

'Horribly chilling effect': D.C. Circuit ruling could stall new pipeline projects

BY ERIC WOLFF, RY RIVARD | 06/25/2021 10:23 AM EDT | UPDATED 08/18/2021 12:42 PM EDT



Tanker trucks are shown parked near the entrance of Colonial Pipeline Company in Charlotte, N.C. | Chris Carlson/AP Photo

The D.C. Circuit's [decision to strike down the approval of a Missouri pipeline](#) could slow projects and potentially choke off new gas production.

The court's decision to vacate a permit for the 65-mile Spire STL Pipeline more than two years after it was issued casts doubt on the validity of a key tool pipeline operators deployed to demonstrate need. It also introduces significant uncertainty into the ability of operators to secure necessary regulatory approvals and pipeline investments, experts say.

"The notion that you can build a pipe and have the certificate order overruled later on — that has a horribly chilling effect on the industry and the ability to raise money for pipelines at all," said Rick Smead, managing director for advisory services for RBN Energy, an energy

consultancy. "Having clarity and certainty at the FERC level, really as quickly as they can do it, is very important."

In reaching its decision, the D.C. Circuit endorsed then-Commissioner, and now chair, Rich Glick's dissent in FERC's 2018 approval of the pipeline, which has experts questioning whether FERC will frown on the use of affiliate agreements to demonstrate need for other pipeline projects going forward.

Under its 1999 gas pipeline certificate policy, FERC allowed developers to use agreements between their affiliates to prove that there was demand for their projects. In the Spire case, the developer was poised to reap a FERC-approved 14 percent return on equity for building the project, which led the court to say the company was self-dealing.

"I think the case sets out some pretty clear guideposts on what's acceptable and what's not," said Natalie Karas, counsel for the Environmental Defense Fund and lead attorney on the Spire case, who said FERC's decision to award the Spire STL permit imposed a significant economic burden on customers.

"These decisions have implications for people and we should be protecting their interests," she said.

Glick and fellow Democratic Commissioner Allison Clements have used similar language in arguing that FERC has to consider more than the needs of companies when it approves new infrastructure. The pair teamed up this week to [launch a new Office of Public Participation](#), aimed at making it easier for the public to intervene in cases.

Glick is now leading the commission in a thorough review of its pipeline approval policy, and most observers expect the commission to set tougher environmental and market requirements if Glick can swing the votes.

For the gas industry, the case creates new uncertainty.

The lack of new pipelines could impede new gas production. RBN Energy, the energy consultant, said rising production in the Marcellus shale aimed at meeting post-Covid demand in the U.S. is about to run into the limits of existing pipeline capacity, with few major new projects on the horizon. The consultant McKinsey & Company said [in a 2020 report](#) it expects gas demand and the need for pipelines to increase through 2030.

PennEast, a 116-mile pipeline that would help ease that constraint, depended on affiliates to subscribe to 74 percent of its capacity when it applied for its own certificate, [according to a dissent Glick wrote](#) in 2018. The Supreme Court is expected to rule on an unrelated challenge to PennEast this month, but even if the developer wins that case, it faces a legal challenge from the Delaware Riverkeeper Network [on similar issues](#). The D.C. Circuit stayed consideration of that case challenging PennEast's FERC certification because of the project's reliance on affiliate shippers. PennEast did not respond to a request for comment.

Jennifer Danis, a senior fellow at Columbia Law School's climate change center, said the Spire case [will have "important bearing" on what the court does with PennEast](#). Danis represents Susan Tierney — who filed in support for EDF opposing the FERC certification of the Spire pipeline — and the New Jersey Conservation Foundation, which conserves some of the land along the proposed route of the PennEast pipeline.

The Spire ruling should also inform FERC's own rethink of how to judge interstate pipeline projects, Danis said.

"The ruling should give FERC a floor for what is acceptable evidence of public need; a private affiliate agreement alone is never sufficient," she said in a text message. "Nor should it be - the Gas Act mandates that FERC protect the public interest by only certifying gas infrastructure that serves the public. Private contracts, particularly those amongst affiliates, can easily be manipulated to create the appearance of demand where no true market is signaling for it."

Some experts argued that the case was being overblown by the victors, saying that the narrowness of the opinion, which focused heavily on facts specific to Spire, means it shouldn't have major repercussions.

"I don't think this is that big of a deal," said Michelle Michot Foss, a fellow at Rice University's Baker Institute for Public Policy. "The original decision to certify looks a bit sloppy — 'only' 87.5 percent of capacity taken by an affiliate is not a small amount of capacity but there certainly is no reason to move forward with a project — of any type — if it's not needed."

Environmentalists argue that pipelines must have an even higher bar to prove market need, because, EDF's Karas said, the U.S. should be working to reduce demand for gas in an effort to fight climate change. However, analyses such as the McKinsey report predict an increase in gas consumption for at least the next 10 years before decarbonization policies take hold.

CORRECTION: A previous version of this report incorrectly referenced TC Energy's North Baja project proposal and incorrectly described the size of the project and its application to FERC.

More on this topic

JUN 2021

29th



NEWS
Article

Pipelines notch win against states before Supreme Court



NEWS
Article

Pipelines notch win against states before Supreme Court

28th



NEWS
Newsletter

PennEast precedent



NEWS
Newsletter

PennEast precedent



NEWS
Newsletter

Biden talks, the GOP settles down

AROUND THE WEB

CP13-113-000 Dominion Cove Point LNG, LP

E&E News

Integrated Resource Plan

E&E News

The National Rural Electric Cooperative Association Comments on ...

E&E News

UNITED STATES OF AMERICA BEFORE THE FEDERAL ENERGY ...

E&E News

LAW FIRM CLIMATE CHANGE SCORECARD

E&E News



YOUR ACCOUNT MANAGEMENT TEAM

Thomas Zhang

Senior Account Manager

tzhang@politico.com

(703) 236-7925

[RESOURCE CENTER](#)

[CORRECTIONS](#)

[TERMS OF SERVICE](#)

[PRIVACY POLICY](#)

[DO NOT SELL MY INFO](#)