

THE FERC PIPELINE CERTIFICATE PROCESS: INSIDER SECRETS TO MAKING YOUR VOICE HEARD

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The Federal Energy Regulatory Commission (FERC) is a federal agency located in Washington D.C., with authority to issue companies a "certificate of necessity and convenience" for gas pipelines used for transport in interstate commerce. Because FERC is located outside of your community, you probably believe that the pipeline companies, with their high priced Washington D.C. lawyers and lobbyists have a significant advantage over ordinary residents and local businesses in the certificate process. But the truth is that the FERC process offers enormous opportunities for widespread public participation, so long as you know how it works. This Guide, along with my presentation is intended to offer a background on the process and tips used by Washington insiders to make their voices heard.

This Guide is two parts. Part I is an FAQ (frequently asked questions) overview of the FERC process. The Appendix contains a sample motion to intervene.

1. Why is FERC even involved in this process? This is a local project.

Under the **Natural Gas Act**, 15 U.S.C. sec. 717(c), a natural gas company that proposes to construct or extend facilities for transportation or sale of natural gas in interstate commerce (*i.e.*, across state lines) must apply to FERC for a **certificate of public convenience and necessity**.

2. So if FERC is involved in the process, what does that mean for me as a resident of the community or an abutting landowner?

The most important action you can take as a landowner affected by a proposed pipeline extension is to *file a motion to intervene* and a request to be included on the service list (you can include your request in the motion). A motion to intervene makes you a PARTY to the case. By becoming an intervenor, you are entitled to copies of (or at least, access to) the information

¹ This Guide is intended to provide a general overview of the FERC process and sample, generic forms that may be used to participate. This Guide does not constitute legal advice, nor are the forms contained herein necessarily appropriate for all specific situations.

filed by the company, you can seek rehearing of FERC's ruling if you do not like the outcome and you can even challenge FERC's order in court. Although filing challenges can be costly, **it is the ability to do so that will give you leverage in dealing with the pipeline company.**

3. How do I file a motion to intervene?

A sample of a template motion to intervene is attached. Essentially, you must explain why you are affected (or, in legal parlance, "aggrieved") by the proposed action. Be as specific as possible – discuss issues such as your proximity to the project, past concerns or problems with the particular company and anticipated impact on property values. Include pictures, or maps downloaded from Google Maps to show the proximity and the potential impact that the project will have. To further bolster your intervention, you may also file a Declaration, which has the same effect as a statement made under oath. A Declaration will give added credibility to your intervention and humanize it to regulators.

You may use FERC's electronic filing system to file the motion. It is very important to file the motion on time.

4. How do I find out what the deadlines are for intervening?

When a company files a pipeline application or engages in the "pre-filing" process, it is obligated to notify "affected landowners and towns" by mail or hand AND publication in a local newspaper of general circulation. The notice of application will contain the deadlines. In addition, the pipeline company must send a copy of FERC's pamphlet on Landowner's rights (may be downloaded from FERC website).

5. Am I an affected landowner entitled to notice?

For purposes of a proposed pipeline, an affected landowner includes owners of property directly affected by the proposed activity (*i.e.*, used or crossed), abutting either side of an existing right of way or living within 50 feet of the proposed work area.

6. Once I intervene in a case, what do I do?

As an intervenor, your most important function is to get your views in front of the FERC and make them part of the administrative record. You can file comments at any time, but to make the most of your participation, you should comment at certain key phases in the process. These phases are:

--The Motion to Intervene – in your motion, you should file comments on the company's application.

-_The Environmental Assessment – Midway through the proceeding, the FERC will issue an Environmental Assessment that evaluates the environmental effects of the project and impact on the surrounding community.

--The Certificate – When FERC issues a certificate and you do not agree with it, you can file a rehearing request. You MUST file for rehearing within 30 days after FERC issues the certificate order. Please do not wait until the last minute to seek rehearing because if something goes wrong, your rehearing request will not be accepted. Rehearing deadlines are set by statute and FERC has no power to waive them.

--Post-certificate compliance – After the FERC issues a certificate, the pipeline company usually must comply with certain requirements. This provides another opportunity for comment. You should also consider filing an intervention in this phase of the proceeding (in some instances, the compliance proceeding is treated as a separate docket).

7. How does FERC decide whether to grant a certificate of convenience to a pipeline?

FERC must consider several factors pursuant to its policy statement on pipeline certificates. Specifically, FERC must consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, avoidance of unnecessary disruptions to the environment, and avoidance of the unnecessary exercise of eminent domain.

In addition, under the National Environmental Policy Act (NEPA), FERC must consider a variety of impacts, including socio-economic impacts and cumulative impacts. Cumulative impacts are impacts which result from the proposed action itself as well as past, present and foreseeable future actions, which may be minor individually but are collectively significant.

5. FERC granted the certificate. What rights do I have now?

If you intervened in the proceeding, you could file a request for rehearing up to thirty days following issuance of the order. However, even if you did not seek rehearing, you can participate in this stage which is the post-certificate or compliance proceeding.

The certificate requires Transco to take many actions. You can intervene in

this phase of the process and monitor and comment on Transco's compliance.

9. I have heard that the pipeline company has the power of eminent domain. What does that mean and why does a pipeline company have that right?

Eminent domain is a right that allows a private company to take, with appropriate compensation, private land for a public purpose. Section 717(h) of the Natural Gas Act gives the right of eminent domain to pipeline companies that have received a certificate of public necessity and convenience from FERC. However, the pipeline company cannot use the eminent domain right *unless* it is unable to arrive at an agreement with the property owner. In the Transco Sentinel case, the FERC order prohibits Transco from exercising eminent domain until the company files site specific plans that receive FERC approval.

10. What will happen to my land if I don't agree to sell it and the pipeline company uses eminent domain?

The pipeline company can bring an eminent domain action in federal court in the district where your property is located and if the value exceeds \$3000 (if the property value is lower, the case will take place in state court). The federal court will follow Rule 71.1h of the Federal Rules of Civil Procedure which in some cases may differ from the state law process.²

11. I don't want to sell my property. Can I make that argument in the eminent domain proceeding?

Once an eminent domain proceeding is underway, there are very limited opportunities to challenge the taking itself. As one federal court recently said, the time to challenge the intrusion is before the FERC, not in the eminent domain proceeding.³ The primary focus of the eminent domain proceeding is to determine the value of the property.

² *Guardian Pipeline*, 2008 U.S. Dist. LEXIS 45785 (E.D. Wis., June 11, 2008).

³ *Guardian Pipeline*, 210 F. Supp. 2d 971 (N.D. Ill. 2002).