

### FERC weighs tightening rule on pipeline eminent domain

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Published: Monday, February 1, 2021



The Federal Energy Regulatory Commission under newly appointed Chairman Richard Glick (pictured) has signaled it's open to stricter rules to help landowners protesting a pipeline's path. FERC

The Federal Energy Regulatory Commission is eyeing stricter rules to empower property owners affected by natural gas pipelines or export projects.

The five-member panel, now led by President Biden's pick of Democratic Chairman Richard Glick, issued an **order** last week seeking input on potential changes to its eminent domain proceedings, among other topics.

"Glick is reopening the door for landowner rights," said Paul Patterson, a utility analyst with Glenrock Associates LLC. "You don't have to be a tremendous student to know he is not happy with the way FERC has been approaching gas pipelines."

Republican Commissioner James Danly, who served as chair under former President Trump, issued a sharply worded dissent challenging the move on procedural grounds.

When FERC approves a gas project, the developer is granted eminent domain rights to take private property in the project's path. Property rights advocates, environmental groups and Congress have criticized the commission in recent years for the way it has handled complaints from landowners, who are often disadvantaged by a lack of familiarity with the process.

"FERC has not quite achieved making this process more accessible to landowners. Especially in the middle of a pandemic, it's hard for landowners to figure out how to participate in this agency process they've never heard of," said Jessica Bell, an attorney with the State Energy & Environmental Impact Center at the New York University School of Law. "People miss the chance to intervene or don't understand what that means and lose their rights."

Last summer, a federal court ordered the independent agency to stop using a procedural delaying tactic, called a tolling order, that prevented landowners from seeking timely legal challenges while pipeline construction on their property continued ([Energywire](#), July 1, 2020).

To address the issue, FERC issued a rule in June to stop companies from beginning construction on FERC-approved infrastructure projects until the commission dealt with landowner objections ([Energywire](#), June 10, 2020).

At the time, Glick argued that the rule did not go far enough: Although it stopped most pipeline construction from beginning until FERC weighed landowner complaints, it allowed some tree clearing and did not address FERC's approval process for projects that rely on eminent domain. Pipeline companies can also still condemn property before FERC makes a final decision on landowner disputes.

"Eminent domain is among the most significant actions that a government may take with regard to an individual's private property," Glick wrote in his [partial dissent](#). "And the harm to an individual from having his or her land condemned is one that may never be fully remedied, even in the event they receive their constitutionally required compensation."

Two energy companies, TC Energy Corp. and Kinder Morgan Inc., objected to FERC's June order and asked for rehearing. The Interstate Natural Gas Association of America (INGAA) also requested clarification of the rule.

Now the commission under Glick is using that case as a platform to request comments about its broader approach to eminent domain proceedings.

"Hopefully, this is a good step towards boosting public participation," Bell said.

In his [dissent](#), Danly argued that the commission's Jan. 26 order does not address all the arguments the gas companies made in their request for rehearing. It therefore "falls short" of the panel's legal obligations, he said. He also said reopening the docket for comments will further delay the companies' rehearing requests and therefore be "in tension" with a recent ruling from the U.S. Court of Appeals for the District of Columbia Circuit that prohibits such delays.

"An inattentive reader who does no more than glance at the title of today's order might well be lulled into believing that it accomplishes more than it really does ... [T]he Commission neither addresses the arguments raised on rehearing nor provides any clarification," Danly wrote. "Instead, with no explanation other than a bald declaration that '[w]e believe that the issues raised regarding this rulemaking merit further consideration,' today's order lists a number of questions for further briefing."

An INGAA spokesperson said the group agrees with Danly's dissent. The commission's decision to request comments without addressing the full scope of INGAA's request for clarification will significantly delay the proceeding, the spokesperson said.

"All parties to a pipeline proceeding should have their requests for rehearing heard by FERC in a predictable and timely manner," the spokesperson wrote in an email. "The current absence of a clear timeline for FERC to resolve questions on rehearing creates uncertainty for landowners, infrastructure developers, and those who depend on the timely development of new energy infrastructure."

Carolyn Elefant, a former FERC attorney who currently represents landowners in private practice, said the focus on the agency's process for handling landowner objections "frustrates" her because it makes "everything increasingly complicated when it doesn't have to be."

If FERC spent more time upfront evaluating pipeline and export projects — including weighing complaints and objections — before granting eminent domain rights, it would take less time to address requests for rehearing, she said.

"It might add a month to the certificate proceeding, but it would put the universe of arguments right upfront," Elefant said.

FERC uses a 1999 policy statement to guide its process for granting certificates to use eminent domain. Updating or revising the policy statement was a priority for Republican former FERC Chairman Kevin McIntyre before he died in 2019 ([\*Energywire\*](#), April 20, 2018). The docket remains open.

Bell at the NYU School of Law said she agrees that FERC's pipeline certificate process is due for an upgrade, but she said that in the meantime, it's essential to stop developers from taking private land before landowners have had a chance to fight their case.

"Until we can get that analysis more modernized and attuned to the realities of the changing electricity and energy sector, having this ability to pause things while rehearing is pending is even more important," she said.