THE FUTURE OF NATURAL GAS LEGISLATION

RIA MAVINKURVE
College of Humanities, Arts, & Social Sciences
University of California Riverside

SAYD HUSSAIN
College of Engineering & Computer Science
Florida Atlantic University

Abstract

The contentious interpretations of the role of natural gas as a player in the United States’ path to decarbonization raises significant questions about the future of state and federal natural gas legislation. Using the court case PennEast Pipeline v. New Jersey as a lens through which these issues are examined, this paper analyzes the jurisdictional disconnect between state and federal authority on natural gas pipelines and argues that the use of natural gas and natural gas liquids, while serving as a precursor to the transition to a clean-energy future, is not adequately regulated in the current natural gas policy. In order to address the legal questions surrounding the implementation of natural gas pipelines, natural gas policy must be amended to clarify the extent of the Federal Energy Regulatory Commission’s authority to override state agency regulation over property and to redefine the role of natural gas as a component of the public interest.

Legislative History of the Natural Gas Act and Natural Gas Policy Act

Natural gas, or fuel whose components contain in part or in whole any part of natural gas, liquid, petroleum gas, synthetic gas from natural gas liquids or
petroleum, any combination of natural and synthetic gas, or biomethane, as defined by Congress is considered as a server of the public interest by the Natural Gas Act of 1938 (NGA). However, this act was amended in 1947 to grant permission to natural gas companies to exercise the right of federal eminent domain in the district court of the United States for cases originating in the State courts. This amendment inherently posed constitutional questions surrounding the 5th Amendment, which guarantees the right to due process and requires the government to compensate citizens when it takes private property for public use. Section 717(j) of the Natural Gas Act permitted any state, municipality, or state commission to apply to the Federal Power Commission (FPC) by petition. The cases of FPC v. Natural Gas Pipeline Co. (1942) and FPC v. Hope Natural Gas (1944) upheld the constitutionality of the NGA by citing the 5th and 14th amendments respectively to equate Congressional authority for price regulation in interstate commerce with state authority to regulate intrastate commerce.

The NGA provided adequate guidance prior to the economic downturn of the natural gas market that characterized the 1970s. This took place as a byproduct of the uptick in prices of gas and oil following the OPEC (Organization of the

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3 Fifth Amendment of the U.S. Constitution, Legal Information Institute, https://www.law.cornell.edu/constitution/fifth_amendment, (last visited March 30, 2021.)
7 Id.
Petroleum Exporting Countries) institution of an oil embargo against the U.S. that occurred as a result of the U.S. support for Israel in the Arab Israeli War of 1973.\(^8\) The original NGA’s federal regulation of natural gas permitted the federal government to set rates that natural gas companies themselves charged for their products. The FPC could no longer adequately address all producers’ rates, whose price controls were initially based on geographic regions.\(^9\) The Federal Power Commission in 1974 deemed area-wide pricing unfeasible, which lead to the eventual passage of the Natural Gas Policy Act of 1978.\(^10\)

Approved by the 95th U.S. Congress and signed into law by President Jimmy Carter, the Natural Gas Policy Act of 1978 (NGPA) revised the NGA by addressing the flawed price controls on natural gas.\(^11\) One year prior, the Federal Power Commission had evolved into the Federal Energy Regulatory Commission (FERC), thus authorizing the regulation of interstate and intrastate natural gas production.\(^12\) The goal behind the establishment of the NGPA was to set forth a national natural gas market that could effectively equalize supply and demand while setting price ceilings for wellhead gas prices in order to dish economic incentives out to natural gas producers.\(^13\)

However, the market response to the NGPA between 1980 and 1985 was negative: Natural gas reaching consumers in the producing states were

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\(^10\) Id.

\(^11\) Id.


thriving markets and experienced no shortages. But the customers in the consuming states did experience gas shortages which led to schools and factories being forced to close. This reality led to additional regulation of prices by the FPC and state utility regulators, which resulted in a dramatic rise in average wellhead prices and a consequent decrease in demand that essentially flipped the economic status of the natural gas market from good to bad from the 1960s and 70s.

To mitigate this, the 1989 Natural Gas Wellhead Decontrol Act eliminated the price ceilings that regulated the natural gas wellhead prices, completely leaving the prices of natural gas up to the market. The FERC Order No. 636 consolidated the deregulation of the interstate natural gas industry and ordered the separation of transportation and sales services in natural gas pipelines to give more freedom of consumption choice to customers.

