-80 (2005)).

22. *Allegheny Def. Project v. FERC*, 932 F.3d 940, 944 (D.C. Cir. 2019) (per curiam) (quoting 15 U.S.C. § 717r(a)-(b)), *reh’g en banc granted*, 943 F.3d 496 (D.C. Cir. 2019)).

23. *Id.* at 949-51 (Millett, J., concurring) (discussing rehearing process and tolling orders).

and pipeline construction.<sup>24</sup> This means that the pipeline can be partially or completely built before landowners can seek judicial review of the validity of the pipeline certificate or the exercise of eminent domain.<sup>25</sup>

Federal court review of FERC public use determinations has, until now, been essentially nonexistent and deference to FERC's use of tolling orders is longstanding. But with an increasing number of landowners affected by pipelines and the possibility of pipelines being built for export purposes, this hands-off approach may be changing. Two recent cases from the D.C. Circuit—one involving the substantive question of public use and the other involving the procedural question of FERC tolling orders—illustrate this trend.

#### A. Energy Exports and Public Use

In the first case, *City of Oberlin v. Federal Energy Regulatory Commission*, the city of Oberlin, Ohio and a landowner organization asked the U.S. Court of Appeals for the D.C. Circuit to vacate a FERC order granting Nexus Gas Transmission a certificate to construct and operate an interstate pipeline to transport natural gas from the Appalachian Basin to markets in Ohio, Michigan, and Canada, and authorizing the use of eminent domain.<sup>26</sup> To market the pipeline, the company entered into long-term contracts, known as precedent agreements, with eight different companies that made up 59% of the pipeline's capacity. Two of those precedent agreements were with Canadian gas shippers.<sup>27</sup>

The petitioners raised numerous grounds for vacating the FERC order, and in December 2019, the D.C. Circuit rejected all of them except for one relating to the use of eminent domain. On this issue, the petitioners argued that the precedent agreements with Canadian companies could not be used to satisfy the "market demand" the pipeline needed to establish to receive a certificate.<sup>28</sup> The court agreed with the petitioners that "the[] facts do not explain why it is lawful for the Commission to predicate a section 7 finding of project need on precedent agreements with foreign shippers serving foreign customers."<sup>29</sup> Moreover, the court stated that section 7 grants FERC authority to issue a certificate for "transportation in interstate commerce" and that the court had expressly refused to interpret "interstate commerce" under section 7 to include "foreign commerce."<sup>30</sup>

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24. *See id.* at 950.

25. *See id.*

26. 937 F.3d 599, 601, 603 (D.C. Cir. 2019).

27. *Id.* at 603.

28. *Id.* at 605-07.

29. *Id.* at 606.

30. *Id.* at 606-07 (emphasis omitted) (first quoting 15 U.S.C. § 717f(c)(2) (2018); and then quoting *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 152 (D.C. Cir. 1948)).

The court also criticized FERC's failure to directly address the petitioners' argument that relying on demand for export violates the Public Use Clause. The court found "inadequate" FERC's reliance on prior statements that it would not apply an additional test beyond that required by the public convenience and necessity determination to evaluate whether a particular pipeline was a public use.<sup>31</sup> The court stated that such a conclusion "begs the unanswered question of whether—given the fact that section 7 authorizes the use of eminent domain—it is lawful for the Commission to credit precedent agreements for export toward a finding that a pipeline is required by the public convenience and necessity."<sup>32</sup> Although the court did not vacate the pipeline's certificate, it did remand the case to FERC for further explanation to justify its decision.<sup>33</sup> Thus in *Oberlin*, for the first time, the D.C. Circuit questioned FERC's grant of eminent domain to a natural gas pipeline company. While FERC will undoubtedly return with an explanation as to why the pipeline is justified based on the market benefits to domestic customers, the fact that the court even required further explanation at all is significant.

#### B. Due Process and FERC's Use of "Tolling Orders"

The second case, *Allegheny Defense Project v. Federal Energy Regulatory Commission*, involves FERC's procedural practice of issuing tolling orders in a case involving the Atlantic Sunrise Pipeline—proposed to run from Pennsylvania, through the Carolinas, and into Alabama.<sup>34</sup> As described above, tolling orders can prevent landowners from obtaining judicial review of FERC orders granting pipeline companies eminent domain rights until after the pipeline is partially or fully constructed. In *Allegheny Defense Project*, the panel majority had relied on precedent to uphold FERC's use of tolling orders and rejected the petitioners' arguments that the practice violated their procedural due process rights.<sup>35</sup>

Judge Millett concurred, describing FERC's tolling policy as "a Kafkaesque regime" under which FERC "can keep homeowners in seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop."<sup>36</sup> Judge Millett's lengthy concurrence was a scathing indictment of FERC's current approach to natural gas pipeline approvals, accusing FERC

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31. *See id.* at 607.

32. *Id.*

33. *Id.* at 611.

34. 932 F.3d 940, 943, 945 (D.C. Cir. 2019) (per curiam), *reh'g en banc granted*, 943 F.3d 496 (D.C. Cir. 2019).

35. *Id.* at 947-48.

