

Chapter 5

CITE AS
37 *Energy & Min. L. Inst.* 5 (2017)

New and Unsettled Issues in Federal Natural Gas Act Condemnation and State Law Condemnation in the Marcellus and Utica Shale Plays

Stefanie L. Burt
Ariel N. Forbes¹
Reed Smith LLP
Pittsburgh, Pennsylvania

Synopsis

§ 5.01.	Introduction	137
§ 5.02.	Federal Law Condemnation	137
	[1] — Overview of the Natural Gas Act.....	137
	[a] — Purpose and History.....	137
	[b] — Elements Needed for Condemnation Under the Natural Gas Act.....	138
	[i] — Possession of a Federal Energy Regulatory Commission (FERC) Certificate	138
	[ii] — Necessity of Property Interests Sought.....	139
	[iii] — Inability to Acquire the Property Interests by Agreement with the Landowner.....	139
	[c] — Condemnation for Surface and Subsurface Storage	140
	[2] — Condemnation Practice and Procedure Generally	140
	[a] — Collateral Attacks on the FERC Certificate	140
	[b] — Immediate Possession and Access to the Condemned Property	141
	[c] — Just Compensation.....	142
	[i] — Establishing Just Compensation.....	142
	[ii] — Alternate Calculations of Just Compensation.....	142

¹ The authors thank Jennifer M. Cully at Reed Smith LLP for her excellent research and assistance with this chapter.

	[iii] — Evidence to Determine Just Compensation	143
[3]	— Unsettled Legal Issues	145
	[a] — Are “Good Faith” Negotiations Required Prior to Initiating a Condemnation Action?	145
	[b] — Is a Counterclaim Permitted in Response to a Complaint in Condemnation?	147
	[c] — Are Common Law Claims Permitted Against a Party with the Right of Condemnation?	148
	[d] — When Is the “Time of Taking?”	149
	[e] — For Natural Gas Storage Fields, Who Owns the Right to Store?	151
§ 5.03.	State Law Condemnation	152
	[1] — Introduction	152
	[2] — Pennsylvania Condemnation Law	153
	[a] — Eminent Domain Code v. Business Corporation Law (BCL)	153
	[b] — Practice and Procedure Under the Eminent Domain Code	154
	[c] — Overview of Procedure Under the BCL	155
	[d] — Just Compensation	156
	[e] — Challenging Condemnation	156
	[f] — New and Unsettled Issues	158
	[1] — What Qualifies as Public Utility Corporation Under the BCL?	158
	[ii] — Where a Pipeline Is Both Intrastate and Interstate, Does Eminent Domain Authority Exist Under the BCL?	160
	[iii] — Who Owns the Pore Space?	160
	[3] — Ohio Condemnation Law	162
	[a] — Overview of Condemnation Practice and Procedure	162
	[b] — Just Compensation	162
	[c] — New and Unsettled Issues	163
	[i] — Do Pipeline Companies Have a Right to Survey Prior to Obtaining a FERC Certificate?	163
	[4] — West Virginia Condemnation Law	164
	[a] — Overview of Condemnation Practice and Procedure	165
	[b] — Just Compensation	165
	[c] — New and Unsettled Issues	166

[i] — Is the “Potential” to Serve the Public Sufficient? 166

[ii] — Does a Right to Survey Exist Under State Law for a Proposed FERC-certificated Pipeline? 167

[iii] — Who Owns the Pore Space?..... 168

[5] — Conclusion 169

§ 5.01. Introduction.

This chapter discusses federal and state law concerning the rights of natural gas companies to exercise the power of eminent domain for pipeline systems and storage fields necessary for providing natural gas service to the public. The first section of this chapter discusses the process of condemnation under the federal Natural Gas Act and identifies several unsettled issues in the case law applying federal condemnation practice and procedure. The second section of this chapter discusses condemnation procedure and new and unsettled issues arising in Pennsylvania, West Virginia, and Ohio, three states experiencing a significant increase in pipeline infrastructure development to support natural gas production from the Marcellus and Utica Shales.

§ 5.02. Federal Law Condemnation.

[1] — Overview of the Natural Gas Act.

[a] — Purpose and History.

The Natural Gas Act allows for the use of eminent domain to obtain “the necessary right-of-way to construct, operate, and maintain . . . pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines.”² Congress enacted the Natural Gas Act to regulate the interstate transportation, sale, and use of natural gas.³ Although the elements and the general procedure of the Natural Gas Act are fairly consistent, several issues under the Act where courts have

² 15 U.S.C. § 717f(h) (2016).

³ Sabal Trail Transmission, LLC v. +/- 1.44 Acres of Land, No. 5:16-CV-164-OC-30PRL, 2016 WL 2991151, at *1 (M.D. Fla. May 24, 2016).