**Current Natural Gas Policy**

The status of natural gas as a player in the fight against climate change is undeniably a controversial topic. Proponents of natural gas often cite it as a prerequisite to a smooth economic and environmental transition to a decarbonized society as well as a means to shift away from dependence on oil imports from the Middle East. On the other hand, opponents of natural gas cite it as a primary emitter of methane, a greenhouse gas that accounts for higher levels of environmental degradation than carbon dioxide and comprises fugitive gas emissions. Conflicting interpretations of natural gas lend themselves to conflicting policies around natural gas across states.

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15 Id.
16 Id.
House Bill 1084 (HB 1084), a Washington state bill prohibiting natural gas infrastructure at the state level, is the first statewide natural gas ban proposal, introduced in January 2021. There are, however, numerous prohibitions of natural gas on local levels in states like California and New York. Other states’ legislation, like that of the states of Kansas and Missouri, look to “ban the ban” of natural gas as a result of perceiving these bans as economically unfeasible, despite specific cities’ wishes to ban natural gas. Many of the statewide and local proposals that have come this year are still in progress. Some cities, such as Salt Lake City, Utah, while they are not considering a ban, are aspiring to incentivize the use of resources aside from gas and natural gas.

At the federal level, recent developments surrounding natural gas have particularly surrounded interstate natural gas pipelines. On February 18th, 2021, the Federal Energy Regulatory Commission (FERC) proposed an amendment to its regulations of business practice standards for natural gas pipelines based on revisions made by the North American Energy Standards Board (NAESB). These standards consist of maximized transparency surrounding tariff provisions and compliance with the respective standards in

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conjunction with streamlining the transactional processes for market competition in the wholesale natural gas industry.\textsuperscript{22}

The Biden Administration issued executive orders to discuss new standards for control of the Natural Gas industry. However, because executive orders do not hold the capacity to ban overall fracking for natural gas and the banning of fracking would have to take place through Congress, Biden’s \textit{Executive Order on Tackling the Climate Crisis at Home and Abroad} primarily halted new natural gas leases without a necessarily complete review of what next steps are to be taken.\textsuperscript{23} Given that specific states are exercising state jurisdiction over their own natural gas policies, the weight of federal natural gas policy against state gas policy poses new grounds for analysis.

Essentially, natural gas policies do not only raise questions about the legitimacy of natural gas in combating environmental degradation, but they also raise questions about state vs. federal authority and how the Federal Energy Regulatory Commission’s authority weighs against the federal government’s authority.

\textbf{PennEast Pipeline v. New Jersey}

The court case \textit{PennEast Pipeline v. New Jersey} is an optimal court case for analyzing the authority of the Federal Energy Regulatory Commission and weighing state and federal authority around natural gas laws, specifically natural gas pipelines. Through a \textit{writ of certiorari} issued to the U.S. Court of Appeals for the 3rd Circuit, the case made its way up to the US Supreme Court, which agreed on February 3rd, 2021 to hear the case.\textsuperscript{24}

\textsuperscript{22} Id.
The PennEast Pipeline Company (PennEast), in wanting to construct a liquefied natural gas (LNG) pipeline throughout the State of New Jersey (New Jersey), obtained federal approval and sued to gain access to properties in New Jersey.\footnote{Id.} However, New Jersey cited the 11th amendment as a constitutional argument against these suits, arguing that the NGA did not permit PennEast to exercise jurisdiction over these territories; the U.S. District Court for the District of New Jersey permitted PennEast’s access to the properties and New Jersey appealed to the U.S. Court of Appeals for the 3rd Circuit.\footnote{Id.} Upon this appeal, the 3rd Circuit ruled that New Jersey was immune, under the 11th amendment, to PennEast’s suit under the NGA.\footnote{Id.} Consequently, PennEast appealed this ruling to the Supreme Court; the case is set for argument on April 2021.\footnote{Id.}

The case begs the question of whether the 3rd Circuit properly exercised jurisdiction over this case, as well as what the NGA requires jurisdictionally under the concept of \textit{eminent domain}, and whether FERC certificate holders have the federal authority to exercise \textit{eminent domain} over state claims concerning land.

\textbf{FERC, Federal and State Authority and the Natural Gas Act}

Given that the FERC is a federal commission, its jurisdictional responsibility does not consist of regulation of municipal power systems, water quality certificates, or oil pipelines, nor the regulation of local distribution pipelines of natural gas, nor regulation of natural gas sales to consumers.\footnote{The History of Regulation, NaturalGas.org, http://naturalgas.org/regulation/history/, (last visited Mar 30, 2021.)} The
aforementioned responsibilities are assigned to the State Public Utility Commissions (SPUC) instead.\textsuperscript{30} FERC ultimately answers to the US Congress, meaning that FERC’s decisions are to be appealed, if need be, before federal courts. This appears to offer a conspicuous answer: if FERC is an agency of the federal government, why would it not be able to exercise federal \textit{eminent domain}?

