

Court's 'historic' FERC slap-down shifts pipeline war

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Pieces of the Spire STL natural gas pipeline awaiting construction are pictured. Federal Energy Regulatory Commission

A federal court ruling yesterday could influence how the Federal Energy Regulatory Commission reviews and approves pipelines, with major implications for the gas industry and legal cases around the country, analysts say.

The U.S. Court of Appeals for the District of Columbia Circuit axed a certificate for the Spire STL pipeline in a forceful opinion that criticized FERC for failing to follow its own policies and delve into whether there was a need for the 65-mile natural gas pipeline from Illinois to Missouri.

Instead, the court found that FERC had relied too heavily on Spire's precedent agreement with shipper Spire Missouri, a retail utility that was affiliated with the pipeline developer ([*E&E News PM*](#), June 22).

The fate of the operational pipeline is now in the hands of the agency. Analysts said the ruling could influence FERC's ongoing review of its Certificate Policy Statement, which dictates the process for determining whether a proposed pipeline is in the public interest and should therefore be approved. FERC Chairman Richard Glick reopened the review this year but has not indicated when it will end.

The agency has historically greenlit proposals as long as they included one or more precedent agreements, which indicate that customers are willing to reserve capacity on the pipeline, but that practice could change depending on the outcome of the FERC review ([*Energywire*](#), May 28).

"I don't think it can be overstated how important this decision is today," said Gillian Giannetti, an attorney with the Natural Resources Defense Council's Sustainable FERC Project. "This is a historic opinion that could change the landscape of how FERC assesses pipeline need."

In a statement, FERC said it is reviewing the decision to determine what actions "may be appropriate."

The ruling could affect other major projects currently being challenged in court, such as the PennEast and Mountain Valley natural gas pipelines, which FERC also approved after reviewing affiliate precedent agreements, legal experts said.

"FERC is really going to have to flesh out a new process by which it considers public convenience and necessity for affiliate projects, and there are many, many of those around the country right now," said Jennifer Danis, a senior fellow at Columbia Law School's Sabin Center for Climate Change Law.

Danis, who filed an amicus brief in the case on behalf of a client, said it will be important for the commission in the future to back up its conclusions on pipelines with data and modeling. She noted that federal law has always required FERC to take those steps but said litigation is sometimes necessary to prompt compliance. This case defined the outer bounds of what FERC could do under the law, she said.

"The D.C. Circuit is quite clear about protecting the public interest and FERC's obligations, when it's making assertions about vague public benefits, that it has that data to support those," she said.

In the ruling, the D.C. Circuit agreed with the Environmental Defense Fund that FERC had ignored "record evidence of self-dealing" and had not seriously weighed the benefits of the projects against their potential risks.

"Under the circumstances presented in this case — with flat demand as conceded by all parties, no Commission finding that a new pipeline would reduce costs, and a single precedent agreement between affiliates — we agree with EDF that the Commission's approach did not reflect reasoned and principled decisionmaking," said Senior Judge Harry Edwards in an opinion for the court.

"This is a tremendous victory to get rid of this blind reliance on affiliate precedent agreements and the idea that they can weigh the adverse impacts with a one-sentence conclusion," said David Bookbinder, chief counsel at the Niskanen Center, which has represented landowners before the commission in various proceedings.

The decision would directly affect Bookbinder's case against the pipeline associated with the Jordan Cove liquefied natural gas terminal in Oregon. As with the Spire STL pipeline, FERC also relied on affiliated precedent agreements in its approval of Jordan Cove's Pacific Connector pipeline, he noted.

Bookbinder said he is planning to notify its panel of judges in the D.C. Circuit in his case of the decision soon.

The ruling "cuts FERC off at the knees about several of their favorite subterfuges, their insistence that affiliate agreements are as valid as any other precedent agreements and that they don't have to look at any other factor," he said.

"The court said you certainly do have to look at other factors when people are bringing you evidence of self-dealing," Bookbinder said.

Natalie Karas, the lead counsel of the energy program at EDF, who led the challenge against the FERC certificate, agreed that yesterday's decision would likely alter FERC's approach but did not comment on whether the ruling might spark new lawsuits against natural gas pipelines.

"I think, going forward, this decision will guide FERC's action in approving new applications and considering other similar examples and will show to pipeline developers what would be considered permissible under the statute and what would not," she said.

Glick and a looming shutdown?

