

A Guide to EMINENT DOMAIN & CONDEMNATION for Oil Pipelines in Wisconsin*

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Eminent domain is the power of government to seize private property for public use. Such a seizure of private property is typically referred to as a **taking** and is exercised through a procedure known as **condemnation**. When private property is taken for public use, **just compensation** must be paid to the property owner.

Wisconsin law authorizes the **Public Service Commission** (PSC) to grant the power of eminent domain to oil pipeline companies that meet all the following requirements:

- a. Authorized to do business in the state
- b. Transmit oil through a pipeline in the state
- c. Maintain terminal or product delivery facilities in the state
- d. Engage in interstate or international commerce

However, the power of eminent domain cannot be granted to pipeline companies until the PSC determines that it is in the **public interest**. In making that determination, the PSC does not review the construction or the specific route of the pipeline. Even with the power of eminent domain, pipeline companies cannot condemn tribal lands or property owned by the state or a local government.

Public Interest Determinations

Pipeline companies need both temporary and permanent property rights to build a pipeline. Temporary rights are needed to access and construct the pipeline, and permanent rights are needed to operate and maintain the pipeline. When a pipeline company cannot obtain the necessary property rights through voluntary negotiations with property owners and has to result to condemnation, it must submit a **public interest determination application** to the PSC.

The submission of this application constitutes a request to open a **docket**. A docket is defined as either an **investigation** or a **proceeding**, which are two different methods used to process public interest determination applications. Upon the receipt of an application, the PSC has 60 days to deny the application or open a docket. The PSC formally opens a docket when it issues a **notice** of investigation or proceeding. Dockets can be found at PSC.WI.GOV.

What is the Public Interest?

The Wisconsin Legislature has not defined what constitutes the public interest, and therefore the PSC has broad discretion to determine whether granting a pipeline company the power of eminent domain is in the public interest.

For example, in 2008, the PSC granted the power of eminent domain to Enbridge after finding that the public interest was advanced by the increase in capacity to deliver crude oil to Midwestern refineries, from which Wisconsin obtains much of its refined petroleum products, including gasoline.

In 1993, the PSC granted the power of eminent domain to Enbridge to avoid the adverse impacts of relocating a preexisting pipeline and because the oil transmitted through that pipeline fuels commerce in the Great Lakes region, including the Midwest and Canada.

Participating in PSC Investigations & Proceedings

When a docket is opened, the applicant is usually the **only party**. There are two ways for non-applicants to become parties to investigations or proceedings. Any person whose substantial interests may be impacted by the PSC's decision has a right to become a party and participate in the docket, which is known as **intervention as of right**. Any person whose substantial interests will not be impacted by the PSC's decision may ask for permission to become a party if it will improve PSC decision-making, which is known as **permissive intervention**. The deadline to intervene is typically 14 days after the

notice of the investigation or proceeding is issued. There is no requirement that intervening parties be represented by an attorney. **Intervenor compensation** may be available to intervening parties for help paying the costs of participation.

The PSC rarely makes public interest determinations and the method it uses to process applications has varied. An investigation before the PSC typically occurs when the applicant is the only party. Investigations include at least one **public hearing**, which involves the presentation of information about the public interest determination application and provides members of the public an opportunity to make a statement about the application or submit written comments.

A proceeding before the PSC involves a **contested case hearing**, which is a trial-type administrative hearing where two or more parties have opposing interests that will be impacted by the outcome of the proceeding. Parties to a proceeding may **depose witnesses, file motions, and seek discovery**. Any person has the right to testify in a proceeding without becoming a party, but that testimony is usually limited to one comment per person regarding non-technical personal knowledge or personal opinion. After the contested case hearing, the parties may file **briefs** arguing why the PSC should make a particular decision. The PSC may also allow non-parties to file briefs.

Just Compensation & Condemnation Proceedings

Even after the PSC makes a public interest determination granting a pipeline company the power of eminent domain, Wisconsin law sets forth strict procedures that must be followed to ensure property owners receive just compensation. As a first step, the pipeline company must consult with the property owner and have the property in question **appraised**. The property owner must be provided with a full narrative copy of that appraisal and then has 60 days to obtain an independent appraisal at the pipeline company's expense. These appraisals help establish the **fair market value** of the property to be acquired.

Takings & Easements

Pipeline companies often only need to acquire easements for portions of properties instead of all rights to the entire property. The fair market value for easements is determined based on the loss in value of the entire property. If the part of the property that is not acquired will be of little value, it is known as an **uneconomic remnant**, and the pipeline company is required to make an offer to acquire the entire property. When the land taken for an easement is zoned or used for agricultural purposes, the property owner has the option of receiving just compensation in a lump sum or in annual payments.

Pipeline companies must still attempt to obtain the necessary property rights through voluntary negotiations with property owners. If a pipeline company and a property owner cannot reach an agreement through voluntary negotiations, the pipeline company may then submit a **jurisdictional offer** to the property owner. The property owner then has 20 days to accept the jurisdictional offer. Any property owner that does not accept a jurisdictional offer has 40 days to file a legal action contesting the pipeline company's right to condemn the property. However, the amount of just compensation cannot be contested through that legal action. Once that legal action concludes, property owners have another 20 days to accept the jurisdictional offer.

When a property owner does not accept a jurisdictional offer within the applicable deadline, the pipeline company may petition the county circuit court to commence **condemnation proceedings**. The court then determines whether it is necessary for the pipeline company to obtain the property in question. For this determination, the pipeline company only needs to show that condemning the

property is reasonably necessary and proper for the accomplishment of the desired public purpose.

If the court finds that obtaining the property is necessary and proper, the petition is sent to the **county condemnation commissioners** for a **determination of just compensation**. In making that determination, the commissioners must hold a hearing, at which the property owner may submit evidence and provide testimony. The commissioners consider evidence related to the property including but not limited to previous sales, comparable sales, appraisals, and the highest and best use. To ensure the independence of the commissioners' determination, the amount of the jurisdictional offer is not disclosed. The property owner has 60 days to appeal the commissioners' determination to the county circuit court.

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