



NATURAL GAS PIPELINES AND THE LAW

presented by
Brad Stephens

Stephens Law
Office

in conjunction
with

West Virginia
University
Extension
Service
October 2015

OVERVIEW

- **Types of Pipelines**
- **Easements and Rights-of-Way**
- **Public Utilities and Eminent Domain**
- **Governmental Regulation**
- **Negotiation**

TYPES OF PIPELINES

Gathering,
Transmission,
Distribution

TYPES OF PIPELINES

- Gathering Lines: collect gas from wells and transport it to larger pipelines. Typically 24" or less in diameter, operate at about 500-1400 psi. (Some involved in Marcellus Shale operations are larger.)

TYPES OF PIPELINES

- Transmission Pipelines: collect gas from smaller pipelines, such as gathering lines, and transport it to or from compressor stations, storage or treatment facilities, or other transmission pipelines. As large as 42"; operate at up to 1480 psi (maximum operating pressure of planned Atlantic Coast Pipeline)

TYPES OF PIPELINES

- Distribution Pipelines: distribute gas to smaller service lines that serve end-use customers. Typically up to 12" and operate at about 200 psi or less.

For Gas Pipeline

This Easement and Right of Way Agreement ("Easement") is entered into by and between _____, with an address of _____, and _____, with an address of _____, for the purpose of creating a right of way and easement for a pipeline under the following terms:

Grant. Grantor grants to Grantee, Grantee's successors and assigns, a right of way to construct, reconstruct, operate, maintain, repair, replace and remove a pipeline for the transportation of gas on a portion of the real estate owned by Grantor described in the attached hereto (Exhibit A constituting a meets and bounds description of the real estate) gross upon which the easement as specifically described below will be located. The permanent parcel number(s) for each parcel of land described). The right of way and easement shall be deemed to run with the land.

Description of Easement Area. The easement will run along a line that is defined by meets and bounds in a legal description prepared and stamped by an Ohio Registered Professional Surveyor in good standing, as set out in Exhibit B attached hereto. Said line of easement is shown on a map also prepared by the Registered Surveyor attached hereto as Exhibit C.

a. Temporary Easement for Construction of Gas Pipeline as described in Exhibit A.

EASEMENTS
AND
RIGHTS-OF-
WAY

Get it in
Writing!

EASEMENTS AND RIGHTS-OF-WAY: ESSENTIALLY THE SAME

- **Easement**: an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.
- **Right-of-way** is one kind of easement, namely a person's legal right, established by usage or by contract, to pass through or occupy grounds or property owned by another.

WHY A RIGHT-OF-WAY?

A pipeline operator typically does not want to actually acquire the land the pipeline crosses. Instead, the company acquires a right-of-way—the right to install, operate, and maintain a pipeline—over and under the property, thereby avoiding the additional responsibilities of ownership of the land.

THE OPTION

- Frequently, when the precise route of a pipeline (typically a gathering line) has not yet been determined, an operator will obtain an option from a landowner to obtain an easement.

THE OPTION

- Typically provides the operator with 1-2 years during which the company can choose to obtain a ROW across the landowner's tract, but the company is not obligated to do so
- Company pays a smaller sum (often around \$1,000) to obtain the option than to actually purchase an easement



ON RECORD

Easement/
ROW
instruments
are typically
recorded
with the
County Clerk

This places
the public
on notice of
the
existence of
the ROW

PUBLIC UTILITIES AND EMINENT DOMAIN

Who has
the right
to
condemn?

EMINENT DOMAIN

- Eminent Domain: the power of a governmental entity (or an entity with authority granted by the government) to take privately owned property, and convert it to public use, subject to reasonable compensation for the taking.
- Only companies recognized as public utilities under West Virginia law or possessing a certificate of public convenience and necessity from federal authorities have the power of eminent domain.

WHAT IS A PUBLIC UTILITY UNDER WEST VIRGINIA LAW?

- A very broad definition: Any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service. *W. Va. Code 24-1-2*

WHAT IS A PUBLIC UTILITY UNDER WEST VIRGINIA LAW?

- “Public services” include “transportation of oil, gas or water by pipeline . . . supplying water, gas or electricity by municipalities or others . . .” *W. Va. Code 24-2-1*
- This includes all companies engaged in distribution of natural gas to residential and commercial customers. *Examples: Dominion Hope, Mountaineer Gas.*

CAN A PIPELINE-ONLY COMPANY ENTER YOUR PROPERTY WITHOUT YOUR PERMISSION?

