

Eminent Domain and Natural Gas Pipeline Easements: Valuation and Right To Take Issues



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IT IS TRUE that established energy corridors attract additional utilities. Power line corridors may represent an attractive route for natural gas transmission lines, just as established natural gas lines often seem to attract additional natural gas pipelines thereafter.

Landowners along these corridors may feel beleaguered as additional utilities are installed across their properties. Whether there are multiple utilities or just one utility, landowners thoughts usually turn eventually to two issues: Can I somehow stop this from happening? If not, can I make the condemnor pay dearly for this imposition?

EFFORTS TO STOP PIPELINES OR OTHER UTILITY PROJECTS

• Since utility companies usually have defensible reasons for new projects (e.g., to comply with federal regulations or extend services to meet demand), it is usually an uphill struggle to stop or divert such projects. Proving that a pipeline or other utility project is arbitrary or capricious can be nearly impossible. There is often a certain degree of arbitrariness with respect to the route of a utility, but proving capriciousness is another question. Nevertheless, landowners may challenge the right to take on a number of bases.

Necessity of the Project?

Landowners frequently question the necessity of utility projects through their property. In *City of Memphis v. Tandy J. Gilliland Family, LLC*, 391 S.W. 3d 60 (Tenn. App. 2012), the landowner in a road widening case pointed out that when he negotiated with the State of Tennessee

regarding the widening of the roadway, the State acquired sufficient property so that the Memphis Light, Gas, and Water Division could relocate their power lines within the expanded right of way. The power company, however, did not wish to utilize the land acquired by the State and refused the State's offer to relocate power poles within the new right of way. Instead, Memphis filed suit to condemn an additional easement outside the State's right of way for the placement of its power poles. The landowner argued that this was totally unnecessary. The trial court agreed.

The Tennessee Court of Appeals overturned this ruling, pointing out that the trial court improperly substituted its own judgment of necessity for that reserved to the legislative branch, thus exceeding its authority. Tennessee law provides that landowners cannot contest questions such as the utility of an improvement, the choice of route, and the necessity for taking, because these are legislative questions which the court cannot review. Tennessee's Supreme Court refused to review this case.

Timing?

Sometimes, condemning authorities get a bit ahead of themselves and try to condemn property long before it is truly needed. They fear that improvements will be placed upon property that is perfect for their future plans. Taking property too early can be arbitrary and capricious, but there is no established time period that will be uniformly applied here.

Politics and Local Ordinances, etc.

Many pipeline and utility projects are at least unpopular with the affected landowners, especially transmission lines, as opposed to distribution lines. Some projects are more generally unpopular or controversial. Natural gas compressor stations in particular seem to cause a good bit of controversy, at least in the general area where they are to be located. Landowners sometimes complain to politi-

cians. Politicians may try to help their constituents (or possible future constituents). Sometimes, laws or ordinances are passed to try to stop such projects from being built near these vocal landowners. Such laws or ordinances may be pre-empted by the Natural Gas Act. In addition, ordinary state eminent domain laws may, or may not, defeat such tactics.

Under the Supremacy Clause of the U.S. Constitution, federal law is the "Supreme Law of the Land." U.S. Const. art. IV, cl. 2. Thus any conflicting state or local law is preempted and therefore, "without effect." *Washington Gas Light Co. v. Prince George's County Council*, 711 F. 3d 412, 419 (4th Cir. 2013). The pre-emptive effect of the Natural Gas Act is well established. Congress intended to occupy the field to the exclusion of state law by establishing through the Natural Gas Act a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce. *Dominion Transmission, Inc. v. Summers*, 723 F. 3d 238, 243 (D.C. Cir. 2013).

The Natural Gas Act does not, however, preempt all statutes and local ordinances. It does not affect the rights of states under the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 et. seq.; the Clean Air Act, 42 U.S.C. §7401 et. seq.; or the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et. seq. State and local regulations passed and validly enacted pursuant to these federal acts are not preempted. Otherwise, the Natural Gas Act and related federal regulations occupy the field with respect to siting, construction, or operation of natural gas facilities. *See, e.g., Dominion Transmission v. Summers, supra.*

Not all natural gas pipelines are *interstate* pipelines, or involve interstate commerce, however. So the question arises as to whether local ordinances, such as zoning ordinances, can be successfully used to thwart efforts to locate natural gas facilities, or other utilities, in a particular location if the Natural Gas Act does not apply. At first blush, the question naturally arises: "How can it be possible to defeat

the power of eminent domain simply by utilizing local ordinances or zoning ordinances?” The power of eminent domain would be a weak one if it can be trumped by local ordinances and zoning laws. Nevertheless, there seems to be some dispute over this issue. *See, e.g., Potomac Edison v. The Jefferson County Planning and Zoning Commission*, 512 S.E. 2d 576, 204 W.Va. 319 (W.Va., 1998), where Potomac Edison Company encountered significant problems in trying to condemn a tract of land for an electrical power substation. In early meetings with the Planning Commission, the Commission pointed out to Potomac Edison that the site it had selected was zoned for rural agricultural use, and that the proposed electrical substation was not a permitted use under County land use ordinances. The possibility of a variance was raised and the process was outlined for Potomac Edison.

