Obtaining Right of ENTRY

Ambiguous state laws create vacuum of authority for interstate pipeline construction

BY TAYLOR DOYLE, ESQ.

In constructing interstate pipelines, relying on state condemnation laws for gaining access to private property has become a growing challenge. A recent decision by the West Virginia Supreme Court in *McCurdy v. Mountain Valley Pipeline, LLC* emphasizes the barriers interstate natural gas pipelines face in relying on state condemnation laws for right of entry.

A Dual-Plan Process

Under the Natural Gas Act, an interstate natural gas company must obtain a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC). This application process requires a map of the pipeline's proposed location as well as the list of potential environmental impacts. While this information is most accurately obtained through on-the-ground surveys, the Act does not confer right of entry onto property for survey purposes.

Depending on the state, companies may turn to the state condemnation authorities for survey access. This creates a dual-plan process with natural gas companies following the state condemnation requirements to satisfy state law while simultaneously preparing to only apply for federal condemnation authority. Recent state and federal court decisions have brought this dual-plan process to a head and shaped the way pipeline projects will have to obtain right of entry in their respective state.

Mountain Valley Pipeline on Hold

With an estimated capital expense of $3.5 billion and over 300 miles of pipeline, the Mountain Valley Pipeline (MVP) is the fourth largest interstate natural gas project in the country pending a FERC certificate. The pipeline will be constructed and owned by Mountain Valley Pipeline, LLC, which is a joint venture between EQT Midstream Partners, LP, NextEra US Gas Assets, LLC, Con Edison Gas Midstream, LLC, WGL Midstream and RGC Midstream, LLC. EQT Midstream Partners will operate the pipeline and own a significant interest in the joint venture.

The 42-inch pipeline will travel from northwestern West Virginia to southern Virginia, transporting two billion cubic feet of natural gas daily from the Marcellus and Utica Shale Formations to the Mid and South Atlantic regions of the United States. In October 2015, Mountain Valley filed a formal application with FERC for approval to construct, own and operate the pipeline with a targeted in-service date of late 2018. To determine the route prior to this filing, the company requested survey permission from landowners and subsequently surveyed the route where they had permission.

Where landowners denied survey permission, MVP sought to obtain involuntary access using state condemnation law, as they attempted

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to do with the McCurdy property. Involuntary access involves one of the most fundamental concerns of this nation's founding. The Fifth Amendment of the U.S. Constitution guarantees, "nor shall private property be taken for public use, without just compensation." States often echo this guarantee. The West Virginia Constitution states, "Private property shall not be taken or damaged for public use, without just compensation."

Accordingly, landowners may deny entry of any person/entity to their property unless that person/entity is endowed with the authority of eminent domain, i.e., condemnation authority to take property for public use. Some states have allowed third-party right of entry for pre-FERC certificate pipeline projects with solely out-of-state gas distribution use. Referred to as "pass-through pipelines," these projects do not distribute natural gas within the state, but instead pass it through to another state's energy market. As such, the state courts have deemed that the projects do serve the public use and thereby endowed it with state condemnation authority. Whether West Virginia law similarly allowed right of entry for pass-through pipelines would be at the core of the McCurdy/MVP argument.

A Question of Public Use

The McCurdy/MVP survey negotiation illustrates how an ambiguity in state right of entry law can create an unnerving battle for both landowner and pipeline company.

The McCurdys own three tracts of land in Monroe County, West Virginia located within MVP's proposed survey corridor. In January 2015, MVP's right of way agent sent the McCurdys a letter outlining its intent to conduct surveys on their property. As part of its environmental impact review, MVP needed to survey three specific endangered species found on the McCurdy's land: one animal, the Indiana Bat, and two plants, the Shale Barren Rock Cress and the Running Buffalo Clover. In February 2015, a right of way agent called the McCurdys and requested verbal permission to enter their property to conduct surveys. The McCurdys declined survey permission, asserting their right to deny entry.

MVP subsequently sent them a letter providing its notice of intention to take legal action to obtain access to the property pursuant to West Virginia code that reads in part "…any incorporated company… invested with the power of eminent domain… may enter upon lands for the purpose of… surveying…."

> **"…since the gas was not distributed within the state, it did not constitute a public use and, therefore, did not receive condemnation authority under state law."**

MVP believed they were acting within the framework of state and federal law. The McCurdys disagreed. Shortly after receiving the letter, the McCurdys filed suit in the Circuit Court of Monroe County against MVP seeking a declaratory judgment that MVP has no right to enter their property for surveying purposes.