West Virginia says NO

- Monroe County Circuit Court rules in favor of landowner defendants in suit by EQT & NextEra to obtain access to property for surveying for Mountain Valley Pipeline project. Essentially, not a “public use” under WV law; risk of abuse of eminent domain for private gain.

Virginia says YES

- Court in Giles County holds that state statute allows companies to enter property for surveying without permission. States that preliminary surveying activity is not a “taking,” and that legislature intended to exempt actors in such situations from criminal trespass.

GOVERNMENTAL REGULATION

Mainly a
federal
matter for
big
pipelines

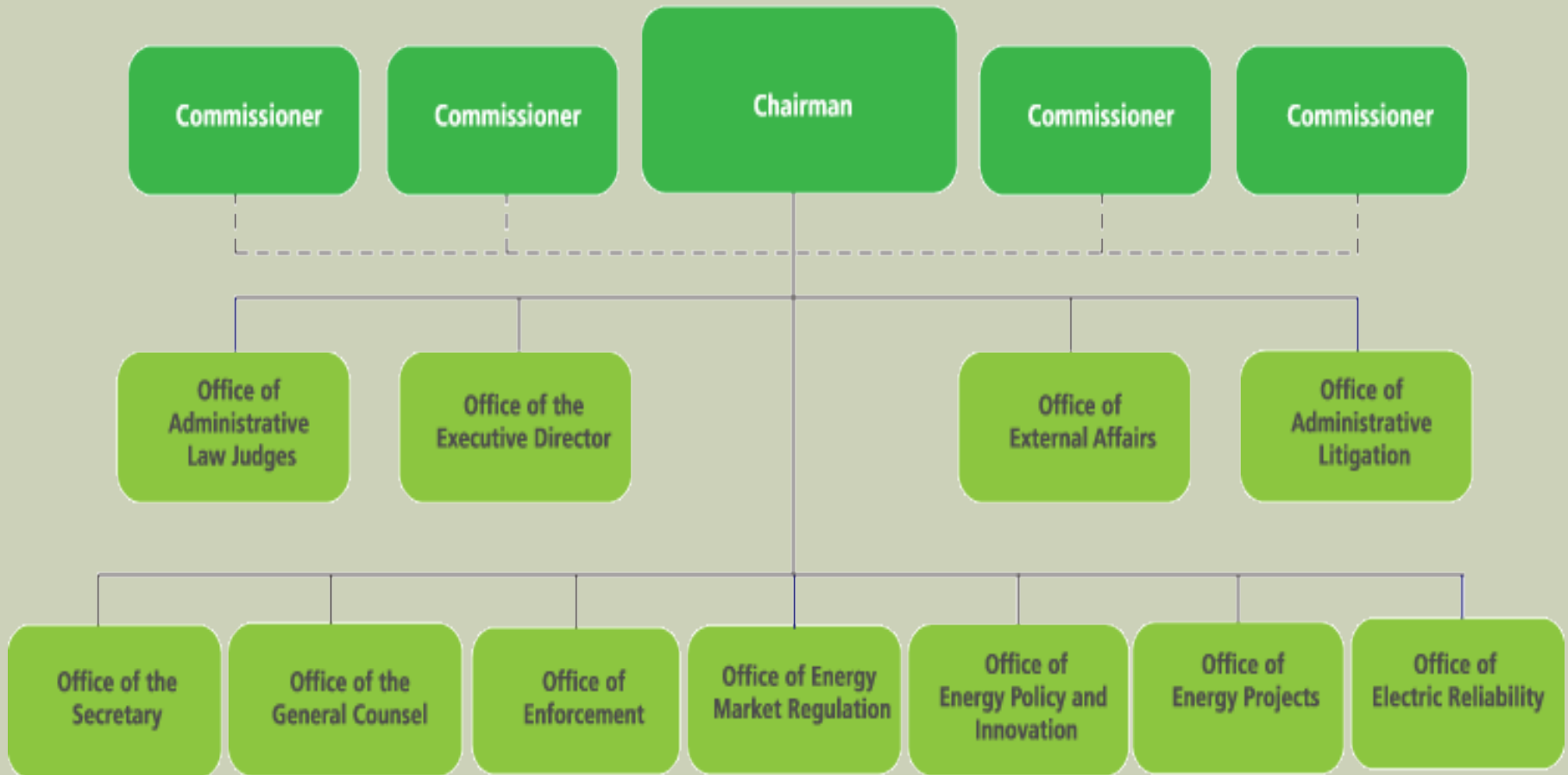


FERC

Independent federal agency has jurisdiction over interstate gas pipelines

FERC STRUCTURE

Federal Energy Regulatory Commission



FERC IS THE LEAD AGENCY

- **FERC has jurisdiction over interstate pipelines under Section 7 of the Natural Gas Act. An applicant for a Certificate of Public Convenience and Necessity from FERC must demonstrate that a proposed pipeline project is in the public interest.**