FERC's review of its Certificate Policy Statement on pipeline approval processes has drawn thousands of comments so far.

The current policy statement says that FERC will scrutinize "all relevant factors" when considering proposed pipeline projects. But environmental groups, industry

representatives and commissioners themselves acknowledge that the existence of precedent agreements has historically been viewed by the commission as a proxy for pipeline need.

"[The] fact that the court so swiftly knocked down the Commission's reliance on an affiliate precedent agreement to demonstrate market need here will undoubtedly factor into FERC's broader reexamination of the Certificate Policy Statement," Jeff Dennis, general counsel and managing director of Advanced Energy Economy, a clean energy trade group, said in an email.

Glick, who voted against the commission's 2019 decision to approve the Spire STL pipeline, has criticized the reliance on precedent agreements, particularly in cases where project applications only include agreements between affiliated companies. Yesterday's ruling underscores the need for the commission to revisit its methodologies for discerning the demand for and benefits of a project, Glick said.

"As I noted in my 2019 dissent regarding the Spire project, the Commission must consider all relevant factors when determining the need for a project and balance the evidence of need against adverse impacts," Glick said in a news release. "Today's decision shows that when FERC cuts corners with its analysis, it puts its decisions — and the investments made in reliance on those decisions — at substantial risk."

Former FERC Commissioner Cheryl LaFleur, a Democrat who had also voted against approving the pipeline, praised the court's ruling on social media shortly after the decision.

"I was excited to see today's DC Circuit opinion vacating and remanding this case, which clearly violated @FERC's own standards for public interest and necessity," she wrote on Twitter.

Although precedent agreements between affiliate companies have come under fire as a questionable signal of project need, supporters argue that the deals are still binding contracts showing market demand for a pipeline.

"An affiliated shipper's need for capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor," FERC wrote in its majority order approving the Spire STL pipeline in 2018.

Despite yesterday's ruling, the pipeline developer said the pipeline "has more than proven it is essential," particularly during the polar vortex last February.

"While other parts of the Midwest struggled with supply and extremely high costs, the STL Pipeline ensured the St. Louis region had access to reliable, affordable energy, when it needed it most," said Jason Merrill, a spokesperson for the company.

"We are currently reviewing the order and considering next steps," Merrill said.

Analysts at ClearView Energy Partners, though, predicted that the pipeline could be shut down.

"Spire STL's shut down currently looks to be more a question of when than if," ClearView said in a note yesterday.

'This is shocking'

Landowners, who say Spire and its contractors bullied and mistreated them throughout development and construction of the project, called for immediate action on the pipeline.

"They need to shut that gas off right now," said Kenny Davis, who has about 1,500 feet of the pipe on his land. "As far as I'm concerned, they're trespassing."

But it's not clear to them what comes next.

"It's never happened before," he said, "so I don't know what's going on."

Nate Laps, a consultant hired by Davis and other landowners whose land was condemned, has been leading the fight for years. Laps said he was stunned by the ruling.

"This is shocking," he said. "This is an unknown."

Davis said Spire took his land under what's called "quick-take" condemnation, after offering him "pennies on the dollar" compared with what it was worth. He still hasn't been paid, or gotten a court date to make his case.

The construction crews mixed precious topsoil with clay, ripped out his timber and ruined the best deer-hunting spot on the land, he said. He had hoped to build a retirement home on the property, but can't because the high-pressure line runs through the middle of it, and the home would be in the blast zone if it ruptured.

"FERC just let them get away with it," Davis said.

Spire said it went "above and beyond expectations" in its handling of construction ([*Energywire*](#), Sept. 23, 2019).

FERC allowed the pipeline to begin operations in 2020, despite protests from landowners that the company wasn't fixing the damage it had done to their farms. Under former Chairman Neil Chatterjee, FERC told officials that any problems had been handled responsibly.

"Spire is appropriately documenting any environmental compliance issues," Chatterjee **wrote** in 2019.

Laps' firm holds a purchase option on its clients' land as wide as the easement, and that could be a factor in any resolution of what happens with the land and the pipe.

He said it might be best for the landowners in the long term if the pipeline keeps pumping gas, since it's already operating. Ripping it out would cause more damage, though pipelines usually stay in the ground even after operations cease, according to Laps. His clients, he said, didn't oppose the pipelines, but were angered by Spire's tactics.

"They just want to be made whole," Laps said, "and return to good farming practices."

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