Potomac Edison replied by basically telling the Planning Commission that its local ordinances didn’t apply to them and that the ordinances should be amended to clarify this point. The Planning Commission was not impressed; the request for exemption was denied.

Potomac later filed a petition for condemnation of the desired property, but did not name the Planning Commission. The Circuit court granted title of the property to Potomac Edison. When Potomac Edison applied for a permit with the Planning Commission, the Commission advised that a variance was required and that Potomac had to follow State law by providing a certificate of compliance with local zoning permits (which the Planning Commission refused to issue). Potomac Edison then sought a declaratory judgment from the circuit court, along with a writ of mandamus, to force the Planning Commission to issue the necessary certificate. The Circuit Court agreed that requiring compliance with land use ordinances would frustrate the meaning and purpose of West Virginia condemnation statutes, and granted the mandamus.

The Planning Commission appealed and in this issue of first impression the Supreme Court of Appeals of West Virginia disagreed with Potomac Edison’s argument that it was, in essence, a state agency which is exempt from the Planning Commission’s Authority. The Court pointed out that numerous other jurisdictions have concluded that privately owned power utilities should be subject to local zoning restrictions, unless there is a specific statutory exception. (citing *Commonwealth Edison Co. v. County of Lake*, 540 N.E.2d 6 (1989), as well as decisions from New York, Texas, and Ohio. See also, generally, A. Manley, *Applicability of Zoning Regulations to Projects of Nongovernmental Public Utility as Affected by Utility’s Having Power of Eminent Domain*, 87 A.L.R. 3d 1265 (1978).

The West Virginia Court reversed the Circuit Court, saying that the Planning Commission had not absolutely or finally prohibited the construction of the power substation in question. The Court basically told Potomac Edison to “try again” and work with the Planning Commission.

The appellate court in *Potomac Edison* realized that zealous application of zoning and planning regulations could, theoretically, unreasonably interfere with the public utility’s operations. The Court said that “local planning and zoning agencies should apply land use restrictions with great restraint,” and that public utilities should enjoy a “favored” status. The court urged the planning commission to apply a “balanced approach” and provide “reasonable parameters” for land use, “but local governments cannot effectively prohibit a utility from conducting its necessary activities, and thereby “dump” the construction of utility facilities on other jurisdictions.”

Courts in other states have declined to follow the rule set forth in West Virginia. *See, e.g., Forsyth County v. Georgia Transmission Corp.*, 280 Ga. 664 (2006), where the court held that such local ordinances were an unconstitutional infringement on a public utility’s power of eminent domain, thereby

violating the home rule provision. The Court refused to follow the holding in *Potomac Edison*, *supra*, noting that statutory schemes vary from state to state and that states that require power companies to submit to local ordinances generally do so only in the absence of any statutory exemption. The Georgia court held that it was up to the power company to decide the necessity of eminent domain, and not local governments.

VALUATION ISSUES FROM CONDEMNOR'S PERSPECTIVE

• Utility easements through property can have a variety of impacts upon the value of the remaining property. Usually, the compensation owed to the landowner for the easement itself is not particularly contentious because it is usually calculated based upon a percentage of fee value. When new easements are taken within old utility corridor easements it may be difficult for landowners to prove significant damages.

The real issue in these cases is the issue of whether the landowner's remaining property has been devalued as a result of the placement of the utility on the property. Such damages are called by different names in different states: incidental damages, severance damages, etc. For a landowner, proving such damages can be difficult.

The general public instinctively believes that electric transmission lines or natural gas pipelines cause loss of value to adjacent property, but the question is whether this belief is accurate and provable. Appraisers can be found on all sides of the question. Appraisers hired by banks for residential or commercial real estate purchases often completely ignore the fact that the property in question has an electric or gas transmission line running through the property. Appraisers who do condemnation work have their own opinions. Some believe adamantly that these utilities cause significant incidental damages, and others believe just as strongly that they do not.

Landowners worry about the value of their remaining property, and rightfully so. Such landowners frequently turn to attorneys to press their rights. These attorneys inevitably turn to appraisers to prove the damages. This is where the game really begins. Actually proving that a gas or electric line causes loss of value to adjacent property can be difficult. Some appraisals assessing incidental damages have little or no true supporting data. In such cases, counsel for the landowner may turn to evidence of pipeline explosions, safety issues, and other proof designed to create fear. The theory is that if you cannot prove loss of value, perhaps you can cause it.

