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NISKANEN FILES COMMENTS ON BEHALF OF PROPERTY OWNERS TRYING TO KEEP THEIR LAND

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Last week, the Niskanen Center filed **comments** with the Federal Regulatory Energy Commission (“FERC”) about the Commission’s more egregious efforts to prevent property owners from trying to stop pipeline companies from taking their land. I’m not going to try and boil 35-pages down into one blog post, but rather focus on just one of these issues: the type of notice that landowners get that pipeline companies are coming for their land. (This only applies to gas pipelines, since oil pipelines are governed by state, and not federal law.)

The Due Process Clause provides that no person “shall be deprived of life, liberty or property, without due process of law.” Almost 70 years ago, the Supreme Court set out the basic test for what constitutes adequate notice when the government (or someone, like pipeline companies, acting under government authority) wants to take your property. That notice must be:

reasonably calculated, under all the circumstances, to apprise interested parties of the dependency of the action and afford them an opportunity to present their objections. *The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.*

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (emphasis added; citations omitted). In other words, you have to give people both the necessary information and sufficient time for them to object to the plan. Unfortunately, the notice that FERC provides to landowners fails miserably at both these requirements.

If your land is being targeted by a pipeline company, you'll get that notice in the form of an inch-thick package of documents from the company; the intent appears to be that drowning rural landowners in an intimidating stack of official paper is a good start to confusing them. Landowners who want to object to having their land taken must then figure out from these documents (1) that they have to intervene in the pipeline company's application process at FERC; (2) how long they have to do so; (3) what they must say in their motion to intervene; and (4) how they're supposed to get that motion to FERC.

Good luck.

Three separate documents in the pile of paper deal with intervention, and they each provide incomplete, contradictory, and incorrect information. All three have only a single sentence (in documents ranging up to 30+ pages) saying that landowners have to intervene in order to preserve their right to appeal FERC's (inevitable) decision granting permission for the pipeline company to take their property. And that's the good news.

Only one of the documents tells the landowner what the intervention deadline is and, in the notices I reviewed, (with one exception) it ranged from 13-17 days from when the landowner gets the package. And that's 13-17 days to get their intervention to FERC - if they try to do this by mail, they may have less than 10 days to send it. Interestingly, FERC has no fixed rule for the amount of time it allows for intervention - it simply picks, with no explanation, a date about two weeks out. People reading this will understand that two weeks to intervene in a federal administrative proceeding is not a generous amount of time, especially when FERC pipeline proceedings can take years.

This might be a good time to take note of the kind of people who get these notices. They're poor and uneducated, because pipelines don't get built through high-rent real estate. They get built in remote places where the land is cheap and landowners don't have the resources for a fight. I looked at the demographic

statistics for the 17 counties that the Mountain Valley Pipeline, one of the most controversial of the recent construction spree, will traverse. The percentage of the adult population with *less than a high school education* ranges from 42% in Roanoke County, VA, to 77% in Webster County, WV. And Roanoke County is an outlier: in each of the other 16 counties, *half or more of the adult population has less than a high-school education*. (For reference, nationally less than 12% of American adults lack a high school degree.) These people are going to be just fine with that stack of fine print.

So, let's say that they manage to figure out that they have to intervene, and do so in about two weeks. What does "intervene" mean? What are they supposed to say in their "motion to intervene"? *None* of the documents contain a single word about that. The most information they get is a single sentence in that whole pile of paper, that "All motions to intervene should be submitted to the Commission pursuant to 18 C.F.R. § 385.214."

I bet that not a dozen people in Webster County who are not lawyers know what "18 C.F.R. § 385.214" means.

So, suppose they then figure out that they need to consult that section of the Code of Federal Regulations. It starts with, "Any motion to intervene state, to the extent known, the position taken by the movant and the basis in fact and law for that position." I've dealt with the federal regulatory process for decades, and I have no idea what that sentence means. "The position taken by the movant" *as to what?* As to whether I meet the criteria for intervention? As to whether the pipeline company should take my land? As to whether building the pipeline is a good idea at all?

It gets worse. The next paragraph reads:

- (2). The motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:
 - (i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;
 - (ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:
 - (A) Consumer,
 - (B) Customer,
 - (C) Competitor, or
 - (D) Security holder of a party; or
 - (iii) The movant's participation is in the public interest.

Poor rural landowners probably don't know whether they have a right to participate "expressly conferred by statute or by Commission rule, order or other action". And while they certainly have "an interest which may be directly affected by the outcome of the proceeding", they may not understand that those words include "the pipeline company may come take my property", *especially* when that isn't included in the listed examples.

So, let's further assume that landowners can decipher this as well. How do they get that intervention motion to FERC?

If they have internet access, they can file it electronically. If they don't, then FERC leads them on a truly merry dance, with three completely different sets of instructions for how to file a paper intervention. They either have to:

1. File an original and 7 copies with FERC, and serve the applicant and all other parties;
2. File an original and 5 copies with FERC, with no mention of serving the applicant or any other party; or
3. File an original and 3 copies with FERC by overnight mail, and serve the applicant but not any of the other parties.

I have absolutely no doubt that FERC has created this labyrinth to try and shut landowners out of the administrative and judicial processes. We'll see if FERC decides to fix any of these problems, or whether the courts are going to have to do it for them.

Read the comments that we submitted to FERC **here**, and access supporting materials **here**.