FERC IS THE LEAD AGENCY

- Other federal statutes come into play in the application process, including:
 - National Historic Preservation Act (impact on sites eligible for or listed on the National Register of Historic Places)
 - Clean Water Act (any fill of wetlands or stream rechanneling; construction stormwater permits – via state agency)
 - National Forest Management Act and related statutes (when route crosses National Forest)
 - Endangered Species Act (impacts to threatened or endangered species)

NATIONAL ENVIRONMENTAL POLICY ACT

- NEPA requires federal agencies to conduct a review of “any major federal action” anticipated to significantly impact the environment.
- The pre-application process provides opportunities for the public to comment on such impacts, and for the relevant agencies to provide input.
- A project of the scope of the interstate pipelines presently proposed should ultimately call for the preparation of an Environmental Impact Statement or “EIS.”

FERC AND EMINENT DOMAIN

- Upon FERC's award to an applicant of a CPCN, barring an appeal of the decision to federal court, the company will have the power of eminent domain, and thus will have the right to enter private property for surveying and construction work, and ultimately to condemn the easement for the pipeline. Usually brought in federal court (at least in WV)

FERC AND EMINENT DOMAIN

- Landowner is entitled to “just compensation” for the taking: typical measure of damages is the difference in the value of the land occupied by the permanent easement before the project and its value afterward (diminution in value).

WHAT ABOUT NEGOTIATION?

Why
should I
negotiate?

NEGOTIATION VS. EMINENT DOMAIN

- Why should I negotiate with a pipeline company?
 - Better terms and conditions in the easement agreement; more accommodations from the company if you're more willing to deal
 - (where eminent domain applies – interstate / utility pipelines) Possibly superior compensation to what would be awarded by a jury in a condemnation case
 - Possibly better routing of the pipeline if you allow pre-construction surveys on your property (potential to minimize impacts to sensitive lands, rivers and streams, rare species)

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Location Approval – company may not change the planned route of the pipeline or add new pipelines without your consent (provision often includes condition that your consent “may not unreasonably be withheld.”)

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Limitation on above-ground facilities– no compressor stations, pig launchers, etc.

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Compensation for any and all damages – cut timber, limitations on access due to pipeline’s route, etc.

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Reclamation – specify exactly how the right-of-way is to be reclaimed, i.e., soil replacement, restoration to original slope, reseeding, etc.

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Indemnification – provision stating that the company agrees to indemnify (protect and pay legal expenses for) you for any and all damages incurred by any party as a result of the construction, operation, or maintenance of the pipeline.

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- No Warranties – you do not guarantee that you have good title to the land covered by the easement, or at least limit it to “special warranty” (only responsible for time period since you acquired ownership, not before).

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Road maintenance / fences / gates - limit access road width, specify methods of maintenance / surface, control access to keys to locked gates, require replacement of fences damaged or removed during construction.

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Be aware of limitations on road construction and weight limits across pipeline route.
- Operators routinely limit number of crossings in agreement, angle of crossing (no closer to parallel than 45 degrees), and weight limit of vehicles crossing.

WHAT SHOULD I NEGOTIATE FOR IN AN EASEMENT AGREEMENT?

- Make sure you know whether you're signing an **OPTION** for an operator to occupy and easement (their choice within **1-2 years**) or the actual **EASEMENT** agreement (a done deal as to whether it ultimately crosses your property).

GET EVERYTHING IN WRITING!

- Agreement will include a clause stating that it is the entire agreement between the parties (you and the company), so you have to be sure that all concessions and conditions you want are included in the agreement.

No attorney-client relationship exists between you and me. I highly recommend that you seek legal advice for any particular legal problem or issue you encounter regarding the construction, operation, or maintenance of natural gas pipelines.

**AN
IMPORTANT
DISCLAIMER**

**Seek your own
legal advice!**

Brad Stephens
Stephens Law Office
P.O. Box 490
Morgantown, WV 26507

stephens.law.office
@gmail.com

(304) 680-4055

**THANK
YOU!**

My contact info