Motions in limine can sometimes eliminate or reduce such inflammatory proof, but the truth is that most juries are going to consider safety and the possibility that a pipeline or electric transmission line is going to cause stigma-type damages, regardless of the proof on this topic, or the lack of such proof. In my experience, juries are likely to give some amount of stigma type damages in the case, regardless of what the proof shows. Therefore, from a condemnor's perspective, it is best to anticipate this and disprove stigma type damages to the extent possible, assuming landowners are seeking significant damages.

Typically, the law on this topic says something like this: Incidental damages can include the devaluation of a property caused by the public's reasonable apprehension of danger, but only in so far as it depreciates the present market value of the land not taken. *Alloway v. City of Nashville*, 13 S.W. 123, 126 (Tenn. 1890). A recent explosion can have an impact on property values for property adjacent to gas pipelines. *See, e.g., Phillips Pipeline Co. v. Ashley*, 605 S.W.2d 514 (Mo. App. E.D. 1980), where appraisers from the area testified that a recent explosion actually caused fear and a loss of property values along gas pipelines.

But what if there have been no recent pipeline explosions or power line incidents? Can landown-

ers put on proof at trial of specific explosions from other distant locations or other states? The answer is “probably not, but maybe sometimes...depending on the judge.” *See, e.g., Delhi Gas Pipeline Co. v. Mangum*, 507 S.W.2d 631 (Tex. Civ. App. 1974), where proof of explosions was not allowed because the following test was not met:

- There must be a basis in reason and experience for a fear of explosion;
- Such fear must be shown to enter into the calculations of a substantial number of persons who deal in the buying and selling of similar property;
- There must be actual depreciation of market value because of such fear; and
- The explosion to be proved must involve a pipeline which is generally similar in essential characteristics to the new pipeline being installed.

Skillful attorneys for landowners in cases where property has been taken for gas lines or electric transmission lines, can still find ways to try to scare juries into awarding more money without putting on proof of specific explosions, regardless of whether such proof is “fair” or not. Calculations of a potential impact radius, studies indicating that people are afraid of pipelines, etc., can always be found or created.

It is easy to get “lost” in these arguments and lose sight of the real questions: (1) Do natural gas transmission lines or electric transmission lines cause actual loss of value to adjacent property, or not? and (2) If likely jurors already believe that utility corridors cause incidental damages to the surrounding property, what should the attorney for the condemnor do about it? Fear of explosion can

cause some buyers to shy away from property, but it should not be difficult to see if market values for property along pipelines are actually lower than other property nearby which is not adjacent to a pipeline.

There are over 305,000 miles of interstate and intrastate transmission pipelines in the lower 48 states. There are over 2 million miles of distribution pipelines. More than 71 million residential, commercial, and industrial customers were served, using 26.79 trillion cubic feet of natural gas in 2014.

With all of these pipelines in the ground, it should not be that hard to demonstrate whether or not adjacent properties lose value or not in a given area. Many gas pipelines run right through residential developments, or even under them. They run under Wal-Mart parking lots, through apartment complexes, and through golf courses. Many developments came along after the pipelines were laid, and many pipelines have been laid through already existing developments. The point is that utility corridors are just about everywhere and each of those corridors presents an opportunity to determine whether gas pipelines or electricity transmission lines actually affect property values along the corridors. Most corridors are easements, with landowners actually owning the property, selling it and reselling it time and time again.

In my opinion, property values are not established by proof of explosions, surveys of prospective buyers, or other such “proof”...property values are established based upon sales of property or other reliable proof from experts such as realtors. Government statistics pertaining to gas transmission lines show that fear of natural gas transmission lines is not particularly rational:

Type of Accident	Annual Number of Deaths
All accidents	123,706
Motor Vehicle	43,945
Poisoning	29,846
Falls	22,631
Drowning	3,443
Fire, smoke inhalation, burns	3,286
Floods ^b	82
Lightning ^b	51
Tornado ^b	75
Natural gas distribution lines ^c	14
Natural gas transmission pipelines ^c	2

^a U.S. Census Bureau 2012.
^b NWS 2013.
^c PHMSA 2014b.

See also www.phmsa.gov for every conceivable piece of data related to natural gas pipelines.

Although studies can be fairly expensive, they can also be extremely effective. Large quantities of data pertaining to sales of properties containing pipeline or power line easements can be compared to sales of other properties in the same neighborhood which do not contain pipelines or power lines. Often, the homes have the same floor plans and are nearly identical. At least in Nashville, such studies show that there are typically no incidental damage to property adjacent to utility easements for natural gas pipelines. The Nashville studies mirror

many other studies that show the same thing. See, e.g., the final environmental impact statement (EIS) prepared by the Federal energy Regulatory Commission for the Constitution Pipeline Project and Wright Interconnect Project. <http://www.ferc.gov/industries/gas/enviro/eis/2014/10-24-14-eis.asp>

CONCLUSION • If a landowner whose property is crossed by a utility line can properly prove that his remaining property is devalued, then the landowner should be compensated for that devaluation. Finding such real proof, however, can be elusive.

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