36. *Id.* at 948 (Millett, J., concurring); *see also* Niina H. Farah, *D.C. Circuit to Review "Kafkaesque" FERC Process*, E&E NEWS: ENERGYWIRE (Dec. 6, 2019), <https://perma.cc/LQP6-SA2R>.

of taking advantage of the court's earlier decisions on tolling orders as "a license to routinely blow past" Congress's thirty-day rehearing deadline, with the result being that "the Commission can toll until the cows come home and thereby forestall judicial review while people's homesteads are being destroyed."<sup>37</sup> Judge Millett concluded that the current regime violated the petitioners' due process rights and that the D.C. Circuit should reconsider its prior approval of the practice.

In an order issued within weeks of its decision in *Oberlin*, the D.C. Circuit voted to rehear en banc the legality of FERC's practice of issuing tolling orders.<sup>38</sup> In doing so, the court has called into question for the first time the ability of pipeline companies to exercise eminent domain before a court can review whether the project is a public use in the first place.

### C. New Judicial Scrutiny of Pipeline Public Use?

It remains to be seen how the D.C. Circuit will rule on the propriety of FERC tolling orders when it hears the *Allegheny Defense Project* case en banc. Likewise, the petitioners in *Oberlin* still face an uphill battle in arguing that either section 7 of the Natural Gas Act or the Public Use Clause is a roadblock to the use of eminent domain for the Nexus pipeline. But regardless of the outcomes, these cases are significant. They are the first indication that the D.C. Circuit is questioning whether FERC has gone too far in facilitating the expansion of the U.S. natural gas pipeline network regardless of the impact on private property rights.

As an increasing number of pipelines are built with export opportunities in mind, the justification for the use of eminent domain under both *Kelo* and the Natural Gas Act is significantly weaker. While natural gas companies can continue to point to the jobs and tax benefits associated with new natural gas pipelines, the justification for deference to FERC approvals of eminent domain under the "public convenience and necessity" standard may be undermined when some or all of the gas is destined for export markets. This is particularly true because Congress expressly declined to extend eminent domain authority for natural gas export facilities, which are permitted under section 3 of the Natural Gas Act, despite granting such authority to interstate natural gas pipelines under section 7. FERC itself has emphasized the distinction between the two sections of the law in prior orders,<sup>39</sup> and that distinction is also a focus for pipeline opponents in current litigation over pipelines proposed for natural gas export.<sup>40</sup> As a result, the courts may soon clarify the extent to which export

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37. *Allegheny Def. Project*, 932 F.3d at 951-52 (Millett, J., concurring).

38. *Id.* at 497.

39. *See, e.g.*, *Broadwater Energy LLC*, 122 FERC ¶ 61,255, at 10 (Mar. 20, 2008).

40. *See, e.g.*, Niskanen Center, Comments on the Federal Energy Regulatory Commission's Draft Environmental Impact Statement for the Jordan Cove Energy Project 42-62 (July



projects satisfy the statutory requirements for use of eminent domain under the Natural Gas Act, the constitutional requirements for public use under the Fifth Amendment, or both.

More guidance from the courts in this area is important. Pipeline developers are currently undertaking a massive efforts to build new, long-lived fossil fuel infrastructure at a time when the Trump Administration is attempting to reduce the federal government's obligation to evaluate the cumulative climate impacts of these projects.<sup>41</sup> It is certainly true that for most pipeline projects, proposers can ensure that at least some of the gas is committed to domestic customers in order to attempt to satisfy the public convenience and necessity requirements of the Natural Gas Act as well as the Public Use Clause of the Fifth Amendment. Nevertheless, property rights advocates and environmental groups alike recognize that the Public Use Clause and the Natural Gas Act themselves can become important checks on these projects. The current lawsuits bring long-needed scrutiny to FERC's evaluation of natural gas pipelines under both statutory and constitutional law, and the outcome of these cases may influence the types of projects pipeline companies propose and the depth of review FERC is required to give them.<sup>42</sup>

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5, 2019); Final Opening Brief of Petitioners at 28-42, *City of Oberlin v. FERC*, Nos. 18-1248(L), 18-1261 (D.C. Cir. Mar. 28, 2019), 2019 WL 1420997.

41. Kelsey Brugger, *NEPA Climate Overhaul Could Unleash Energy Projects*, E&E NEWS: ENERGYWIRE (Jan. 6, 2020), <https://perma.cc/LQ8L-T2Z8>; see *New Natural Gas Pipelines Are Adding Capacity from the South Central, Northeast Regions*, ENERGY INFO. ADMIN.: TODAY IN ENERGY (Nov. 7, 2019), <https://perma.cc/65JA-BTCG>.

42. FERC, too, is taking action in response to the lawsuits. In February 2020, the commission announced it was undertaking a reorganization to prioritize landowners' rehearing requests "to ensure landowners are afforded a judicially appealable rehearing order as quickly as possible." Jeremy Dillon, *FERC Reorganizes to Address Landowner Disputes*, E&E NEWS: GREENWIRE (Feb. 3, 2020), <https://perma.cc/9QWX-XLJ7> (quoting FERC Chairman Neil Chatterjee).