After a lower court decision in the McCurdy's favor, MVP appealed, and the Supreme Court of Appeals of West Virginia reviewed the case. The Supreme Court concurred with the lower court's decision and ruled that MVP had to wait for their FERC certificate before gaining right of entry. The decision focused on West Virginia Code: a company is invested with the power of eminent domain if "the purpose for which said company desires to appropriate land is for a public use." Although MVP argued that the natural gas would come from West Virginia exploration, since the gas was not distributed within the state, it did not constitute a public use and, therefore, did not receive condemnation authority under state law. As a result, MVP did not have right of entry under West Virginia state law. The decision comes as a blow to new interstate natural gas projects in the state. Unless a natural gas pipeline distributes natural gas within West Virginia, they do not have the right of entry for survey prior to a FERC certificate.

The property owners openly declined survey permission, asserting their right to deny entry.

The *McCurdy* decision is representative of the dilemma faced by interstate natural gas pipelines across the country: meeting FERC filing requirements without federal authority to survey. State codes vary widely on their treatment of survey access for pass-through pipelines. Some states do not permit pre-FERC certificate survey access for pass-through pipelines, and project developers have no choice but to request survey access from landowners and/or work from existing maps and surveys for their FERC application. This leads to uncertainty about the pipeline route, resulting in reroutes and delaying the infrastructure development the project promises. Of the states that allow survey access for pass-through pipelines, state law varies widely on their requirements and restrictions.

Review of Other States

For clarity, we will briefly address recent court decisions of Pennsylvania, Virginia and Ohio, three states with among the highest outstanding FERC applications. Since the 2008 Marcellus natural gas boom and the pipeline infrastructure resulting therefrom, some aggrieved landowners have forced these courts to address pre-FERC certificate right of entry law.

Pennsylvania does not allow right of entry for interstate projects that do not meet state requirements because similar to the *McCurdy* decision, the Pennsylvania court was not willing to read federal right of entry authority into an ambiguous state law. The state's Constitutional Statute defines a "public utility" to include "…any person or corporations…operating in [Pennsylvania] equipment or facilities" for transmitting natural gas to the public. Such an entity is a condemnor, and a condemnor, with notice, has "the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals."

In *Tennessee Gas Pipeline Co. v. Garrison,* the Federal Middle District Court of Pennsylvania refused to allow the Tennessee Gas Pipeline company to use this state right of entry statute for their interstate project: "In claiming a right to enter Defendants' property to carry out the surveys, Plaintiff fuses state and federal law in a way that does not stand up to close scrutiny…[T]he Natural Gas Act does not provide for pre-condemnation entry onto Plaintiff's property, nor does it point to state law for such authorization."

Historically, Virginia law has allowed right of entry without the landowner's permission, and a Virginian federal district court recently affirmed a reading of the state's condemnation law in broad favor of right of entry for interstate purposes. Under Virginia code, any natural gas company engaged in the transportation of interstate gas may "make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line…as are necessary… to satisfy any regulatory requirements" without the landowner's permission if the company previously requested permission and did not receive it.

In *Klemic v. Dominion Transmission, Inc.*, the Western District Court of Virginia found that the Atlantic Coast Pipeline, in its interstate transportation and sale of natural gas, served a public purpose. Unlike *McCurdy* and *Tennessee Gas*, the *Klemic* decision did not limit the definition of "public" to projects solely serving in-state interests and condoned pre-FERC certificate right of entry for the interstate project.

When the West Virginia Supreme Court concurred with the lower court, MVP was required to wait for their FERC certificate before gaining right of entry.

Similar to Virginia, Ohio has a broad interpretation of its state law in favor of interstate natural gas company's right of entry. Ohio code states that "…any agency may, upon the notice prescribed in this section, prior to or subsequent to the filing of a petition [to appropriate land], enter upon any lands . . . and premises for the purpose of making such surveys, soundings, drillings, appraisals, and examinations as are necessary or proper for the purpose of the agency." Agencies that have the right to appropriate property in Ohio include companies that are organized for the purpose of transporting natural or artificial gas through tubing, pipes, or conduits.

In *Texas Eastern Transmission, LP v. Barack,* the federal district court found that Texas Eastern Transmission, a subsidiary of Spectra Energy, was an "agency" because it was organized to transport natural gas. Further, the court held that the public interest will be served because the project will help supply energy to consumers in the eastern United States. Like Virginia's *Klemic* decision, Ohio's *Texas Eastern* fuses state law with federal/interstate public interest.

Solution Relies on Amendment

The silence of the Natural Gas Act regarding pre-FERC certificate right of entry creates a vacuum of authority in the interstate pipeline construction process. While some states have sought to fill this void—allowing right of entry for pass-through pipelines—the recent West Virginia decision highlights the problem of relying on ambiguous state statutes while seeking federal approval. Unless the Natural Gas Act is amended to provide for pre-FERC certificate right of entry, interstate projects must be prepared for a FERC application process without that right. ✪

References

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This article is for informational purposes and not intended to serve as legal advice.

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