It is critical to note that \textit{PennEast}, in this case, cites the 1938 Natural Gas Act,\textsuperscript{31} whose designation of energy infrastructure to federal government authority, is contingent on the infrastructure being in the public interest; conflicting modern state laws around the country pertaining to natural gas brings the status of natural gas infrastructure as being in the public interest into question. Furthermore, due to Congress’ lack of authority to prevent State authority from asserting limits on its own court’s jurisdiction, the FERC orders do not necessarily address sovereign immunity, and any authority to do so is not mentioned in the NGA. Sovereign immunity is tied to the 11th Amendment, and the constitutional validity of the NGA has only been established through the 14th and 5th Amendments-- not the 11th.\textsuperscript{32}

Historical examples as cited by \textit{PennEast} point to an unsuccessful arrangement when states exercised their powers concerning the construction of NLG pipelines; these arrangements did not contain approval processes by FERC to authorize the acquisition of land for natural gas infrastructure development.\textsuperscript{33}

\textsuperscript{30} Id.
However, the success of these arrangements is somewhat subjective, particularly due to the contentious role of natural gas as a facet of the public interest and a catalyst for environmental protection (or degradation). The installation of NLG pipelines is also inherently contentious; with states like Washington and California beginning to implement local and statewide natural gas ban bills, federal authority to install NLG pipelines on state land without necessarily requiring state approval will innately cause tension, and this tension needs to be mitigated through new, more specific language in the NGA.

While the proceedings of the *PennEast v. New Jersey* case will most likely end up abrogating future attempts to weigh state authority against FERC authority, there are still further questions to consider – FERC approval is required for *PennEast* and other natural gas companies to lay NLG pipelines; however, there is also an issue with the question of *PennEast’s* authority following the permission as a private company. As a result, the citation of the NGA does not fully address the issue at hand, it only addresses eminent domain by the certificate holder-- not necessarily by FERC itself.

Furthermore, the landscape of natural gas usage has considerably changed since the 1990s. From the Trump administration to the Biden administration, the use of natural gas is projected to change further. The Energy Information Administration (EIA) projects that natural gas use will inevitably decline this year as a result of economic recovery from COVID-19 in tandem with inflation of natural gas prices, but then increase again in 2022 as a result of growth in other regions.\(^{34}\) Essentially, certain U.S. regions will begin the process of phasing out natural gas for renewable energy sources while certain U.S. regions will start to use more natural gas than before, seeing it as a fitting

transitional energy source. The disparity in state interpretations of natural gas will inevitably lead to different levels of tension that would likely be raised should natural gas companies assert eminent domain over states.

To alleviate this tension, the findings of the PennEast Pipeline v. New Jersey\textsuperscript{35} need to be codified into the NGA, but that will not necessarily address all aforementioned concerns. What needs to be implemented is a renewed definition of the public interest, whose role is a prerequisite to the implementation of natural gas pipelines in the NGA, given the differing ideas of states as to whether natural gas is good, as well as clarification on the authority of certificate holders versus the authority of FERC itself in regard to jurisdiction over both federal and state authority.

### Conclusion

The timeline of the NGA from its passage in 1938 to its multiple stages of evolution over time has shown the ever-changing nature of issues that are capable of coming up in such a contentious manner with critical environmental, economic, and legal implications. The PennEast Pipeline v. New Jersey\textsuperscript{36} court case exemplifies the tension that may take place in environmental policy between the federal level and the state level, particularly under the Natural Gas Act which permits certificate holders to exercise eminent domain over states with natural gas pipelines being categorized as part of the public interest.

With increasing disparities among state policies surrounding natural gas, it is critical that the NGA establishes, despite the fact that many of its issues will be answered in the proceedings of the PennEast Pipeline v. New Jersey case, a clear explanation of both the certificate holders’ right to eminent domain and the rights and authorities of FERC itself, and that the proceedings should state


\textsuperscript{36} Id.
whether states have successfully barred natural gas pipelines from their jurisdiction.

The path to decarbonization in the energy sector is a long road that constantly presents ever-changing legal questions, and it is imperative that they continue to be answered to establish clarity and facilitate an effective road to a green future.