

E&E Energywire

FERC vows rapid responses in eminent domain legal brawl

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Federal energy regulators told a court yesterday that they would attempt to reach final decisions within 30 days on complaints from property owners who have their land seized for construction of projects like natural gas pipelines.

The Federal Energy Regulatory Commission's pledge comes as the agency faces a high-profile showdown in the U.S. Court of Appeals for the District of Columbia Circuit over its delayed response to landowner grievances — even as pipeline developers move forward with construction.

"While this reorganization will not eliminate complaints about delayed judicial review from all parties, the Commission has chosen to allocate its resources to ensure the speediest review for those litigants placed in the most vulnerable position by Commission decisions," FERC wrote in a [filing](#) with the D.C. Circuit.

Challengers of the Atlantic Sunrise pipeline, the project targeted in the lawsuit, said the court is unlikely to put much stock in FERC's "nonbinding" commitment.

"Frankly this is not a very good promise," said Robert McNamara, a senior attorney at the Institute for Justice, which has fought land takings for the pipeline in a separate case. "If the government wants to moot a federal lawsuit, it will have to make a legal or regulatory change.

"It will have to bind them for the future," he said.

McNamara added that FERC made no attempt to argue that its policy change would render the lawsuit moot.

The pledge follows a D.C. Circuit ruling that upheld FERC's approval of Atlantic Sunrise, but not without a scathing concurrence from Judge Patricia Millett criticizing the agency's "Kafkaesque regime" of using "tolling orders" to delay decisionmaking while allowing pipeline development to proceed.

Millett, an Obama appointee, ultimately concluded that she was bound by D.C. Circuit precedent to affirm FERC's certificate for the project.

The court later took the rare step of agreeing to reconsider the case ([Energywire](#), Dec. 6, 2019).

FERC emphasized in its brief that although it deemed its reformed process a necessary policy change, it still believed that the use of tolling orders was consistent with the agency's authority under the Natural Gas Act.

In a separate **filing** to the D.C. Circuit yesterday, energy companies involved in the Atlantic Sunrise pipeline said there is no constitutional barrier preventing developers from beginning work on the project to carry Marcellus Shale gas to Mid-Atlantic and Southeastern states, even amid landowner objections.

The pipeline operator, Transcontinental Gas Pipe Line Co. LLC, along with project shippers Chief Oil & Gas LLC and Southern Co. Services Inc., said it was the job of Congress and not the courts to determine what due process rights landowners should receive.

They argued that the Fifth Amendment only guarantees the right of landowners to receive "just compensation" for the portion of their land seized and that the taking must be for public use. However, they said, property owners do not have any right to freeze construction while challenges are in progress.

"The Natural Gas Act permits a stay of FERC's orders only in those situations which are so extraordinary that such a stay is required," the companies wrote in their brief, "but absent such a stay, Congress has chosen for these projects to proceed despite an appeal of the issuance of a FERC certificate."

Oral arguments in the case are scheduled for March 31.